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Ex-
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In

COMMENTARIES

ON THE LAW OF

STATUTORY CRIMES;

INCLUDING THE

WRITTEN LAWS AND THEIR INTERPRETATION IN GENERAL,
WHAT IS SPECIAL TO THE CRIMINAL LAW,

AND THE

SPECIFIC STATUTORY OFFENSES AS TO BOTH
LAW AND PROCEDURE.

BY

JOEL PRENTISS BISHOP.

STANFORD LAW

THIRD EDITION,

REVISED AND ENLARGED,

BY

MARION C. EARLY,

OF THE ST. LOUIS BAR.

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PREFACE TO THIRD EDITION.

In the preparation of this edition it has been intended to keep within the sphere contemplated by the author, and the original text has been preserved in its entirety. We have found that the principles therein set forth have been followed by the highest courts in the land, being often cited *verbatim* with approval. In only a few instances has it been deemed advisable to make additions to the text, while copious notes have been added presenting in as compact form as possible the results of the judicial investigations of the subjects discussed, and new matters properly within the scope of the text have been elaborately treated. The index has also been amplified and extends to the new matters contained in the notes. About four thousand citations have been added, bringing the work down to date. In citing cases it has been our aim to mention in every instance all the reports in common use in which the case appears, including the various series of reports and the Reporter system, but some omissions have occurred which it has been one of the objects of the table of cases to supply. We have constantly endeavored not to trespass upon the subjects treated by the author in the late editions of his works upon Criminal Law and Criminal Procedure, but frequent references are made to these works, which apply to the latest editions. All additions and citations are distinguished by being inclosed in brackets.

ST. LOUIS, 1901.

PREFACE TO THE SECOND EDITION.

The volume here presented, supplementing the two volumes entitled "Criminal Law," and the two on the law of "Pleading and Evidence and the Practice in Criminal Cases," called, for short, "Criminal Procedure," completes a series covering the whole field of American criminal law, criminal evidence, criminal pleading, and criminal practice, both at the common law and under the statutes. In the construction of the series, and in the printing of the successive editions, there have been some changes of matter from one work to another, all duly pointed out when they occurred. As the volumes stand in the later editions, the four which precede this, while mingling in their explanations the written law with the unwritten, are silent on the questions discussed in this volume. These are an exposition of the general principles of statutory interpretation, which, since they are in the main the same in criminal cases and in civil, extends necessarily into the civil department; elucidations of the principles of interpretation special to the criminal law, with their specific applications; such topics as the statute of limitations in criminal causes, pleadings upon private statutes and municipal by-laws, and some others of the like kind; and, finally, discussions of the offenses which are purely or in substance statutory, in distinction from mere statutory extensions of common-law crimes. As to the last-named particular, Book V, entitled "Statutory Extensions of Common-law Offenses," might seem to occupy an exceptional position. But the statutes discussed in it are such as, while analogous to some common-law inhibitions,

were not so distinctly of the like sort as to render beyond question their title to a standing in the other volumes; and, moreover, I deemed that more room could be found for them here than there.

The book of "Directions and Forms" for prosecution and defense in criminal causes, to follow this series, and constitute of it a part, has been for some years far under way, and I expect soon to lay it before the profession.

In the late editions of this series of books I have departed from the common methods of legal authors, and from my own method in the earlier editions, by stating everything in fewer words than is customary, and thus finding room for an amount of legal doctrine per volume nearly unprecedented. I resolved to make, without any increase of volumes, not only the expositions of the criminal law and procedure more full than had been attempted by any other writer, for so much I had already accomplished, but to render them, in a reasonable degree, complete. Thus, in the third edition of "Criminal Procedure," I doubled the substantial matter, and added to the cases cited in the ratio of five new ones for every three old ones. In like manner I have doubled the substantial matter of this volume. To do it I was compelled to rewrite the whole. Yet, with slight variations, I have followed the former order of section numberings, down to section 1092. Thence, for the few remaining pages, the numberings are new.

The combined criminal law of England, of our numerous states, and of our national jurisdictions, constitutes a vast system of jurisprudence. A reader may get some idea of it from comparing, if he will take the pains, the tables of cited cases for my five volumes, with the like table in Fisher's "Digest of the Reported Cases determined in the House of Lords and Privy Council, and in the Courts of Common Law, Divorce, Probate, Admiralty, and Bankruptcy" for England; including, as the preface explains, "selections from the equity decis-

ions, and the modern series of Irish reports." He will see that I have apparently almost as many cases as Fisher, who has covered nearly the entire body of the English jurisprudence. From this seeming, some deduction should be made because of the fact that, in the aggregate, there are a considerable number of cases which, pertaining to more than one branch of the criminal law, are cited in more than one of the books of this series. And equally from Fisher's work and from mine, some of the cases, not deemed important, are purposely omitted.

If the reader will further "look and see" for himself, he will discover that, whatever be the merits of other works on like subjects with this series, it is the first and only endeavor to reduce to order for professional use this vast system, by one mind, examining for itself in full the cases in the books of reports; together, of course, with whatever else should be considered in connection therewith. The unity of aim, and the qualification for every part, which this method is adapted to secure, ought to produce results in the highest degree desirable. If, in the present instance, such results do not appear, the fault lies in an utter lack of ability in the author. How far he has proved competent is a question which can be definitively decided only by a future generation. Until then, even the most prejudiced inquirer, who shall entirely exclude from his examinations my own books, will admit that, since the time when their publication began, *somehow* the literature of this department of the law has been making rapid improvement, while yet no new writers in it of eminence have appeared. Perhaps those who will take the trouble to "look and see" may not find it difficult to search out the reasons.

The condition of our books of forms in criminal practice, and other things connected therewith, remains, the reader will note, substantially as it was when the publication of this series began. Why is not the advance perceptible also in them? Why the halting here, while there the movement is onward?

For what is this waiting? It may not be unprofitable to observe, during coming years, how fares this hitherto inert department.

The long time this book has lain out of print has been to me a source of deep regret. Three years ago, I discovered that, of ten volumes of mine which bore the imprint of the publishers of this one, the editions of six were exhausted. I was then laboring upon new editions, and ever since I have been doing the same, to the full extent of my strength. With the issue of this volume, one only — the one entitled "The First Book of the Law" — will remain still out of print. And the demand for "Directions and Forms," completing this series, is so urgent that I have resolved to make it my next venture.

Hoping, therefore, to come before the profession again soon, and thanking them for past indulgence, I introduce the reader to the body of the work. J. P. B.

CAMBRIDGE, March, 1883.

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STATUTORY CRIMES.

BOOK I.

THE WRITTEN LAWS CLASSIFIED AND EXPLAINED.

CHAPTER I.

INTRODUCTORY VIEWS.

§ 1. Misapprehensions.— On this subject of the interpretation of statutes, misapprehensions more wide and injurious prevail in the profession than on almost any other in the entire law. It is often assumed to proceed without rules, and to present views changing, as in a kaleidoscope, with every legislative turn in the enactment of a new statute. But,—

§ 2. Doctrines stable.— In truth, statutory interpretation is governed as absolutely by rules as anything else in the law. And the rules are of common-law origin. In large part they adhere to the subject itself, in whose very nature they dwell, so that even legislation cannot cast them off. A few of them have, in England and some of our states, been legislated upon. But legislation on them is less extensive than on most other legal subjects. The making of a new statute no more changes a rule of interpretation than does the deciding of a new issue in a court. So that, on the whole, the rules of statutory interpretation are specially stable.

§ 3. Importance of subject.— In practical importance there is no legal subject which approaches this. No lawyer can advise a client an hour but some question of the interpretation of a statute will, directly or indirectly, come up for decision. It may not *seem* difficult; yet blunders without end are constantly being made, in questions of this class, where the familiar rules of interpretation were either unknown to or

overlooked by the adviser. And more causes are lost in court from practitioners stumbling on these questions than on any other. For the judges are but lawyers on the bench, and they need specially to be guarded against this class of mistake.

§ 4. Relations of subject.— This subject is related to some others of prime importance; deriving help from them, and in turn imparting it to them. Foremost of these is the —

Interpretation of private writings.— A statute is a writing, equally with a will or a contract. And to a considerable extent the rules for the one class are those also for the other. But there are differences rendering it unsafe to follow the rules interchangeably, except where appearing in connection with their reasons. Again,—

Science of entire law.— Statutory interpretation, more than any other one legal subject, interweaves itself with the science and reasons of the entire law. A new statutory provision, cast into a body of written and unwritten laws, is not altogether unlike a drop of coloring matter to a pail of water. Not so fully, yet to a considerable extent, it changes the hue of the whole body; and how far and where it works, the change can be seen only by him who comprehends the relations of the parts, and discerns how each particle acts upon and governs and is governed by the others. Further to explain,—

§ 5. Nature of statute.— Every statute operates to modify or confirm something in the law which existed before. No statute is written, so to speak, upon a blank in the institutions of society. No such blank exists or can exist.[1] A particular thing is to-day either lawful or unlawful. It can fill no middle space — no blank — between the two. If, for example, it is lawful, a statute may make it unlawful, either generally or under specified circumstances, or it may settle a supposed doubt of its lawfulness. In every case it is a thread of woof woven into a warp which before existed. It is never to be contemplated as a thing alone, but always as a part of a harmonious whole. Hence,—

§ 6. Knowledge of prior law.— Whatever may be the rules of interpretation, and however known, obviously no statute can be understood except by him who understands the prior law. Not, therefore, to theorize, but for practical help, persons

[1] Crim. Law, I, §§ 5–7.

seeking the meaning of statutes constantly go back to see what is the unwritten or otherwise prior law; with which "lock and key," says Coke, they "set open the windows of the statute."[1] Otherwise their search after the statutory meaning would be vain. To illustrate,—

§ 7. Prior law and statute combining.— Every statute, as just said, combines and operates with the entire law whereof it becomes a part; so that, without a discernment of the original mass, one can form no correct idea of the action of the new element. As, if the provision is, "that he who steals another's watch shall be imprisoned in the penitentiary five years," it combines with the prior law as follows. A babe of two years seizes the watch and throws it into the fire. Here is an act, not speaking now of the intent, apparently within the statutory terms. No exception in favor of babes is written in the enactment. So, if we do not look to the prior law, the babe must go to the penitentiary. But the unwritten law had already provided that no child under seven years of age shall be the subject of criminal prosecution.[2] By interpretation, therefore, the statutory provision is limited by this one of the common law,— a consequence quite impossible to be seen by a man who does not know the common law. Again, if a person of mature years and well-balanced judgment does this thing to another's watch, does he steal it? The answer turns on the meaning of the verb "to steal." It is a word of ancient and common use in indictments for larceny. And, as the statute is a law, we know its language to be legal; so that this word "steal" has here the same meaning as in indictments for larceny at the common law. And thus we are remitted to the question, not perhaps quite settled, whether or not the taking, to constitute larceny, must be *lucri causa*.[3] Here is an obscurity arising from the not quite settled condition of the common law. But,—

§ 8. Obscurities.— There are other obscurities; as,—

Whether statute or common law give way.— If, at the point of contact between the common law and a statute, the former is plain, still not always will it be interpreted to limit the latter, though, as just seen, it sometimes will be.[4] The very object of

[1] 2 Inst. 308. And see Harbert's Case, 3 Co. 11*b*, 13*b*.

[2] Crim. Law, I, § 368.

[3] Crim. Law, II, §§ 842–848.

[4] See Bishop, First Book, § 482.

the statute may be to control the unwritten law on the particular question; then, of course, it must prevail. Here is one of the main difficulties of interpretation. In subsequent parts of this volume, rules will be given as helps in this difficulty, while yet no rules can make plain everything of this sort under all circumstances. One's general knowledge of the science of legal doctrine, and power to balance things throughout the entire system of law, will then come into special service. Again,—

§ 9. Meaning of statute.— The particular terms of a statute may not have acquired an exact legal meaning; then not unfrequently it will be in doubt. Or the arrangement of the sentences may be such as to leave uncertain some question concerning what was intended. In circumstances like these, rules will furnish some help, but more will come from one's general knowledge of the language, and of the entire law in its scientific combinations.

§ 10. Statute modifying statute.— Thus far we have contemplated the prior law chiefly as unwritten. But some of the greatest difficulties occur where enactment has been piled on enactment,— nothing is in terms repealed, but this year a statute is added to what was written last year, and so from year to year,— and, while plainly the later law repeals by construction the earlier in part, it as plainly does not in whole; yet where the repeal begins and where ends is the question. While interpretation does what it can in such cases, it cannot be uniform; for, the judges being men, they will necessarily, like other men, see things differently in cases of doubt and uncertainty.

CHAPTER II.

THE DIFFERENT SORTS OF WRITTEN LAWS AND THEIR ORDER OF PRECEDENCE.

§§ 11, 11*a*. Introduction.
12. Constitution of United States.
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17. State statutes.
17*a*. Municipal by-laws.

§ 11. Jurisdiction of laws.—Laws, like courts, have their jurisdictions beyond which they are of no effect. Thus the statutes of one state are not of force in another,[1] nor do those of the United States bind in the states persons and things within the exclusive sphere of state sovereignty. But, to the extent to which they do not overstep their jurisdictions,—

Order of precedence—How chapter divided.—The laws, with us, have their rules of precedence and comparative force. The unwritten ones give place to the written. The order of the written, in which also they will be discussed in this chapter, is as follows: I. The constitution of the United States; II. Treaties; III. Acts of congress; IV. The constitutions of the several states; V. State statutes; VI. By-laws of municipal corporations.[2]

[1] Succession of Bofenschen, 29 La. An. 711.

[2] In a Georgia case, Lumpkin, J., observed: "The laws of Georgia may be thus graduated, with reference to their obligation or authority: 1st. The constitution of the United States. 2d. Treaties entered into by the federal government before or since the adoption of the constitution. 3d. Laws of the United States made in pursuance of the constitution. 4th. The constitution of the state. 5th. The statutes of the state. 6th. Provincial acts that were in force and binding on the 14th day of May, 1776, so far as they are not contrary to the constitution, laws and form of government of the state. 7th. The common law of England and such of the statute laws as were usually in force before the Revolution, with the foregoing limitation." Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 204, [48 Am. D. 248.]

§ 11a. All are "laws."— All these are, in legal language, "laws."[1] Thus,—

Constitution.— A written constitution of the state or United States is a "law."[2] And —

Treaty.— So also is, under the constitution of the United States, a treaty.[3] Likewise —

Statute.— A statute, whether of a state or of the United States, is a law.[4] And —

By-law — Ordinance.— A municipal by-law, otherwise termed a city or town ordinance, is, as the name imports, a law.[5]

I. The Constitution of the United States.

§ 12. Supreme.— The constitution of the United States is, within its sphere, to use its own term, "supreme."[6] While it remains unaltered, it is subject to no power above it, for there is none. It binds the people who made it, equally with all else within its jurisdiction.[7] All laws, in whatever form or from whatever source proceeding, contrary to it, are void.[8]

[1] Crim. Law, I, §§ 1–3.

[2] R. R. Co. *v.* McClure, 10 Wall. 511; Board of Public Schools *v.* Patten, 62 Mo. 444; Pacific R. R. Co. *v.* Maguire, 20 Wall. 36; Farmers' Bank *v.* Gunnell, 26 Grat. 131; Medical College *v.* Muldon, 46 Ala. 603; Daily *v.* Swope, 47 Miss. 367; S. *v.* Weston, 4 Neb. 216; Lehigh Valley R. R. Co. *v.* McFarlan, 4 Stew. Ch. 706. See Cox *v.* S., 8 Tex. Ap. 254, [34 Am. R. 746.]

Effect.— There are constitutional provisions which, from the special nature of the case, cannot have practical effect until legislation has lent its aid. S. *v.* Dubuclet, 28 La. An. 698; *post*, § 14.

[3] Const. U. S., art. 6; The Cherokee Tobacco, 11 Wall. 616; Hauenstein *v.* Lynham, 100 U. S. 483; Taylor *v.* Morton, 2 Curt. C. C. 454.

[4] Wells *v.* Buffalo, 14 Hun, 438; Lacey *v.* Waples, 28 La. An. 158; Albrecht *v.* S., 8 Tex. Ap. 216, [34 Am. R. 737;] Monroe *v.* S., 8 Tex. Ap. 343; S. *v.* Moore, 13 Vroom, 208; Jones *v.* Perry, 10 Yerg. 59, [30 Am. D. 430.]

[5] Jones *v.* Fireman's Fund Ins. Co., 2 Daly, 307; S. *v.* Williams, 11 S. C. 288.

[6] Const. U. S., art. 6.

[7] Dodge *v.* Woolsey, 18 How. (U. S.) 331, 347; Vanhorne *v.* Dorrance, 2 Dall. 304, 308; [Stockton *v.* R. R. Co., 32 Fed. R. 9.]

[8] Id.; Calder *v.* Bull, 3 Dall. 386, 399; Dartmouth College *v.* Woodward, 4 Wheat. 518, 625; Livingston *v.* Moore, 7 Pet. 469; Craig *v.* Missouri, 4 Pet. 410, 464; Green *v.* Biddle, 8 Wheat. 1; [Moore *v.* S., 43 N. J. L. 203, 39 Am. R. 558. *Ex post facto* laws are held to be unconstitutional, but laws regulating rules of procedure will be upheld. Duncan *v.* Missouri, 152 U. S. 371; Murphy *v.* Com., 172 Mass. 264, 43 L. R. A. 154, 52 N. E. R. 505. Laws changing the rules of evidence and rendering that admissible which was inadmissible at the time of the arrest of the accused are not unconstitutional. Thompson *v.* Missouri, 171 U. S. 380. The rule that the legislature may alter rules of procedure at its

II. Treaties.

§ 13. Complications and distinctions.— Treaties are, in some respects, as to their nature and the jurisdiction to interpret them, distinguishable from the other laws. Therefore, on the subject of their precedence, there are peculiarities and complications of doctrine, admonishing us to caution.

Nature — Constitutional provisions.— By the law of nations, a treaty is a mutual pledge of faith between sovereign powers.[1] Such, therefore, we must deem it to be in our governmental system; and, under the constitution of the United States, it is also law.[2] The words are, that, among other things, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state[3] shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."[4] The president has the "power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur."[5] Thereupon "the judicial power shall extend to all cases in law and equity arising under . . . treaties made or which shall be made."[6] The states are forbidden to enter into treaties.[7] One plain deduction is, that —

Superior to state laws.— A treaty is superior both to the constitution and to the statutes of a state; and to it, in a case of conflict, they must yield. Of course, a treaty, to have this effect, must be within the treaty-making power.[8] But —

pleasure must be taken in a reasonable sense, and a statute which may alter in a substantial manner the position of the accused, even if it is possible that it might operate more beneficially than the prior law, will be held unconstitutional. Thompson *v.* Utah, 170 U. S. 343.]

[1] Vattel, Law of Nations, b. 2, ch. 12; Story, Const., § 1818; [*Ex parte* Cooper, 143 U. S. 472.]

[2] *Ante*, § 11*a*.

[3] Blandford *v.* S., 10 Tex. Ap. 627; [Baker *v.* Portland, 5 Saw. 566.]

[4] Const. U. S., art. 6.

[5] Const. U. S., art. 2, § 2.

[6] Const. U. S., art. 3, § 2.

[7] Const. U. S., art. 1, § 2.

[8] Ware *v.* Hylton, 3 Dall. 199; Baker *v.* Portland, 5 Saw. 566; Gordon *v.* Kerr, 1 Wash. C. C. 322; Fisher *v.* Harnden, 1 Paine, 55; Succession of Mager, 12 Rob. (La.) 584, 588; Succession of Dufour, 10 La. An. 391; Succession of Prevost, 12 La. An. 577; P. *v.* Gerke, 5 Cal. 381; Fellows *v.* Blacksmith, 19 How. (U. S.) 366; Orr *v.* Hodgson, 4 Wheat. 453. It is believed that the doctrine of the text is correct, both in reason and authority, beyond controversy. Still the late William Beach Lawrence said in a *brochure* on "Foreign Treaties of the United States in Conflict with State Laws

§ 13a. By whom expounded and enforced — (Distinguished from statute).— A treaty differs greatly in some respects from a statute. If parties, under the latter, acquire rights, they go to the courts to obtain them, and from their determination thereon there is no appeal to any other department of the government. Hence the courts are necessarily the exclusive ex-

relative to the Transmission of Real Estate to Aliens," published in 1871: "Whether the treaty-making power of the general government is competent to enter into stipulation with foreign powers, affecting the transmission of real estate and other matters generally considered to be of state cognizance, has been made a question in the supreme court of the United States. Though that tribunal had previously recognized as the supreme law of the land the treaty of 1794 with England, by which, according to Attorney-General Cushing, 'all impediment of alienage was absolutely leveled to the ground despite the states' (Fairfax *v.* Hunter, 7 Cranch, 603), yet in the case of Frederickson *v.* S., 23 How. (U. S.) 445, it abstained, even though the question before it referred merely to personal property, from expressing an opinion as to the competency of the government of the United States to regulate, by treaty, testamentary dispositions or laws of inheritance within the states." Pages 45–47. Now, the constitution of the United States declares treaties to be supreme over state laws and constitutions in just the same words as it declares itself to be. How, then, can there be doubt? And, in point of authority, in the last case before me on the subject, the supreme court of the United States held that our treaty with the Swiss Confederation superseded the Virginia state laws of inheritance. Said Swayne, J., in delivering the opinion: "In Chirac *v.* Chirac, 2 Wheat. 259, it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage, and placed them in precisely the same situation as if they had been citizens of this country. The state law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in Carneal *v.* Banks, 10 Wheat. 181, and with respect to the British treaty of 1794, in Hughes *v.* Edwards, 9 Wheat. 489. A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a state. Orr *v.* Hodgson, 4 Wheat. 458. By the British treaty of 1794, 'all impediment of alienage was absolutely leveled with the ground, despite the laws of the states. It is the direct constitutional question in its fullest conditions. Yet the supreme court held that the stipulation was within the constitutional powers of the Union. Fairfax *v.* Hunter, 7 Cranch, 608, 627. See Ware *v.* Hylton, 3 Dall. 199, 242;' 8 Opin. Att. Gen. 417. Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this case, says: 'Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power and may be adjusted by it.' Treat. on the Const. and Gov. of the U. S. 204." Hauenstein *v.* Lynham, 100 U. S. 483, 489, 490.

pounders of the statute, and, so far as its validity is a question of constitutional law, of the constitution also. But, if another nation claims of ours a right under a treaty, it does not ordinarily undertake the enforcement thereof in our courts, it makes application to the executive department of our government. Hence, to the extent to which this doctrine is applicable, the ultimate interpretation of the treaty is beyond the judicial jurisdiction. So likewise the power which makes and conducts war may refuse to fulfill a treaty, and the courts must follow the lead. But, in the absence of any lead by the treaty-making or the war power, the courts must construe and enforce a treaty as they would any other law. So in reason the question stands, and the adjudications are not widely different. Now,—

§ 14. Treaty and statute in conflict.— Congress, by the constitution, has the power to declare war.[1] As a measure of war, therefore, it can abrogate, hence it can violate, a treaty. But, aside from this power, as it cannot make a treaty, so therefore it cannot annul one. Such plainly is the view which should govern the legislative body, and from which it cannot without a dereliction of duty depart. The result of which is that, in general, a treaty takes precedence of a statute. But if congress, having power to override a treaty as an act of war, in disregard of its constitutional duty herein trenches upon it from other motives, can the courts look into the motives[2] and hold the statute to be therefore void? The judicial doctrine appears to be established that they cannot, so that practically an act of congress is superior to a prior treaty, while also a treaty may supersede an act of congress.[3]

[1] Const. U. S., art. 1, § 8.

[2] *Post*, § 38.

[3] The Cherokee Tobacco, 11 Wall. 616; U. S. *v.* Tobacco Factory, 1 Dill. 264; Webster *v.* Reid, Morris, 467; Ropes *v.* Clinch, 8 Blatch. 304; Langford *v.* U. S., 12 Ct. of Cl. 338. In an able argument, now before me, by Hon. William Lawrence, he says: "It is so well settled that congress can by law dispose of the public lands that no one controverts it. It is equally certain, and will not be denied, that this power is superior to and controls all *prior* attempts by treaty to dispose of them. Every treaty with foreign nations or dependent tribes of Indians yields to a *later* act of congress in relation to a subject-matter within its jurisdiction. Congress has passed many such acts, and the courts yield '*to the will of the legislature*' always." He refers to "Act July 17, 1798, 1 Stat. 578; 2 Curt. C. C. 460; 8 Opin. Att. Gen. 737; Act March 26, 1804; Foster *v.* Neilson, 2 Pet. 253, 303, 307; Joint Resolution, April 10, 1869, 16 Stat.

Judicial effect — Interpretation.— In the absence of any action of the political department binding the courts, they take judicial notice of a treaty, and give it effect, precisely as they do the constitution and acts of congress.[1] Hence they must and do interpret the treaty;[2] yet, where the political depart-

55; Osage Treaty, 1865, 14 Stat. 687; Act July 15, 1870, § 12, 16 Stat. 362; same treaty, arts. 1, 2 and 17; Act Feb. 21, 1863, 12 Stat. 658–1101; Act Feb. 16, 1863, 12 Stat. 652; Act Jan. 29, 1861, erected state of Kansas; Art. 5, Cherokee Treaty, Dec. 1835, and other treaties; [U. S. *v.* Lynde,] 11 Wall. 632; Taylor *v.* Morton, 2 Curt. C. C. 454, 458; The Clinton Bridge, 1 Woolw. 150, 155; Mitchell *v.* U. S., 9 Pet. 711, 712; Act June 30, 1834, 4 Stat. 729; Act March 30, 1802, 2 Stat. 141." The reader perceives that the question is here put in not quite the same form as in my text, though the effect of the doctrine is not different. So, in the supreme court of the United States, Swayne, J., in delivering the opinion, said: "The effect of treaties and acts of congress, when in conflict, is not settled by the constitution. The question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of congress (Foster *v.* Neilson, 2 Pet. 253, 314) and an act of congress may supersede a prior treaty. Taylor *v.* Morton, 2 Curt. C. C. 454; The Clinton Bridge, 1 Woolw. 150, 155. . . . The consequences, in all such cases, give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance." The Cherokee Tobacco, *supra*, at p. 621. Another learned judge said: "Government is certainly under the strongest moral obligation to preserve inviolate the faith of all treaties; but if the legislative power, which in such matters is sovereign, sees proper to violate this duty, there is no power in the judiciary to prevent it. True, a treaty is by the constitution declared to be a supreme law of the land, but so is an act of congress. The latter may repeal the former in the same manner that one statute may repeal another. It is an act of sovereignty, which, if the judiciary could arrest, they might paralyze all the energies of the war itself, on the ground that the declaration of war was a violation of treaties." Mason, C. J., in Webster *v.* Reid. *supra*, at pp. 477, 478. The fact that the constitution does not in words declare the order of precedence between a statute and a treaty should, it is believed, have no weight in the argument. It does not say whether itself or a statute shall be of the greater effect; and the result that a statute is void which violates it is a mere deduction of construction. By a like construction it results "that," in the words of Swayne, J., in the above case of The Cherokee Tobacco, "a treaty cannot change the constitution, or be held valid if it be in violation of that instrument." p. 620. Under the constitution the treaty-making power is not in congress, but in the president and senate. Congress can declare war. In any exercise of the war power it may violate a treaty. But, by construction, since it cannot make one, it cannot otherwise than as a measure of war unmake one. Still the courts do, doubtless properly, decline jurisdiction to rectify a wrong of this sort. [See Horner *v.* U. S., 143 U. S. 570.]

[1] Martin *v.* Hunter, 1 Wheat. 304; Clark *v.* Braden, 16 How. (U. S.) 635.

[2] Crim. Pro., I, § 224; Holden *v.*

ment has spoken, they follow its interpretation,[1] deeming themselves to be, in the words of Eyre, C. J., in an English case, "not even the expounders of treaties."[2] When a statute and a treaty have been made with reference to each other, to carry out a common object, they are to be construed together.[3] And no statute will be so construed as to violate a treaty, when any other interpretation is reasonably permissible.[4]

Treaty requiring legislation.— A treaty, like a clause of the constitution,[5] requires in some circumstances a statute to give it practical effect, and in others it does not. Without legislation it may annul a conflicting state law.[6] If, for example, it declares the subjects of the foreign power entitled to hold or inherit lands in our states the same as though they were citizens of the United States, it overrides at once every conflicting state law and becomes law in each state.[7] In the nature of things, no act of congress is required to give effect to such a treaty. But one which provides for the surrendering, to the foreign power, of certain classes of offenders against its laws would seem not to confer, without legislation, on any particular officer a jurisdiction to carry the stipulation into effect; hence, to render it effectual, an act of congress is required.[8] Still there are distinctions on this subject not best to be entered into here.[9]

Joy, 17 Wall. 211; Gray *v.* Coffman, 3 Dill. 393; Hicks *v.* Butrick, 3 Dill. 413; Oliver *v.* Forbes, 17 Kan. 118; Fox *v.* Southack, 12 Mass. 143; Com. *v.* Bristow, 6 Call, 60; Fellows *v.* Blacksmith, 19 How. (U. S.) 366; Wilson *v.* Wall, 34 Ala. 288; [Scharpf *v.* Schmidt, 172 Ill. 255, 50 N. E. R. 182.]

[1] U. S. *v.* Arredondo, 6 Pet. 691, 711; Foster *v.* Neilson, 2 Pet. 253, 309; Garcia *v.* Lee, 12 Pet. 511; U. S. *v.* Reynes, 9 How. (U. S.) 127, 153, 154; Williams *v.* Suffolk Ins. Co., 13 Pet. 415, 420.

[2] Marryat *v.* Wilson, 1 B. & P. 430, 433.

[3] Reg. *v.* Wilson, 3 Q. B. D. 42; [Whitney *v.* Robertson, 124 U. S. 195.]

[4] Leavenworth, etc. R. R. Co. *v.* U. S., 92 U. S. 733, 742; [Chew Heong *v.* U. S., 112 U. S. 536; *In re* Ah Lung, 18 Fed. R. 28.]

[5] *Ante*, § 11*a*, note; *post*, § 92*b*; Green *v.* Aker, 11 Ind. 223; Com. *v.* Collis, 10 Phila. 430; Com. *v.* Harding, 87 Pa. St. 343.

[6] Fisher *v.* Harnden, 1 Paine, 55; Opinion of Justices, 68 Me. 589.

[7] Chirac *v.* Chirac, 2 Wheat. 259; Orr *v.* Hodgson, 4 Wheat. 453; Hughes *v.* Edwards, 9 Wheat. 489; Carneal *v.* Banks, 10 Wheat. 181; P. *v.* Gerke, 5 Cal. 381; Succession of Prevost, 12 La. An. 577; Succession of Dufour, 10 La. An. 391; Succession of Mager, 12 Rob. (La.) 584; Droit d'Aubaine, 8 Opin. Att. Gen. 411; [Kull *v.* Kull, 87 Hun (N. Y.), 476.]

[8] *In re* Metzger, 1 Barb. 248. As confirming this principle, see Turner *v.* American Baptist Missionary Union, 5 McLean, 345; Taylor *v.* Morton, 2 Curt. C. C. 454. See *In re* Metzger, 5 How. (U. S.) 176.

[9] Consult British Prisoners, 1

Marshall, C. J., once stated in the supreme court of the United States the doctrine as follows: "Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."[1]

III. Acts of Congress.

§ 15. In general.— Whether we deem an act of congress superior or inferior to a treaty, or equal with it, the national constitution places it, like this instrument itself,[2] above every sort of state law, written or unwritten, constitutional or statutory.[3] To have this effect it must, of course, be within the powers conferred on congress.[4]

IV. The Constitutions of the Several States.

§ 16. In general.— Though, as just explained, the constitution of a state must give way to the constitution of the United States, and to national treaties and statutes made in pursuance thereof, in all other particulars it is the supreme law of the particular state, and to it all conflicting statutes and other laws must yield.[5]

V. State Statutes.

§ 17. In general.— Practically, in most things, the statutes of the state are the highest authorities known to the court; because only of comparatively a few questions do the superior laws above mentioned have jurisdiction. A statute is superior

Woodb. & M. 66; *Ex parte* Metzger, 5 N. Y. Leg. Obs. 83; *In re* Kaine, 10 N. Y. Leg. Obs. 257; Robbins' Case, Whart. St. Tr. 392; s. c. *nom.* U. S. *v.* Nash, Bee, 266.

[1] Foster *v.* Neilson, 2 Pet. 253, 314. And see Taylor *v.* Morton, 2 Curt. C. C. 454; Jones *v.* Walker, 2 Paine, 688; [Whitney *v.* Robertson, 124 U. S. 190.]

[2] *Ante*, § 12.

[3] Const. U. S., art. 6.

[4] *Ante*, § 13; Story, Const., § 1837.

[5] *In re* Goode, 3 Mo. Ap. 226; Loftin *v.* Watson, 32 Ark. 414; Sovereign *v.* S., 7 Neb. 409; Indiana *v.* Agricultural Society, 85 Pa. St. 357; Pierce *v.* Pierce, 46 Ind. 86; S. *v.* Lancaster, 6 Neb. 474; Frye *v.* Partridge, 82 Ill. 267; Haley *v.* Philadelphia, 153 Pa. St. 45, [8 Am. R. 68.]

alike to the unwritten law, which it supersedes in a case of conflict, and to a municipal by-law.[1] Even —

Colonial statute.—A colonial statute appears to have the same effect as any other.[2]

VI. By-laws of Municipal Corporations.

§ 17a. In general.— By-laws of municipal corporations are subject to be controlled by statutes, and in the main by the unwritten law, giving way when in conflict with either.[3] We shall now devote to them a separate chapter.

[1] Field *v.* Des Moines, 39 Iowa, 575, [18 Am. R. 46,] and other cases cited to the next section.

[2] Brice *v.* S., 2 Tenn. 254.

[3] Field *v.* Des Moines, 39 Iowa, 575, [18 Am. R. 46]; Vestry *v.* Mathews, 4 Dea. 578; S. *v.* Curtis, 9 Nev. 325; Lisbon *v.* Clark, 18 N. H. 234; Canton *v.* Nist, 9 Ohio St. 439; Thompson *v.* Mt. Vernon, 11 Ohio St. 688; S. *v.* Crummey, 17 Minn. 72; S. *v.* Lindsay, 34 Ark. 372.

CHAPTER III.

MUNICIPAL BY-LAWS.

§ 18. By-law defined.— A by-law of a corporation is a regulation which itself has established for the government of its own internal affairs. Blackstone terms it a "private statute;"[1] and it has the force of a statute within its narrow sphere.[2]

Municipal by-law — Ordinance.— A municipal by-law, therefore, is a by-law of a municipal corporation. *Ordinance* is a word practically synonymous.[3] And the by-laws of cities are in most localities commonly called city ordinances; even they are popularly so where the more appropriate legal word is by-law.

How municipal corporation created.— Municipal corporations, such as cities and towns, are, in England, created either by act of parliament or by charter from the crown; usually by the latter,[4] regulated, in modern times, more or less by statute.[5] With us they exist only by statute.

Legislative power over charter.— The legislature can amend or repeal an act of incorporation at pleasure,[6] or can force such

[1] He mentions, among the powers of a corporation: "To make by-laws or private statutes for the better government of the corporation; which are binding upon themselves, unless contrary to the law of the land, and then they are void. This is also included by law in the very act of incorporation; for, as natural reason is given to the natural body for the governing it, so by-laws or statutes are a sort of political reason to govern the body politic." 1 Bl. Com. 476.

[2] Hopkins *v.* Swansea, 4 M. & W. 621, 641; S. *v.* Williams, 11 S. C. 288; [R. R. Co. *v.* Hines, 82 Ill. Ap. 488; R. R. Co. *v.* Village of Allamount, 84 Ill. Ap. 274; Water-works Co. *v.* New Orleans, 164 U. S. 471; City *v.* Wilson, 15 Utah, 53; S. *v.* Williams, 11 S. C. 288.]

[3] Jones *v.* Sanford, 66 Me. 585, 588; S. *v.* Jersey City, 8 Vroom, 348.

[4] Willcock, Corp. 25.

[5] As, see 40 & 41 Vict., c. 69.

[6] Sloan *v.* S., 8 Blackf. 361; S. *v.* Branin, 3 Zab. 484; Martin *v.* Dix, 52 Miss. 53, [24 Am. R. 661;] New Orleans *v.* Cazelar, 27 La. An. 156; Stilz *v.* Indianapolis, 55 Ind. 515; Gibonay *v.* Cape Girardeau, 58 Mo. 141; Philadelphia *v.* Fox, 64 Pa. St. 169; Layton *v.* New Orleans, 12 La. An. 515; Annapolis *v.* S., 30 Md. 112; S. *v.* Union, 4 Vroom, 350. And see S. *v.* Person, 3 Vroom, 134; Brackett *v.* P., 72 Ill. 593; [Crook *v.* P., 106 Ill. 237; 5 Am. & Eng. Corp. Cas. 460; Coyle *v.* Mc-

act on the corporators against their will,[1] except as or unless restrained by the constitution.[2] But not unfrequently an act incorporating a municipality is passed to be accepted or rejected by those to be affected thereby as they may choose, and such proceeding is always permissible,[3] while still it is not necessary.[4]

Incidental power to make by-laws.— An incident of every such corporation, even where its charter or incorporating act is silent on the subject, is the power to make by-laws.[5] Commonly the authority is conferred in express words, and it is competent for legislation to do this;[6] but the general power results equally from the very existence of the corporation.[7]

§ 19. Extent of incidental power.— Neither a general statutory power to make by-laws, "nor," in the words of an Eng-

Intyre, 7 Hous. (Del.) 44; Ward *v.* City, 121 N. C. 1; Galloway *v.* Tavares, 37 Fla. 58. In construing a municipal ordinance the same rules govern as apply to the general statutes. Pittsburg, etc. Ry. Co. *v.* Hays, 17 Ind. Ap. 261, 45 N. E. R. 675. The rule generally adopted in this country providing that acts of the legislature shall embrace but one subject, which shall be expressed in the title, has no application to municipal corporations. *Ex parte* Haskell, 112 Cal. 412.]

[1] Paterson *v.* Society, 4 Zab. 385; San Francisco *v.* Canavan, 42 Cal. 541; S. *v.* Jennings, 27 Ark. 419; City *v.* Shields, 52 Mo. 351. See P. *v.* Bennett, 29 Mich. 451, [18 Am. R. 107;] Manly *v.* Raleigh, 4 Jones Eq. 370; P. *v.* Chicago, 51 Ill. 17, 58, [2 Am. R. 278;] Harward *v.* St. Clair, etc. Drainage Co., 51 Ill. 130; Lovingston *v.* Wider, 53 Ill. 302.

[2] S. *v.* McFadden, 23 Minn. 40; Milner *v.* Pensacola, 2 Woods, 632; Bank of State *v.* Bank of Cape Fear, 13 Ire. 75; S. *v.* Canaday, 73 N. C. 198, [21 Am. R. 465;] Mosher *v.* Independent School District, 44 Iowa, 122.

[3] *Post*, § 36; Lammert *v.* Lidwell, 62 Mo. 188, [21 Am. R. 411;] St. Louis *v.* Russell, 9 Mo. 507; [St. Maggard *v.* Pond, 23 Mo. 606.]

[4] Blessing *v.* Galveston, 42 Tex. 641.

[5] Blackstone, *ut sup.;* Willcock, Corp. 99, 100; Rex *v.* Westwood, 2 Dow. & C. 21, 4 Bligh (N. S.), 213, 7 Bing. 1, 4 B. & C. 781; Com. *v.* Stodder, 2 Cush. 562, 569, [48 Am. D. 679;] Angell & Ames, Corp., §§ 110, 325.

[6] S. *v.* Noyes, 10 Fost. (N. H.) 279; S. *v.* Simonds, 3 Mo. 414; [Fred *v.* Ry. Co., 65 Mo. Ap. 121; Water Co. *v.* Aurora, 129 Mo. 540, 31 S. W. R. 946; City *v.* Wilson, 15 Utah, 53; St. Ransen *v.* Ireg, 42 Neb. 186, 60 N. W. R. 601.]

[7] "Though power to make laws is given by special clause in all incorporations, yet it is needless; for I hold it to be included, by law, in the very act of incorporating, as is also the power to sue, to purchase, and the like. For, as reason is given to the natural body for the governing of it, so the body corporate must have laws, as a politic reason, to govern it; but those laws must ever be subject to the general law of the realm, as subordinate to it. And, therefore, though there be no proviso for that purpose, the law supplies it." Norris *v.* Staps, Hob. 210*b*, 211*a*.

lish author, "a general custom to make by-laws, will give an ordinance any greater claim to validity than if it had been made under the incidental power in every corporation."[1] But it is difficult to say exactly how far this general power extends; because, in most instances, our incorporating acts define the powers,[2] so that the decisions under them do not help us on this question.[3] And, as further complicating the authorities, there are in England prescriptive corporations, having local customs,[4] among which are rights founded on ancient and long usage to establish by-laws not within the general authority; but there are no corporations of this sort in the United States.[5] Still we have authorities enabling us to say that a by-law made under the general power must, to be good, not contravene the other laws of their policy,[6] or exceed the proper local or other jurisdiction of the corporation,[7] or be otherwise oppressive or unjust.[8] To particularize: —

§ 20. Express authority — Constitutional. — Any proper by-law made under express authority from the legislature is good, provided the authorizing act did not exceed the constitutional power. But such act may be unconstitutional, therefore void, and therefore the by-law be void.[9] Or, if the by-law

[1] Willcock, Corp. 159.

[2] Kyle *v.* Malin, 8 Ind. 34. Generally the express legislative power is to be deemed simply an addition to the implied. S. *v.* Morristown, 4 Vroom, 57. See Parker *v.* Baker, Clark, 223; [Gas & Water Co. *v.* Elyria, 57 Ohio St. 374.]

[3] Com. *v.* Stodder, 2 Cush. 562, [48 Am. D. 679.]

[4] Willcock, Corp. 74.

[5] Com. *v.* Stodder, 2 Cush. 562, 569.

[6] *Ante*, § 17*a*; *post*, § 22; Mobile *v.* Yuille, 3 Ala. 137, 143, [36 Am. D. 441;] Canton *v.* Nist, 9 Ohio St. 439; [City *v.* Leckie, 78 Mo. Ap. 8; Steinmueller *v.* Kansas City, 3 Kan. Ap. 45.]

[7] Rex *v.* Breton, 4 Bur. 2260, 2267; Com. *v.* Turner, 1 Cush. 493, 496; Williams *v.* Davidson, 43 Tex. 1; S. *v.* Mobile, 5 Port. 279, [30 Am. D. 564;] Thomas *v.* Richmond, 12 Wall. 349; S. *v.* Hoboken, 4 Vroom, 280.

[8] Mobile *v.* Yuille, *supra;* Norris *v.* Staps, Hob. 210*b;* Cullinan *v.* New Orleans, 28 La. An. 102; Shreveport *v.* Levy, 26 La. An. 671, [21 Am. R. 553;] Bowling-Green *v.* Carson, 10 Bush, 64; Com. *v.* Wilkins, 121 Mass. 356; Jones *v.* Sanford, 66 Me. 585; Pieri *v.* Shieldsboro, 42 Miss. 493; Columbia *v.* Beasly, 1 Humph. 232; Barling *v.* West, 29 Wis. 307, [9 Am. R. 576;] Yates *v.* Milwaukee, 10 Wall. 497; St. Paul *v.* Traeger, 25 Minn. 248; Ward *v.* Greeneville, 8 Bax. 228; [Kirkham *v.* Russell, 76 Va. 956; Barnett *v.* Denison, 145 U. S. 145.]

[9] Gunnarssohn *v.* Sterling, 92 Ill. 569; Mowery *v.* Salisbury, 82 N. C. 175; S. *v.* Canaday, 73 N. C. 198, [21 Am. R. 465;] Fretwell *v.* Troy, 18 Kan. 271; Schwuchow *v.* Chicago, 68 Ill. 444; Wheeler *v.* Cincinnati, 19 Ohio St. 19, [2 Am. R. 368;] *Ex parte* Hurl, 49 Cal. 557; Sullivan *v.* McCam-

does not follow, or if it exceeds, the power, it will be void.[1] *A fortiori*, therefore, it will be void if itself unconstitutional.[2] Among —

By-laws commonly permissible,— yet more or less resting on statutory authority, are the following: forbidding the removal of house dirt and offal from the city, except by license;[3] regulating the speed of vehicles drawn through the streets;[4] ordaining rules for passenger transportation in the city, the carriages, prices, and the like;[5] providing for a city market, and prohibiting persons to occupy stands within the near streets, for the vending of such things as are sold in the market;[6] and, in a limited degree, regulating the times for opening and closing places of business.[7] But, in general, a by-law in restraint of

mon, 51 Ind. 264; Grover *v.* Huckins, 26 Mich. 476; Wright *v.* Boston, 9 Cush. 233; Leach *v.* Elwood, 3 Bradw. 453; S. *v.* Williams, 11 S. C. 288. [Unless in conflict with the constitution, a by-law authorized by express legislative authority will be upheld; while a by-law passed by virtue of its incidental powers, or under a general grant of authority, will be declared void, unless it be reasonable and fair. Ry. Co. *v.* Crown Point, 146 Ind. 421, 35 L. R. A. 684, 45 N. E. R. 587; *Re* North Terrace Park, 147 Mo. 259, 48 S. W. R. 860.]

[1] Sullivan *v.* Oneida, 61 Ill. 242; Logan *v.* Pyne, 43 Iowa, 524, [22 Am. R. 261;] Williams *v.* Davidson, 43 Tex. 1; Sumter *v.* Deschamps, 4 S. C. 297. [Municipal corporations can exercise only such powers as are conferred in express terms or exist by necessary implication. If any doubt arises it must be resolved against the power. Electric Light Co. *v.* Jacksonville, 36 Fla. 229; Winchester *v.* Redmond, 93 Va. 711; Lynchburg Ry. Co. *v.* Dameron, 95 Va. 545; Croft *v.* Danbury, 65 Conn. 294; Lesley *v.* Kite, 192 Pa. St. 269; Kennedy *v.* P., 9 Colo. Ap. 490; Van Antwerp *v.* Twp., 3 S. D. 305, 53 N. W. R. 82; Waterloo *v.* Mill Co., 72 Iowa, 437, 34 N. W. R. 197; R. R. Co. *v.* R. R. Co., 105 Mo. 562, 16 S. W. R. 920; Vosburg *v.* McCrary, 77 Tex. 568, 14 S. W. R. 195.]

[2] Clinton *v.* Phillips, 58 Ill. 102, [11 Am. R. 52;] Judson *v.* Reardon, 16 Minn. 431.

[3] Vandine, Petitioner, 6 Pick. 187, [17 Am. D. 351.]

[4] Com. *v.* Worcester, 3 Pick. 462; Chicago, etc. R. R. Co. *v.* Engle, 76 Ill. 317, [S., Trenton Ry. Co. *v.* Trenton, 53 N. J. L. 132, 11 L. R. A. 410, 20 Atl. R. 1076; North Chicago Ry. Co. *v.* Lake View, 105 Ill. 207, 44 Am. R. 788.]

[5] Johnson *v.* Philadelphia, 60 Pa. St. 445; Logan *v.* Pyne, 43 Iowa, 524, [22 Am. R. 261;] Com. *v.* Gage, 114 Mass. 328; Com. *v.* Matthews, 122 Mass. 60; St. Louis *v.* Grone, 46 Mo. 574; S. *v.* Herod, 29 Iowa, 123; *Ex parte* Slaren, 3 Tex. Ap. 662.

[6] Nightingale, Petitioner, 11 Pick. 168; Com. *v.* Rice, 9 Met. 253; Buffalo *v.* Webster, 10 Wend. 100. And see Huntington *v.* Cheesbro, 57 Ind. 74; Com. *v.* Wilkins, 121 Mass. 356; Bowling-Green *v.* Carson, 10 Bush, 64; Com. *v.* Brooks, 109 Mass. 355; St. Paul *v.* Traeger, 25 Minn. 248, [City *v.* Gugenheim, 61 Ill. Ap. 374.]

[7] Ward *v.* Greeneville, 8 Bax. 228, 229; Platteville *v.* Bell, 43 Wis. 488; S. *v.* Welch, 36 Conn. 215; Maxwell *v.* Jonesboro, 11 Heisk. 257.

trade, labor or business can be justified only by express statutory authority.[1] A city adjoining navigable waters may make reasonable by-laws concerning quarantine and wharves within its limits.[2] But it cannot thus prevent persons not its inhabitants from taking shell-fish in a navigable river within its bounds; because this would be in contravention of a common right.[3] Yet, if the inhabitants of a town have the exclusive right of fishing in its waters, such a by-law is within its power.[4] A city corporation cannot make a by-law which shall permit one person to carry on a dangerous business and prohibit another having equal claim. So it has been adjudged,[5] but the doctrine is plainly subject to wide exceptions and qualifications.

§ 21. Nuisance — Bawdy-house — Keeping dog. — Without special legislative authority, a by-law cannot make abatable as a nuisance what is not so by the general law, thus destroying private property;[6] nor, on the other hand, can it authorize the creation of a nuisance, whether public or private.[7] But if the statute creating the corporation authorizes it to make by-laws relating to nuisances, an ordinance is within the authority which subjects to punishment the owners of houses of ill-fame, or those reputed to be such, knowing the facts.[8] And, under this sort of

[1] Barling *v.* West, 29 Wis. 307, [9 Am. R. 576;] Dunham *v.* Rochester, 5 Cow. 462; Plaquemine *v.* Roth, 29 La. An. 261; Norris *v.* Staps, Hob. 210*b*; Rochester *v.* Upman, 19 Minn. 108; Hesketh *v.* Braddock, 3 Bur. 1847; Harrison *v.* Godman, 1 Bur. 12; Clark *v.* Le Cren, 9 B. & C. 52. See *post*, § 23; [City *v.* Bazzetti, 159 Ill. 284; Anniston *v.* Ry. Co., 112 Ala. 557.]

[2] Dubois *v.* Augusta, Dudley (Ga.), 30; St. Louis *v.* McCoy, 18 Mo. 238.

[3] Hayden *v.* Noyes, 5 Conn. 391.

[4] Rogers *v.* Jones, 1 Wend. 237, [19 Am. D. 493.]

[5] Hudson *v.* Thorne, 7 Paige, 261. And see Cullinan *v.* New Orleans, 28 La. An. 102; Shreveport *v.* Levy, 26 La. An. 671, [21 Am. R. 553.]

Wooden buildings. — According to Hudson *v.* Thorne, also, the charter of the city of Hudson does not empower it to restrict the erection of wooden buildings, or to limit the size of buildings; and an ordinance prohibiting a hay-press within certain limits is void. But generally, in our cities, such things may be more or less regulated by by-laws. And see Crim. Law, I, §§ 1150, 1151; Fielding *v.* Rhyl Imp. Co., 3 C. P. D. 272; Waupun *v.* Moore, 34 Wis. 450, [17 Am. R. 446.]

[6] Pieri *v.* Shieldsboro, 42 Miss. 493; Yates *v.* Milwaukee, 10 Wall. 497. And see Lake *v.* Aberdeen, 57 Miss. 260; Waupun *v.* Moore, 34 Wis. 450, [17 Am. R. 446; Grossman *v.* City, 30 Oreg. 478.]

[7] Pettis *v.* Johnson, 56 Ind. 139; S. *v.* Lindsay, 34 Ark. 372. See Franklin Wharf *v.* Portland, 67 Me. 46, [24 Am. R. 1.]

[8] McAlister *v.* Clark, 33 Conn. 91; S. *v.* Williams, 11 S. C. 288; S. *v.* Reckards, 21 Minn. 47.

authority, a by-law may subject the keeping of a dog to a tax, and authorize the killing of the animal as a nuisance if the tax is not paid.[1]

§ 22. Requisites enumerated.— By-laws must be consistent with the act or charter of incorporation, not conflicting with it in letter or manifest intention;[2] harmonious with the general statutory and common law,[3] which they cannot unauthorized supersede;[4] reasonable and beneficial;[5] not, in general, retro-

[1] Mowery *v.* Salisbury, 82 N. C. 175. See Leach *v.* Elwood, 3 Bradw. 453; Louisburg *v.* Harris, 7 Jones (N. C.), 231; [City *v.* Winter, 86 Md. 293; S. *v.* Taft, 118 N. C. 1190. As a general rule municipal corporations have much discretion in determining what is a nuisance, and the exercise of this discretion will not be interfered with by the courts, unless the corporation has manifestly transcended the authority granted to it. S. *v.* Heidenhain, 42 La. An. 483, 7 S. R. 621; Olympia *v.* Mann, 1 Wash. 389. 12 L. R. A. 150. The right to sell spirituous liquors, when granted by a municipal corporation, is subject to all the police powers of the corporation, and, in the absence of any restrictions upon its authority, it may revoke the license at any time. It is neither a contract nor property right in the licensee, but a mere permit to do what would otherwise be an offense under the general law. Ison *v.* Mayor, etc., 96 Ga. 623.]

[2] *Ante*, §§ 17*a*, 19; Hoblyn *v.* Rex, 2 Bro. P. C. 329; Rex *v.* Cutbush, 4 Bur. 2264; Rex *v.* Cambridge, 2 Selw. N. P. (11th ed.) 1176; Reg. *v.* Darlington School, 6 Q. B. 682; Com. *v.* Fahey, 5 Cush. 408; Rochester *v.* Collins, 12 Barb. 559; Clintonville *v.* Keeting, 4 Denio, 341; Indianapolis *v.* Fairchild, 1 Ind. 315, Smith (Ind.), 122; S. *v.* Beaufort, 2 Rich. 496; S. *v.* Hay, 29 Me. 457; Morris *v.* Rome, 10 Ga. 532; Cincinnati *v.* Gwynne, 10 Ohio, 192; Cincinnati *v.* Buckingham, 10 Ohio, 257; Angell & Ames, Corp., §§ 343–346.

[3] Robinson *v.* Mayor, 1 Humph. 156, [34 Am. D. 625]; Chapman *v.* Miller, 2 Speers, 769; S. *v.* Savannah, T. U. P. Charl. 235, [4 Am. D. 706]; Welch *v.* Stowell, 2 Doug. (Mich.) 332; Angell & Ames, Corp., §§ 332–334; Cincinnati *v.* Rice, 15 Ohio, 225; Louisville *v.* Roupe, 6 B. Mon. 591; Markle *v.* Akron, 14 Ohio, 586; Reg. *v.* Edmonds, 4 Ellis & B. 993, 1 Jur. (N. S.) 727, 30 Eng. L. & Eq. 379; Thompson *v.* Mt. Vernon, 11 Ohio St. 688; Seneca County Bank *v.* Lamb, 26 Barb. 595; Lake *v.* Decatur, 91 Ill. 596; Gridley *v.* Bloomington, 88 Ill. 554, [30 Am. R. 566.] But a by-law may sometimes punish the same offense which is indictable under a general law of the state. S. *v.* Plunkett, 3 Harrison, 5. See *post*, § 23; [Buck *v.* Sarles, 129 Ind. 201, 13 L. R. A. 481, 28 N. E. R. 434.]

[4] March *v.* Com., 12 B. Mon. 25; Com. *v.* Turner, 1 Cush. 493. And see Aberdeen *v.* Saunderson, 8 Sm. & M. 663; Cincinnati *v.* Bryson, 15 Ohio, 625, [45 Am. D. 593]; Angell & Ames, Corp., § 333.

[5] Scriveners' Co. *v.* Brooking, 2 Gale & D. 419, 6 Jur. 335; Rex *v.* York, 3 B. & Ad. 770; Elwood *v.* Bullock, 6 Q. B. 383; Com. *v.* Robertson, 5 Cush. 438; Com. *v.* Worcester, 3 Pick. 462, 473; Kennebec & Portland R. R. Co. *v.* Kendall, 31 Me. 470; Williams *v.* Augusta, 4 Ga. 509; Com. *v.* Pittsburgh, 14 Pa. St. 177; Mayor and Aldermen *v.* Maberry, 6 Humph. 368, [44 Am. D. 315]; Boston *v.* Shaw, 1 Met. 130; Austin *v.* Murray, 16 Pick.

spective;[1] not restraining trade,[2] though a by-law merely in regulation of trade is good.[3]

Penalty — Forfeiture.— Every law has necessarily its penal sanction, and a rule not enforceable is not law.[4] So that the power of making by-laws carries with it the power to render them effectual.[5] But, without express statutory authority, a municipal corporation can inflict only the milder penalties.[6] It cannot, for example, create a forfeiture.[7] Yet it can provide "reasonable and proper fines" for the violators of its by-laws.[8] And under statutory authority it may ordain forfeitures.[9]

Binds whom.— A by-law is properly for the government only of members of the corporation. But strangers coming within the corporate limits are amenable thereto.[10] So also their prop-

121, 125; Fielding *v.* Rhyl Imp. Co., 3 C. P. D. 272; S. *v.* Jersey City, 8 Vroom, 348; Corrigan *v.* Gage, 68 Mo. 541; *Ex parte* Frank, 52 Cal. 606, [28 Am. R. 642]; Angell & Ames, Corp., §§ 347–351; [S. *v.* Smith, 67 Conn. 541.]

[1] Howard *v.* Savannah, T. U. P. Charl. 173.

[2] *Ante*, § 20.

[3] Pierce *v.* Bartrum, Cowp. 269; Cuddon *v.* Eastwick, 1 Salk. 143; Com. *v.* Worcester, 3 Pick. 462, 473; Vandine, Petitioner, 6 Pick. 187, [17 Am. D. 351]; City Council *v.* Ahrens, 4 Strob. 241; Morris *v.* Rome, 10 Ga. 532; Angell & Ames, Corp., § 335. See *ante*, § 20; [*Ex parte* Bohen, 115 Cal. 372; Helena *v.* Dwyer, 64 Ark. 424; *Ex parte* Lacey, 108 Cal. 326; Theisey *v.* McDavid, 34 Fla. 440.]

[4] Crim. Law, I, §§ 6–8.

[5] Reinhard *v.* New York, 2 Daly, 243.

[6] *Post*, § 403; Brieswick *v.* Brunswick, 51 Ga. 639, 642, [21 Am. R. 240.]

[7] Kirk *v.* Nowill, 1 T. R. 118; Donovan *v.* Vicksburg, 29 Miss. 247, [64 Am. D. 143;] Angell & Ames, Corp. § 340.

[8] 1 Dill. Mun. Corp. (2d ed.), § 272, referring to Fisher *v.* Harrisburg, 2 Grant (Pa.), 291; Trigally *v.* Memphis, 6 Coldw. 382; Zylstra *v.* Charleston, 1 Bay, 382; Cudden *v.* Estwick, 6 Mod. 123. See also Tobacco Pipe Makers *v.* Woodroffe, 7 B. & C. 838; Mobile *v.* Yuille, 3 Ala. 137, [36 Am. D. 441; Eyerman *v.* Blaksley, 78 Mo. 145; St. Louis *v.* Schornbusch, 95 Mo. 618, 8 S. W. R. 791; Harris *v.* City Council, 100 Ga. 382; *Re* Ah You, 88 Cal. 99, 11 L. R. A. 408, 25 Pac. R. 974.]

[9] Ottumwa *v.* Schaub, 52 Iowa, 515; Mobile & Ohio R. R. *v.* S., 29 Ala. 573; Charleston *v.* Goldsmith, 2 Speers, 428. [In Missouri it is held that a municipality cannot by ordinance create a civil liability against a person violating it and in favor of persons injured by its violation. Moran *v.* Car Co., 134 Mo. 641, 36 S. W. R. 659.]

[10] Pierce *v.* Bartrum, Cowp. 269; Cuddon *v.* Eastwick, 1 Salk. 192; Whitfield *v.* Longest, 6 Ire. 268; Horney *v.* Sloan, 1 Ind. 266; Vandine, Petitioner, 6 Pick. 187; Willcock, Corp. 105; Charleston *v.* Pepper, 1 Rich. 364; Gosselink *v.* Campbell, 4 Iowa, 296; Kennedy *v.* Sowden, 1 McMul. 323. C. *v.* Dow, 10 Met. 382, seems to have proceeded upon the language of the statute which authorized the by-law. See further on this point, C. *v.* Stodder, 2 Cush. 562,

erty, while within those limits, is subject to the operation of the by-law.[1]

§ 23. By-law and general law forbidding same act.— Some very complicated questions, on which the courts are not quite harmonious, have arisen where a by-law is made against a thing already punishable under the general law. The terms of statutes and by-laws so differ that a minute discussion of these questions will not be attempted, since it would occupy too much space. In some of the states, under their statutes, it is deemed not competent for the corporation to render punishable, by by-law, what is already a crime under the general law.[2] In other states this is not held, and effect is given to by-laws making punishable what is so also under the general law. And where the terms of the incorporating act clearly include this power, such result would appear to be unquestionable.[3] But plainly, as a by-law is inferior to a statute, which it cannot supersede,[4] the liability to indictment under the general law remains, unless the authority to enact the by-law is broad enough to include such superseding of the statute.[5] On this principle,—

Arrest and detain without warrant.— A statute of Maine having the provision that, if an officer "shall detain any offender, without warrant, longer than such time as is necessary to procure a legal warrant," he shall, etc.,— the courts hold a town by-law, giving the officer power to detain forty-eight hours without warrant, repugnant to the statute and void.[6] Now,—

§ 24. Second jeopardy.— Assuming the general law not to be repealed by the by-law and both to be in force, can there be a conviction under both? Not all by-laws make the thing

[48 Am. D. 679,] and C. *v.* Chase, 6 Cush. 248. And see Taylor *v.* Americus, 39 Ga. 59.

[1] Spitler *v.* Young, 63 Mo. 42; Hoggatt *v.* Bigley, 6 Humph. 236, 239. See, also, on this point, Horney *v.* Sloan, *supra*.

[2] Washington *v.* Hammond, 76 N. C. 33, 35, 36; Jefferson City *v.* Courtmire, 9 Mo. 692; Savannah *v.* Hussey, 21 Ga. 80. And see Adams *v.* Albany, 29 Ga. 56; S. *v.* Brady, 41 Conn. 588.

[3] Rogers *v.* Jones, 1 Wend. 237, [19 Am. D. 493;] S. *v.* Bergman, 6 Oreg. 341; Hamilton *v.* S., 8 Tex. Ap. 643; Maher *v.* S., 53 Ga. 448, [21 Am. R. 269;] Robbins *v.* P., 95 Ill. 175; Greenwood *v.* S., 6 Bax. 567, [32 Am. R. 539;] Polinsky *v.* P., 11 Hun, 390; P. *v.* Williams, 11 S. C. 288; [Theisey *v.* McDavid, 34 Fla. 440; *Ex parte* McGee, 33 Oreg. 165.

[4] *Ante*, §§ 17*a*, 19.

[5] Fant *v.* P., 45 Ill. 259; S. *v.* Crummey, 17 Minn. 72.

[6] Burke *v.* Bell, 36 Me. 317.

they prohibit a crime.[1] The imposition of a penalty does not render the transaction criminal; a penal action is civil.[2] And it is familiar doctrine that both a civil and criminal proceeding are maintainable for the same wrong.[3] So that, where the by-law simply provides a penalty for the wrong, not constituting it a crime, and it is a crime by the general law, the familiar principles permit a double prosecution on both.[4] Again, the thing declared criminal by the one may not be identical with that so declared by the other; and then neither prosecution will be an impediment to the other, though there is but one transaction.[5] But where precisely the same act is a crime under both the general law and the by-law, there are authorities which hold that a conviction or acquittal under the one will bar proceedings under the other.[6] The result of which is, that the by-law repeals the general law for the cases wherein the prosecution is first had under it. The better doctrine, therefore, is believed to be the contrary; namely, that, just as the same act may be an offense against both the United States and a state, and punished by both,[7] so also it may be against a municipal corporation and a state. It might not be judicious or merciful to resort to both proceedings; but some of our courts, it is believed the greater number, maintain the right.[8] "The powers which are exercised by a city government," observed Perkins, J., in an Indiana case, "are, it thus appears, superadded to those exercised by the state in the same locality."[9]

[1] *Post*, §§ 403, 404; Rex *v.* Sharples, 4 T. R. 777; Davenport *v.* Bird, 34 Iowa, 524; Hoyer *v.* Mascoutah, 59 Ill. 137; Cooper *v.* P., 41 Mich. 403; S. *v.* Decker, 46 Conn. 241; Platteville *v.* Bell, 43 Wis. 488; Jenkins *v.* Cheyenne, 1 Wyo. 287; P. *v.* Manistee, 26 Mich. 422; Schmeider *v.* McLane, 4 Abb. Ap. 154; Greensburgh *v.* Corwin, 58 Ind. 518.

[2] Crim. Law, I, § 32 and notes.

[3] Id., § 264 *et seq.*, 990.

[4] Id., § 1076; S. *v.* Crummey, 17 Minn. 72; Shafer *v.* Mumma, 17 Md. 331, [79 Am. D. 656;] Berry *v.* P., 36 Ill. 423; [Plattsburg *v.* Trimble, 46 Mo. Ap. 459.]

[5] McRea *v.* Americus, 59 Ga. 168, [27 Am. R. 390;] Mayo *v.* James, 12 Grat. 17; S. *v.* Sly, 4 Oreg. 277; Lewis *v.* S., 21 Ark. 209; [*Ex parte* Taylor, 87 Cal. 91, 21 Pac. R. 258.]

[6] S. *v.* Thornton, 37 Mo. 360; Maher *v.* S., 53 Ga. 448, [21 Am. R. 269;] S. *v.* Cowan, 29 Mo. 330; [*Ex parte* Burgeois, 60 Miss. 663, 45 Am. R. 420.]

[7] Crim. Law, I, §§ 987–989.

[8] Levy *v.* S., 6 Ind. 281; Waldo *v.* Wallace, 12 Ind. 569, 584; Greenwood *v.* S., 6 Bax. 567, [32 Am. R. 539;] Hamilton *v.* S., 3 Tex. Ap. 643; S. *v.* Bergman, 6 Oreg. 341; S. *v.* Williams, 11 S. C. 288; [Desoto *v.* Brown, 44 Mo. Ap. 148; McInerney *v.* Denver, 17 Colo. 302, 29 Pac. R. 516.]

[9] Waldo *v.* Wallace, *supra*, p. 584. See also Gardner *v.* P., 20 Ill. 430; Robbins *v.* P., 95 Ill. 175.

§ 25. Interpretation of power to make by-laws.— The charter, or statutory power of enacting by-laws, is to be construed harmoniously with the unwritten rule. Thus,—

Reasonable — Penalty reasonable.— A statute authorized a city corporation "to license bakers, and regulate the weight and price of bread, and prohibit the baking for sale except by those licensed." And this was held to include the power to attach a penalty[1] to the by-law; but it must be reasonable. And when the penalty was that the offender pay a fine not exceeding $50, to be recovered before the mayor, the by-law was adjudged void.[2] So also, as under the unwritten law, it must in other respects be reasonable.[3] Again,—

Notice.— As, under the unwritten rule, one cannot lawfully be proceeded against without notice,[4] it is plain that a legislative power to impose forfeitures does not authorize a by-law providing for a forfeiture without notice to the party.[5]

§ 26. Holding by-law void.—Whenever a corporation undertakes to establish an unauthorized by-law the courts hold it to

[1] *Ante*, § 22.

[2] Mobile *v.* Yuille, 3 Ala. 137, [36 Am. D. 441.] Ormond, J., observed: "What would be a reasonable penalty cannot, from the nature of the thing, admit of a general rule applicable to all cases, but must in every case be determined by the nature of the offense intended to be prohibited. Some general rules, however, may be laid down as applicable to all cases. The penalty must be a sum certain, and cannot be left to the arbitrary assessment of the corporation court, to be determined according to the nature of the offense. It is also said, that, although the utmost limit of the penalty be fixed beyond which the fine cannot extend, it does not remove the objection. The reason assigned is, that it permits the corporation to be a judge in its own cause. Nor, it is said, can the penalty of a by-law extend to the forfeiture of goods, unless such power be expressly given by the charter." Again: "We also incline to doubt the propriety of that portion of the by-law which forfeits such bread as is not of the weight required by the ordinance; as also that portion which requires $20 to be paid by the baker as a license, unless the latter can be supported under the taxing power of the corporation. Though doubtless the corporation could require a fee for the issuance and registration of the license." p. 144. [Kiel *v.* Chicago, 176 Ill. 137.]

[3] S. *v.* Jersey City, 8 Vroom, 348; [Traction Co. *v.* Elizabeth, 58 N. J. L. 619; Lawes *v.* Chicago, 158 Ill. 653; P. *v.* Kipley, 171 Ill. 44, 49 N. E. R. 229.]

[4] *Post*, § 141; Bishop, First Book, § 24; S. *v.* Newark, 1 Dutcher, 399; Corliss *v.* Corliss, 8 Vt. 373, 389.

[5] Rosebaugh *v.* Saffin, 10 Ohio, 31. And see Columbus *v.* Arnold, 30 Ga. 517; Lesterjelle *v.* Columbus, 30 Ga. 936; S. *v.* Morristown, 5 Vroom, 445.

be void.[1] But a by-law may be good in part, and void as to the rest.[2] We have seen[3] that if a by-law is, for example, unreasonable, it is void; and the question whether it is reasonable or not is to be decided, not by the jury, but by the court.[4]

[1] Com. *v.* Robertson, 5 Cush. 438; Austin *v.* Murray, 16 Pick. 121, 127; [Baltimore *v.* Rodecke, 49 Md. 217; Carter *v.* Durango, 16 Colo. 534, 25 Am. St. R. 294, 27 Pac. R. 1057; City *v.* Gugenheim, 61 Ill. Ap. 374.]

[2] *Post*, § 34; Rogers *v.* Jones, 1 Wend. 237, 260, [19 Am. D. 493;] S. *v.* Lincoln, 7 Neb. 377; Keokuk *v.* Dressell, 47 Iowa, 597; Harbaugh *v.* Monmouth, 74 Ill. 367.

[3] *Ante*, § 22.

[4] Com. *v.* Worcester, 3 Pick. 462, 473; S. *v.* Jersey City, 3 Vroom, 348; [Burlington *v.* Unterkircher, 99 Iowa, 401; Mercer County *v.* Fleming, 111 Cal. 46; Willow Springs *v.* Withaupt, 61 Mo. Ap. 275; Lamar *v.* Weidman, 57 Mo. Ap. 507; Trust Co. *v.* Chicago, 162 Ill. 505. An ordinance authorized in express terms by the legislature will not be set aside as unreasonable. Humphreys *v.* Bayonne, 60 N. J. L. 406. And an ordinance may be adjudged reasonable when applied to one state of facts, and unreasonable when applied to a different state of facts. Ford *v.* Standard Oil Co., 32 Hun, 516.]

CHAPTER IV.

AT WHAT TIME STATUTES TAKE EFFECT.

§ 27. Doctrine defined.—In the absence of any express provision, a statute has effect through the entire country from the first moment of the day on which it is enacted, reckoning from twelve o'clock of the preceding night; except that, when a constitutional or other like right would thereby be impaired, the actual hour and minute of its receiving the executive approval may be inquired into, and it will date from the instant thus ascertained. To particularize and explain:—

§ 28. Ancient rule (changed in England).—Formerly, in England, the rolls of parliament were made up by the judges after its adjournment; no dates were given to the several acts, but all, says Dwarris, were "strung together" as one statute. The only date appearing in the rolls was that of the assembling of parliament;[1] therefore, the record being the sole guide to the courts, they held every statute to have gone into operation on that day.[2] Nor was it otherwise with an act which itself provided that it should take effect "from and after its passage."[3] Upon this, the statute of 33 Geo. 3, c. 13, provided that, after 1793, the parliamentary clerk should indorse on every act, immediately after its title, the day on which it received the royal assent; "and such indorsement shall be taken to be a part of such act, and to be the date of its commencement where no other commencement shall be therein provided." And, by construction, the act takes effect from the first moment of such day.[4]

With us.—In North Carolina the majority of the court followed the letter of the old English rule, and held that acts of assembly go into operation from the first day of the session.[5]

[1] Dwar. Stat. (2d ed.) 16, 31, 34, 36, 37, 460.

[2] The Ann, 1 Gallis. 62; Panter *v.* Attorney-General, 6 Bro. P. C. 553.

[3] Latless *v.* Holmes, 4 T. R. 660; Hamlet *v.* Taylor, 5 Jones (N. C.), 36. See P. *v.* Clark, 1 Cal. 406.

[4] Tomlinson *v.* Bullock, 4 Q. B. D. 230, 232.

[5] Smith *v.* Smith, Mart. (N. C.) 26; Hamlet *v.* Taylor, *supra*.

But generally in our states the day — not the hour — on which was taken the last step in the making of a statute appears in the record thereof; and the rule, subject to exceptions to be presently considered, is that no divisions of a day are allowable, and it goes into operation from the first moment of the day on which it receives the executive sanction.[1]

§ 29. Fractions of day.— Doubtless if the record showed the hour and minute at which a statute was enacted, the courts would give it effect only from such minute.[2] Still this conclusion would in some cases be open to question. The rule prevails widely, that the law does not regard fractions of a day.[3] And

[1] *In re* Welman, 20 Vt. 653; U. S. *v.* Williams, 1 Paine, 261; *In re* Howes, 6 Law Rep. 297; 1 Kent, Com. 454, 455; Matthews *v.* Zane, 7 Wheat. 164, 211; Heard *v.* Heard, 8 Ga. 380; S. *v.* Click, 2 Ala. 26; Smets *v.* Weathersbee, R. M. Charl. 537; Rathbone *v.* Bradford, 1 Ala. 312; Goodsell *v.* Boynton, 1 Scam. 555; Temple *v.* Hays, Morris, 9; Taylor *v.* S., 31 Ala. 383; S. *v.* Bank of South Carolina, 12 Rich. 609; Wood *v.* Fort, 42 Ala. 641; Lapeyre *v.* U. S., 17 Wall. 191, 198. See *In re* Richardson, 6 Law Rep. 392; 2 Story, 571. In Johnson *v.* Merchandise, 2 Paine, 601, it was said that a statute takes effect from its passage; a private executive instruction, from the time of being communicated to the person. In Tennessee, "it is," said Turley, J., "provided by the eighteenth section of the eleventh article of the constitution of the state of Tennessee, that 'no bill shall become a law until it shall be read and passed on three different days in each house, and be signed by the respective speakers.' But when this has been done, we think the law takes effect from the date of its passage by relation. The duties [duty] to be performed by the speakers in signing the statutes is not of a legislative, but ministerial character. And to cause the operation of a law to depend upon the period of time when this duty is performed would introduce too great uncertainty in the administration of justice, as there would be nothing but the memory of man to resort to for the purpose of ascertaining it,— the signature not being dated, and there being no record of the time kept." Consequently it was held that a repealing statute avoids an act done by authority of the repealed law, in the interval between its passage and the signatures. Dyer *v.* S., Meigs, 237, 255.

In process of enactment.— A statute has no greater effect on transactions executed during the process of its enactment, or while it was awaiting the executive sanction, than on things done before it was in agitation. Wartman *v.* Philadelphia, 33 Pa. St. 202; [*Re* Kenning's Estate, 56 Hun (N. Y.), 117; Biggs *v.* McBride, 17 Oreg. 640, 5 L. R. A. 115, 21 Pac. R. 878; Freeman *v.* Gaither, 76 Ga. 741.]

[2] See Westbrook Mfg. Co. *v.* Grant, 60 Me. 88, [11 Am. R. 181.]

[3] Bishop, Con., §§ 894, 1439; Portland Bank *v.* Maine Bank, 11 Mass. 204; Reg. *v.* Edwards, 9 Exch. 32, 23 Law J. (N. S.) Exch. 42; Edwards *v.* Reg., 9 Exch. 628; Reg. *v.* St. Mary, Warwick, 1 Ellis & B. 816; Commercial Steamship Co. *v.* Boulton, Law Rep. 10 Q. B. 346; Duffy *v.* Ogden, 64 Pa. St. 240; Lester *v.* Garland, 15 Ves. 248.

a day begins at midnight.[1] But this rule is not unyielding; it bends, permitting the real fact to be shown and prevail, where justice requires.[2] Thus, when a deed was delivered at a certain hour to the register, who immediately commenced the registration of it, but without indorsing on it the time of its delivery, and two hours later an execution was levied on the property it conveyed, the court permitted the hour of delivery for registration to be proved by parol, to give it precedence over the levy.[3] And, in general, the priority of acts may be shown when material.[4] Now,—

Ex post facto.— Plainly, in reason, if a man does a thing at five o'clock in the morning, and it is then lawful, he cannot be punished for it under a statute passed at five o'clock in the evening of the same day, without violating the constitutional inhibition of *ex post facto* laws.[5] If the act were performed at five o'clock in the evening, and the statute passed at the same hour the next morning, all would admit that it could not be applied to the transaction; while still it is not easy to see how the one case could differ in principle from the other. Hence,—

Time of day provable, and when.— In these cases, and in cases less strong, including civil ones where justice imperatively demands, the doctrine, at least the better doctrine, of the present day permits proof, even by parol, of the exact hour when a statute became a law, giving effect to it only from such hour.[6] Accordingly, when a petition in bankruptcy was filed in court about noon, and late in the evening of the same day a bill passed congress and was approved by the president repealing the bankrupt act, but saving cases "commenced before the passage of this act," Story, J., held that the proceeding could go on to its conclusion.[7] In a general way it has been adjudged that the time when an act is passed and signed can appear only in itself or by the record;[8] but, in reason, a rule of this sort,

[1] Bishop, Con., §§ 894, 1439; [S. *v.* Michel, 52 La. An. 986, 27 S. R. 565.]

[2] Chick *v.* Smith, 8 Dowl. P. C. 337; Campbell *v.* Strangeways, 3 C. P. D. 105; Lockett *v.* Hill, 1 Woods, 552; Combe *v.* Pitt, 3 Bur. 1423, 1434; Johnson *v.* Pennington, 3 Green (N. J.), 188.

[3] Metts *v.* Bright, 4 Dev. & Bat. 173.

[4] Lang *v.* Phillips, 27 Ala. 311; Cincinnati Bank *v.* Burkhardt, 100 U. S. 686.

[5] Crim. Law, I, § 279 *et seq.*

[6] Salmon *v.* Burgess, 1 Hughes, 356; *In re* Wynne, Chase Dec. 227, 251.

[7] *In re* Richardson, 2 Story, 571. And see, to the like effect, 3 Opin. Atty. Gen. 82.

[8] *In re* Welman, 20 Vt. 653; Latless *v.* Holmes, 4 T. R. 660. And see U. S.

while convenient in practice, cannot overturn a principle of natural justice, much less control a provision in the constitution. In accordance with this view, it has been held that a court is not forbidden to inform itself of the real date of the president's approval of an act. Therefore, where the date on its face was simply "December 4," it was adjudged competent, in order to ascertain the year, to resort to the records in the secretary of state's office, and to the journals of congress.[1] Again,—

Precedence.— When the order in which were passed two or more statutes bearing the same date becomes important, the

v. Williams, 1 Paine, 261. In P. *v.* Clark, 1 Cal. 406, the majority of the court held the day to be divisible, as respects the time when a statute goes into operation, being the moment of its passage. See also U. S. *v.* Arnold, 1 Gallis. 348; Lang *v.* Phillips, 27 Ala. 311; Kimm *v.* Osgood, 19 Mo. 60.

[1] Gardner *v.* The Collector, 6 Wall. 499. And see Kennedy *v.* Palmer, 6 Gray, 316; Turley *v.* Logan, 17 Ill. 151; Prescott *v.* Illinois and Michigan Canal, 19 Ill. 324; McCulloch *v.* S., 11 Ind. 424; Southwark Bank *v.* Com., 26 Pa. St. 446; *post*, § 37. The above case of Gardner *v.* The Collector, and the reasoning of Miller, J., in the opinion, seem in effect to sustain the following just proposition; namely, 1. It being the duty of the judges to take judicial notice of the contents of public statutes, which need not be proved before them as facts, they must also determine the dates of their enactment. 2. In ascertaining these, they should look at whatever is adapted to inform their minds. The date attached to the president's signature, if full, will ordinarily suffice. If not full, resort may be had to the journals, the time of the publication of the statute, and other sources, to supply the deficiency. If the ends of justice require the precise moment to be ascertained, this may be done in any way satisfactory to the minds of the judges. It may even be shown that the date which the president attached to his signature is an error. The learned judge condensed the doctrine thus: "We are of opinion, on principle as well as authority, that, whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges, who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." p. 511. Consult, as perhaps *contra*, S. *v.* Young, 3 Vroom, 29.

President's proclamation.— The president's proclamation of June 13, 1865, annulling restrictions upon internal trade in the late insurgent states, was held to take effect on the beginning of the day. U. S. *v.* Norton, 97 U. S. 164, decided on U. S. *v.* Lapeyre, 17 Wall. 191. And, it is believed, any executive act carrying clemency to the subject, and not impairing the rights of other subjects, would be so construed.

chapter numbers may be looked into,[1] as doubtless anything else calculated to inform the judicial mind.

§ 30. Knowledge of statute impossible.— The rule, where a knowledge of the statute could not have reached the person charged with violating it, is considered in another connection.[2]

§ 31. Modifications of foregoing rules.— To avoid practical hardships from the foregoing rules, there are in some of the states special provisions of law postponing the taking effect of statutes until a specified time after their enactment,[3] or until they are published.[4] Or the statute itself may, and it often does, fix a time different from the general one, when no constitutional inhibition prevents. But to work this result, its words must be direct and unequivocal.[5] No legislative act can bind future legislation;[6] therefore, if, while there is a general statutory provision postponing the taking effect of statutes until a specified number of days after their publication or enactment, a statute is passed on its face to go into operation immediately, or at a different time from the general one, it does so; this later expression of the legislative will prevailing over the earlier.[7]

Effect of postponing statute.— A statute which is to become law at a future day is a nullity in the meantime. It does not even operate as notice to persons to be affected by it,[8] nor does a repealing clause in it put an end to the law to be re-

[1] Metropolitan Board of Health *v.* Schmades, 3 Daly, 282, 10 Abb. Pr. (N. S.) 205. And see St. Martin *v.* New Orleans, 14 La. An. 113.

[2] Crim. Law, I, § 296.

[3] Cooper *v.* Curtis, 30 Me. 488; Chapman *v.* S., 2 Head, 36; West Feliciana R. R. Co. *v.* Johnson, 5 How. (Miss.) 273; Files *v.* Robinson, 30 Ark. 487; S. *v.* Little Rock, etc. Ry. Co., 31 Ark. 701; Whitehead *v.* Wells, 29 Ark. 99; Johnson *v.* S., 3 Lea, 469, [31 Am. R. 648;] Barry *v.* Viall, 12 R. I. 18.

[4] Tredway *v.* Gapin, 1 Blackf. 299; S. *v.* Donehey, 8 Iowa, 396; Calkin *v.* S., 1 Greene (Iowa), 68; S. *v.* Stevenson, 2 Pike, 260; S. *v.* Superior District Court, 29 La. An. 223; Stine *v.* Bennett, 13 Minn. 153; Smith *v.* Hoyt, 14 Wis. 252. See Parkinson *v.* S., 14 Md. 184, [74 Am. D. 522;] S. *v.* Barrow, 30 La. An. 657; Thomas *v.* Scott, 23 La. An. 689; Scott *v.* Clark, 1 Iowa, 70; Pilkey *v.* Gleason, 1 Iowa, 522.

[5] Wheeler *v.* Chubbuck, 16 Ill. 361; [S. *v.* Mounts, 36 W. Va. 179, 15 L. R. A. 243, 14 S. E. R. 407. Different provisions of an act may take effect at different times, at the will of the legislature. Plummer *v.* Jones, 84 Me. 58, 24 Atl. R. 585; Wheeler *v.* Stuht, 52 Neb. 209, 71 N. W. R. 94. But see Finnegan *v.* Sale, 54 Kan. 420, 38 Pac. R. 477.]

[6] S. *v.* Oskins, 28 Ind. 364.

[7] Hunt *v.* Murray, 17 Iowa, 313; Orleans *v.* Holmes, 13 La. An. 502.

[8] Price *v.* Hopkin, 13 Mich. 318.

pealed.[1] One cannot be punished under it for what he does before the day of its taking effect.[2]

§ 31a. **"From and after."**— If a statute is to take effect "from and after" a day named, there is believed to be no certain rule either that it shall be on such day or on the next following one, but the entire provision and the special nature of the case will determine.[3] Where the words were "from and after the passage of this act," the day of its enactment was held to be included; Story, J., observing that, by the general rule, "where the computation is to be made from an act done, the day on which the act is done is to be included."[4] But, where the words were, "from and after" a specified future date, the enactment was held not to go into operation until the day next succeeding such date.[5] And probably many courts will hold to the distinction indicated by these two cases.[6]

§ 32. **Treaties.**— In international law, and as a contract between nations, a treaty takes effect from the time it is signed; its subsequent ratification relating back to such time. And this is held of our treaties with other nations. They are not, in this respect, affected by the special terms of our constitu-

See Graves *v.* S., 6 Tex. Ap. 228; Paddon *v.* Bartlett, 3 A. & E. 884, 896; Wood *v.* Riley, Law R. 3 C. P. 26.

[1] McArthur *v.* Franklin, 16 Ohio St. 193; Spaulding *v.* Alford, 1 Pick. 33.

[2] S. *v.* Bond, 4 Jones (N. C.) 9. [Statutes operate prospectively only, unless a contrary intention is manifest on their face beyond a reasonable question. Shreveport *v.* Cole, 129 U. S. 36, 9 Sup. Ct. R. 210; Stewart *v.* Vandervort, 34 W. Va. 524, 12 L. R. A. 50, 12 S. E. R. 736.]

[3] Bishop, Con., § 1340; Lester *v.* Garland, 15 Ves. 248; Pugh *v.* Leeds, Cowp. 714; Wilkinson *v.* Gaston, 9 Q. B. 137; Isaacs *v.* Royal Ins. Co., Law Rep. 5 Ex. 296; Wilcox *v.* Wood, 9 Wend. 346; Deyo *v.* Bleakley, 24 Barb. 9; Sheets *v.* Selden, 2 Wall. 177; Peables *v.* Hannaford, 18 Me. 106. "Where time is computed from an act done, the general rule is to include the day. Where it is computed from the day of the act done, the day is excluded. . . . It has been adopted by this court, and must be regarded as settled in this commonwealth." Chapman, J., in Atkins *v.* Sleeper, 7 Allen, 487, 488. *Contra*, Bemis *v.* Leonard, 118 Mass. 502, 508, [19 Am. R. 470.]

[4] Arnold *v.* U. S., 9 Cranch, 104; s. p., U. S. *v.* Williams, 1 Paine, 261; P. *v.* Clark, 1 Cal. 406. And see Hamlet *v.* Taylor, 5 Jones (N. C.), 36; *In re* Welman, 20 Vt. 653. *Contra*, Rex *v.* Moore, Jefferson, 9.

[5] Koltenbrock *v.* Cracraft, 36 Ohio St. 584. See S. *v.* Perrysburg, 14 Ohio St. 472; [Parkinson *v.* Brandenburg, 35 Minn. 294. Under an act requiring that a bill be returned within five days or it shall become a law without the governor's signature, an intervening Sunday must not be included. S. *v.* Michel, 52 La. An. 936, 27 S. R. 565.]

[6] See the first note to this section; Watson *v.* Pears, 2 Camp. 294.

tion.[1] In a general way, the same rule governs a treaty ceding territory to us. "It is true," said Wayne, J., "that . . . its national character continues for all commercial purposes; but full sovereignty, for the exercise of it, does not pass to the nation to which it is transferred until actual delivery. But it is also true that the exercise of sovereignty by the ceding country ceases, except for strictly municipal purposes, especially for granting lands. And for the same reason in both cases; because, after the treaty is made, there is not in either the union of possession and the right to the territory which must concur to give *plenum dominium et utile*."[2] Yet, as a "law" under our constitution,[3] and affecting private rights, it, like a statute which is fully enacted only on receiving the executive sanction, dates simply from the ratification.[4]

[1] Haver *v.* Yaker, 9 Wall. 32; Hylton *v.* Brown, 1 Wash. C. C. 343, and cases in the next note. See Succession of Schaffer, 13 La. An. 113.

[2] Davis *v.* Concordia, 9 How. (U. S.) 280, 289; U. S. *v.* Reynes, 9 How. (U. S.) 127, 148. And see Montault *v.* U. S., 12 How. (U. S.) 47; U. S. *v.* Pillerin, 13 How. (U. S.) 9; U. S. *v.* Rillieux, 14 How. (U. S.) 189; U. S. *v.* Ducros, 15 How. (U. S.) 38; Innerarity *v.* Mims, 1 Ala. 660; Mims *v.* Huggins, 1 Ala. 676.

[3] *Ante*, §§ 11, 13, 14.

[4] Haver *v.* Yaker, *supra;* U. S. *v.* Arredondo, 6 Pet. 691. And see U. S. *v.* Percheman, 7 Pet. 51; Yeaker *v.* Yeaker, 4 Met. (Ky.) 33, [81 Am. D. 530.]

CHAPTER V.

THE ENACTMENT AND VALIDITY OF STATUTES.

§ 32*a*. Introduction.
33, 34. Constitutional validity.
35–35*b*. Interpreters of constitution.
36–37*a*. Constitutional formalities at enactment.
38–41. Defects other than constitutional.

§ 32a. How chapter divided.— We shall consider: I. The constitutional validity of statutes enacted in due form; II. The interpreters of the constitution; III. Constitutional formalities at the enactment; IV. Defects other than constitutional.

I. The Constitutional Validity of Statutes Enacted in Due Form.

§ 33. People sovereign — Legislative bodies.— It is the theory of our state and national governments that sovereignty dwells primarily with the people. For the orderly exercise of it, they have delegated so much as they chose, and no more, to the various official bodies and persons. Legislative powers have thus been conferred on our state legislatures and on congress, the limits whereof, beyond which all attempted acts are nullities, are defined in the constitutions of the several states and the United States.[1] Hence,—

Unconstitutional statutes.— A statute, state or national, thus in excess of constitutional power, is deemed simply void, having no effect, direct or collateral, for any purpose whatever.[2] Not

[1] And see Tennessee *v.* Davis, 100 U. S. 257, 275.

[2] 1 Kent, Com. 448–455; Marbury *v.* Madison, 1 Cranch, 137; S. *v.* Fleming, 7 Humph. 152, [46 Am. D. 73]; Bliss *v.* Com., 2 Litt. 90, [13 Am. D. 251]; Bank of St. Mary's *v.* S., 12 Ga. 475; Haley *v.* Clark, 26 Ala. 439; Strong *v.* Daniel, 5 Ind. 348; Cincinnati, etc. R. R. Co. *v.* Clinton, 1 Ohio St. 77; Frye *v.* Partridge, 82 Ill. 267; National Bank *v.* Southern Porcelain Mfg. Co., 55 Ga. 36; S. *v.* Osawkee, 14 Kan. 418, [19 Am. R. 99; *Re* Plurality Elections, 15 R. I. 617, 8 Atl. R. 881. An unconstitutional act cannot be validated by the legislature. S. *v.* Whitesides, 8 L. R. A. 777, 9 S. E. R. 661.]

even, like an erroneous judgment rendered by a competent tribunal on a valid law,[1] will it protect an officer in performing any of its requirements, or obeying process founded upon it.[2] In England, no superior law of the realm exists to override an act of parliament.[3] What is called constitutional law there is declared by the parliament itself. Still,—

§ 34. Unconstitutional in part.— A statute may be in conflict with the constitution in part, and the rest of it be free from objection. In which case, if the parts are properly separable, the courts will sustain what is sound, and reject the unsound. This may be so even where the sound and the unsound are in one section together.[4] But if the unconstitutional parts are essential to the constitutional, all must fail.[5] And, beyond what thus comes from necessity, the doctrine has been laid down, and it seems to be just, that, if the parts are so mutually related as to make it evident the legislature intended them to constitute one whole, so that if all could not be carried into effect none would have received the legislative sanction, the case is within the same rule.[6] On the other hand, absolute in-

[1] S. *v.* Weed, 1 Fost. (N. H.) 262, [53 Am. D. 188;] Rex *v.* Dyer, 6 Mod. 41.

[2] Astrom *v.* Hammond, 3 McLean, 107; Fisher *v.* McGirr, 1 Gray, 1, [61 Am. D. 381.]

[3] Dwar. Stat. (2d ed.) 523.

[4] Bank of Hamilton *v.* Dudley, 2 Pet. 492, 526; Clark *v.* Ellis, 2 Blackf. 8; Fisher *v.* McGirr, 1 Gray, 1, [61 Am. D. 381;] Steele *v.* S., 5 Blackf. 110; McCulloch *v.* S., 11 Ind. 424; S. *v.* Allen, 2 McCord, 55; Yarmouth *v.* North Yarmouth, 34 Me. 411, [56 Am. D. 666;] Myers *v.* P., 67 Ill. 503; Hagerstown *v.* Dechert, 32 Md. 369; McCready *v.* Sexton, 29 Iowa, 356, [4 Am. R. 214;] Christy *v.* Sacramento, 39 Cal. 3; S. *v.* Clarke, 54 Mo. 17, [14 Am. R. 471;] Rood *v.* McCargar, 49 Cal. 117; Bucky *v.* Willard, 16 Fla. 330; S. *v.* Newton, 59 Ind. 173; *In re* Jilz, 3 Mo. Ap. 243; S. *v.* Clinton, 28 La. An. 201; Berlin *v.* New Britain, 9 Conn. 175; Robinson *v.* Bidwell, 22 Cal. 379; S. *v.* Swift, 11 Nev. 128; Gamble *v.* McCrady, 75 N. C. 509; Darby *v.* Wilmington, 76 N. C. 133; Lea *v.* Bumm, 83 Pa. St. 237; S. *v.* Amery, 12 R. I. 64; Lathrop *v.* Mills, 19 Cal. 513; Maize *v.* S., 4 Ind. 342; Santo *v.* S., 2 Iowa, 165, [63 Am. D. 487;] Mobile & Ohio R. R. *v.* S., 29 Ala. 573; [Eureka *v.* Wilson, 15 Utah, 67, 48 Pac. R. 150; S. *v.* F. I. Co., 152 Mo. 1, 45 L. R. A. 363, 52 S. W. R. 395. Every presumption must be taken in favor of the validity of a statute. Columbia R. R. Co. *v.* Gibbes, 24 S. C. 60; Phœnix Ins. Co. *v.* Burdette, 112 Ind. 204, 13 N. E. R. 705.]

[5] Exchange Bank *v.* Hines, 3 Ohio St. 1, 34; Hinze *v.* P., 92 Ill. 406; P. *v.* Cooper, 83 Ill. 585; *Ex parte* Towles, 48 Tex. 413; P. *v.* Mahaney, 13 Mich. 481; Campau *v.* Detroit, 14 Mich. 276; Reed *v.* Omnibus R. R., 33 Cal. 212; S. *v.* Perry, 5 Ohio St. 497, 506; [O'Brien *v.* Krenz, 36 Minn. 136, 30 N. W. R. 458; S., Maggard *v.* Pond, 93 Mo. 606, 6 S. W. R. 469; Crowley *v.* S., 11 Oreg. 512; Alexander *v.* P., 7 Colo. 155.]

[6] Neely *v.* S., 4 Bax. 174; S. *v.* Dous-

dependence of the provisions is not a prerequisite to letting a part stand while the rest fall.[1]

In by-laws.— As already seen,[2] the like doctrine applies to municipal by-laws. "A by-law," said Lord Kenyon, C. J., "may be good in part and bad in part, yet it can be so only where the two parts are entire and distinct from each other."[3]

Repeals in statutes.— An act consisting of affirmative provisions and a repealing clause may be void as to the former and good as to the latter.[4] Yet practically this would not be so commonly; because, in most instances, the new provision is the motive for repealing the old, so that where the new cannot stand the repeal should not. It was in one case even held that the clause, "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed," was effectual, though the rest of the statute was unconstitutional.[5] But not only the reason just suggested shows that this doctrine cannot be sound in principle; it is also unsound, and it has been so adjudged, because, as observed in the Alabama court, "if the new law is void, the provisions of the former law cannot with propriety be said to be in conflict or contravention of it."[6]

II. The Interpreters of the Constitution.

§ 35. The courts.— It is a popular idea, not altogether absent from judicial opinions, that the courts are both specially and exclusively the interpreters of our constitutions. But noth-

man, 28 Wis. 541; Eckhart *v.* S., 5 W. Va. 515; Warren *v.* Charlestown, 2 Gray, 84; Com. *v.* Clapp, 5 Gray, 97; Com. *v.* Hitchings, 5 Gray, 482; Com. *v.* Pomeroy, 5 Gray, 486, note; [Cherokee Com'rs *v.* S., 36 Kan. 337; S. *v.* Pugh, 43 Ohio St. 98.]

[1] And see P. *v.* Hill, 7 Cal. 97; [*Re* Liquors of McSoby, 15 R. I. 608, 10 Atl. R. 659. Where the language of a statute is capable of two constructions, equally obvious, that will be preferred which makes it constitutional. Supervisors *v.* Brogden, 112 U. S. 261; McGwigan *v.* Ry. Co., 95 N. C. 428; Quarttebaum *v.* S., 79 Ala. 1.]

[2] *Ante*, § 26.

[3] Rex *v.* Faversham, 8 T. R. 352, 356. See also Com. *v.* Dow, 10 Met. 382; Austin *v.* Murray, 16 Pick. 121, 126; Fitzacherly *v.* Wiltshire, 11 Mod. 352, 354; s. c. *nom.* Fazakerly *v.* Wiltshire, 1 Stra. 462, 469; Lee *v.* Wallis, 1 Keny. 292, 295; Cincinnati *v.* Rice, 15 Ohio, 225; S. *v.* Snow, 3 R. I. 64; S. *v.* Copeland, 3 R. I. 33.

[4] Ely *v.* Thompson, 3 A. K. Mar. 70.

[5] Meshmeier *v.* S., 11 Ind. 482.

[6] Tims *v.* S., 26 Ala. 165, 170; P. *v.* Tiphaine, 3 Par. Cr. 241; S. *v.* La Crosse, 11 Wis. 50; Shepardson *v.* Milwaukee, etc. R. R. Co., 6 Wis. 605. And see S. *v.* Hallock, 14 Nev. 202, [33 Am. R. 559;] Childs *v.* Shower, 18 Iowa, 261.

ing of this sort appears in the instruments themselves. The judges are indeed sworn to observe them; so equally are all the other officers of the government. Their function is to decide judicial causes; and, when a cause is presented to them involving a constitutional question, they must interpret the constitution as to it, and no appeal lies to any other department of the government. Thus far, therefore, the courts are the interpreters; nor can the legislature, for example, interfere in any way with this function.[1] But —

Other governmental departments.— The other departments of the government, being bound equally with the judicial to obey the constitution, are under equal obligations to interpret it for themselves.[2] Indeed there are doubtless circumstances in which the courts would feel obliged to place reliance upon, and give effect to, the interpretation made by another branch of the government.[3] There are, moreover, many constitutional questions arising only in such forms that they can never be taken before the courts; so that, if the other departments before which they present themselves could not interpret the constitution to decide them, this "supreme law" would be as to them of no practical effect.

§ 35a. Further of courts interpreting.— Except in the one instance about to be mentioned, courts will not take jurisdiction of a cause simply on the ground that it involves an interpretation of the constitution.[4] Some, on the other hand, and perhaps in a degree all, avoid the consideration of constitu-

[1] And see *Ex parte* Blanchard, 9 Nev. 101; Barnett *v.* Woods, 5 Jones, Eq. 428, 434.

[2] See this topic discussed, Bishop, First Book, §§ 114–123.

[3] We are perhaps wanting in authority on this precise point; but in U. S. *v.* Lytle, 5 McLean, 9, 17, 18, the court refused to interfere with the interpretation of a statute by the executive department; observing, that the executive is bound to give effect to laws regulating its duties, in doing which it must necessarily interpret them. "And, where such construction has been acted on for a great number of years, under the sanctions of the lawmaking power, it becomes a serious question how far the judicial power can or should interfere. . . . Where, under an executive construction of the law, a wrong is done to an individual, the courts will give him redress. But where no such wrong is done, it is supposed that acts of the executive within the general scope of its powers, and by virtue of law, cannot be reviewed; though, to some extent, the letter of the law may not have been followed." McLean, J. Of a like sort is Mathews *v.* Shores, 24 Ill. 27. And see *post*, § 104.

[4] Jones *v.* Black, 48 Ala. 540; Hoover

tional questions except when forced on them in forms of procedure permitting of due argument and deliberation.[1] The interpretation of the highest tribunal is binding on the inferior ones, the same as are its decisions on other questions of law.[2]

§ 35b. As between states and United States.— The courts of a state are the highest judicial interpreters of its constitution. And when a question of the meaning of a state constitution comes before the supreme court of the United States, it is bound by such state interpretation.[3] In like manner, the interpretations of the courts of the United States are controlling over the state tribunals as to the constitution of the United States.[4] And an appeal, by writ of error, lies from a final judgment of a state court to the supreme court of the United States, in certain cases involving the construction of the national constitution.[5] The state courts are bound by the constitution of the United States to the extent of permitting those of one state to pass upon the validity, under it, of the legislation of another state.[6]

III. Constitutional Formalities at Enactment.

§ 36. In general.— A statute, to be valid, must be enacted by the body and in the manner prescribed by the constitution. Thus,—

Legislative body — People.— The people,[7] having by the constitution transferred their law-making power to a legislative body, can no longer, without a recall of some portion of the power thus granted, exercise it directly. This proposition is universally conceded. But there are differences as to some of its applications. To explain,—

v. Wood, 9 Ind. 286; Lopez *v.* S., 42 Tex. 298; Padelford *v.* Savannah, 14 Ga. 438.

[1] Parker *v.* S., 5 Tex. Ap. 579; Taylor *v.* Flint, 35 Ga. 124; Hoover *v.* Wood, *supra;* P. *v.* Mahaney, 13 Mich. 481; Shelden *v.* Miller, 9 La. An. 187.

[2] Wheeler *v.* Rice, 4 Brews. 139; Pierce *v.* Pierce, 46 Ind. 86.

[3] Aicardi *v.* S., 19 Wall. 635; Cass *v.* Johnston, 95 U. S. 360; Bank of North Bennington *v.* Bennington, 16 Blatch. 53.

[4] Bank of U. S. *v.* Norton, 3 A. K. Mar. 423; *Ex parte* Bushnell, 9 Ohio St. 77.

[5] R. S. of U. S., § 709; Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116; The Binghamton Bridge, 3 Wall. 51; Winn *v.* Jackson, 12 Wheat. 135.

[6] Stoddart *v.* Smith, 5 Binn. 355; Braynard *v.* Marshall, 8 Pick. 194. See Kean *v.* Rice, 12 S. & R. 203.

[7] *Ante*, § 33.

Statute to take effect on popular approval — Municipal corporation.—Whether an individual intrusted with an authority can delegate it to another depends on its nature. An agency with a discretion cannot be delegated, but a mere ministerial one may.[1] Therefore, quite conclusively, a body of official persons, endowed with the discretionary power of making laws, cannot transfer it to other hands. But it is consistent with the nature of a law that it authorize associations of men to govern themselves in their own affairs; therefore, as already seen,[2] a statute may establish a municipal corporation, with power to enact reasonable by-laws.[3] And it was never doubted that such a statute may be submitted, for acceptance or rejection, to the people dwelling in the locality to be affected thereby. Yet considerable numbers of courts have held that an ordinary act of legislation is void, if, by its terms, its going into effect depends on a popular vote.[4] Indeed, a count would probably show a greater number of cases in favor of this doctrine than against it. We may doubt whether these cases have proceeded on a right view of the question. It is beyond dispute, in general, that the going into effect of a legislative act may be made to depend on the happening of a future event,[5] or a

[1] Bishop, Con., § 1067. As to powers more analogous to the law-making, see S. *v.* Bell, 34 Ohio S. 194; Matthews *v.* Alexandria, 68 Mo. 115, [30 Am. R. 776;] S. *v.* Fiske, 9 R. I. 94; Springer *v.* McSpadden, 49 Mo. 299.

[2] *Ante*, § 18; Covington *v.* East St. Louis, 78 Ill. 548; Lothrop *v.* Stedman, 42 Conn. 583. And see P. *v.* Nally, 49 Cal. 478; [Port Mining Co. *v.* Hagood (S. C.), 3 L. R. A. 841, 9 S. E. R. 686.

[3] **Taxes, etc.**— And to levy taxes, and the like. U. S. *v.* New Orleans, 98 U. S. 381.

[4] Barto *v.* Himrod, 4 Seld. 483, [59 Am. D. 506;] Thorne *v.* Cramer, 15 Barb. 112; S. *v.* Parker, 26 Vt. 357; P. *v.* Collins, 8 Mich. 343; S. *v.* Copeland, 3 R. I. 33; Parker *v.* Com., 6 Pa. St. 507, [47 Am. D. 480;] S. *v.* Scott, 17 Mo. 521; S. *v.* Field, 17 Mo. 529, [59 Am. D. 275;] Louisville *v.* Baird, 15 B. Monr. 246; Paterson *v.* Society, 4 Zab. 385; Maize *v.* S., 4 Ind. 342; Meshmeier *v.* S., 11 Ind. 482; Santo *v.* S., 2 Iowa, 165, [63 Am. D. 487;] S. *v.* Swisher, 17 Tex. 441; Grant *v.* Courter, 24 Barb. 232; Clarke *v.* Rochester, 24 Barb. 446; P. *v.* Stout, 23 Barb. 349; Louisville & Nashville R. R. Co. *v.* Davidson, 1 Sneed, 637; Morford *v.* Unger, 8 Iowa, 82; Geebrick *v.* S., 5 Iowa, 491; Bank of Rome *v.* Rome, 18 N. Y. 38; Peck *v.* Weddell, 17 Ohio St. 271; Rice *v.* Foster, 4 Harring. (Del.) 479; Corning *v.* Greene, 23 Barb. 33; Johnson *v.* Rich, 9 Barb. 680; Morgan *v.* Monmouth Plank Road, 2 Dutcher, 99; P. *v.* Salomon, 46 Ill. 415; S. *v.* Weir, 33 Iowa, 134; *Ex parte* Wall, 48 Cal. 279, 313, [17 Am. R. 425;] Brown *v.* Fleischner, 4 Oreg. 132.

[5] Lothrop *v.* Stedman, 42 Conn. 583;

contingency; and that, for example, one expired may be revived on the transpiring of a fact to be established by proclamation.[1] The legislature, in exercising its judgment on the advisability of a measure, may well be governed by the yet unascertained fact of the popular approval or disapproval of it; because, as is well known, laws which do violence to public opinion are not enforced, and often tend to evil, while, if such opinion favored them, their results might be good. Therefore to provide for ascertaining the popular opinion by a vote of the people, and to make the going into effect of a statute dependent on the fact thus arrived at, would seem but a legitimate form of contingent legislation, in the highest degree just in all cases where the legislative body doubts concerning such fact and deems it essential. This is not a transferring, by this body, of any part of the legislative power to the people, but intelligently exercising its own.[2] How generally the full doctrine thus stated is, in recent times, held by the courts it would be difficult to ascertain; but, where the submission is of a local statute to the people of the locality, or of a general one to be accepted or rejected in particular places where the vote is taken, popularly termed in some of its forms a local-option law, the constitutional validity of the proceeding is almost universally conceded.[3]

Smith *v.* Janesville, 26 Wis. 291; S. *v.* New Haven, etc. Co., 43 Conn. 351; Fredericton *v.* Reg., 3 Canada S. C. 505.

[1] The Aurora, 7 Cranch, 382. In a Texas case, Lipscomb, J., said: "There is no analogy between the act of our legislature, and the various acts of congress depending upon a future contingency of a rebellion, insurrection, foreign war, a treaty, or the acts of a foreign power. These do not depend upon the vote of the constituency of congress, but on a contingency over which they have no control." S. *v.* Swisher, 17 Tex. 441, 448. On the other hand, in Virginia, where the validity of statutes depending on a vote of the people was sustained, Lee, J., delivering the opinion of the court, said: "Now, if the legislature may make the operation of its act depend on some contingency thereafter to happen, or may prescribe conditions, it must be for them to judge in what contingency, or upon what condition, the act shall take effect. They must have the power to prescribe any they may think proper." Bull *v.* Read, 13 Grat. 78, 90, 91.

[2] Consult, for the affirmative side of this proposition, Locke's Appeal, 72 Pa. St. 491, [13 Am. R. 716;] for the negative, *Ex parte* Wall, 48 Cal. 279, 313.

[3] Locke's Appeal, *supra;* Smith *v.* McCarthy, 56 Pa. St. 359; S. *v.* O'Neill, 24 Wis. 149; Monroe *v.* S., 8 Tex. Ap. 343; Anderson *v.* Com., 13 Bush, 485; S. *v.* Morris Common Pleas, 7 Vroom, 72; P. *v.* Reynolds, 5 Gilman, 1; P. *v.* Salomon, 51 Ill. 37; Erlinger *v.* Boneau, 51 Ill. 94; Com. *v.* Dean, 110

By some opinions, at least, it makes no difference that the law affects equally the entire people of the state.[1] In Rhode Island, where this sort of general legislation has been deemed unconstitutional, the courts sustained an act which provided for a popular vote on the question of its repeal, and, if a majority decide for repeal, it shall have no effect after the tenth day from and after the rising of the session of the general assembly at which the votes are to be counted.[2]

§ 36a. One subject, expressed in title.—The constitutions of some of the states provide that no statute shall embrace more than one subject, and it shall be expressed in the title.[3] There are states wherein this provision is deemed directory only, so that a statute enacted in violation of it is good.[4] But generally it is regarded as mandatory, rendering the contravening enactment void.[5] Still, by the common doctrine, as a statute may be good in part and ill for the residue,[6] if the title specifies one subject and no more, and the parts relating to it are separable from the rest, they will be held valid while the residue is adjudged void.[7] The title need indicate the subject only in

Mass. 357; Guild *v.* Chicago, 82 Ill. 472; S. *v.* Wilcox, 42 Conn. 364; S. *v.* Cooke, 24 Minn. 247, [31 Am. R. 344;] Com. *v.* Weller, 14 Bush, 218; Com. *v.* Hoke, 14 Bush, 668; Fredericton *v.* Reg., 3 Canada S. C. 505. See English *v.* S., 7 Tex. Ap. 171; S. *v.* St. Joseph, 37 Mo. 270; Holcomb *v.* Davis, 56 Ill. 413. *Contra*, *Ex parte* Wall, 48 Cal. 279, 313 (compare with Robinson *v.* Bidwell, 22 Cal. 379); Parker *v.* Com., 4 Pa. Law Journ. Rep. 163; Lammert *v.* Lidwell, 62 Mo. 188, [21 Am. R. 411.]

[1] Smith *v.* Janesville, 26 Wis. 291. And see P. *v.* Collins, 3 Mich. 343; Blanding *v.* Burr, 13 Cal. 343.

[2] S. *v.* Copeland, 3 R. I. 33. And see Williams *v.* Cammack, 27 Miss. 209, [61 Am. D. 508.]

[3] Parkinson *v.* S., 14 Md. 184, [74 Am. D. 522.]

[4] *In re* Boston Mining, etc. Co., 51 Cal. 624; S. *v.* Covington, 29 Ohio St. 102; Pim *v.* Nicholson, 6 Ohio St. 176, 180: Washington *v.* Page, 4 Cal. 388; Cooley, Const. Lim. 81, 82, 150.

[5] Cannon *v.* Hemphill, 7 Tex. 184; Weaver *v.* Lapsley, 43 Ala. 224; S. *v.* Miller, 45 Mo. 495; Cannon *v.* Mathes, 8 Heisk. 504; San Antonio *v.* Gould, 34 Tex. 49; Gifford *v.* New Jersey R. R. Co., 2 Stockton, 171; Parkinson *v.* S., *supra;* Hill *v.* Decatur, 22 Ga. 203; Phillips *v.* New York, 1 Hilton, 488; Madison, etc. R. R. Co. *v.* Whiteneck, 8 Ind. 217; Bright *v.* McCullough, 27 Ind. 223; Keller *v.* S., 11 Md. 525, [69 Am. D. 226;] Cooley, Const. Lim. 141 *et seq.*

[6] *Ante*, § 34; [E. P. Moore, 62 Ala. 471; P. *v.* Hall, 8 Colo. 485.]

[7] Jones *v.* Thompson, 12 Bush, 394; Allegheny County Home's Case, 77 Pa. St. 77; Walker *v.* S., 49 Ala. 329; P. *v.* Briggs, 50 N. Y. 553; *Ex parte* Moore, 62 Ala. 471; *In re* Sackett, etc. Streets, 74 N. Y. 95; Fuqua *v.* Mullen, 13 Bush, 467; Rader *v.* Union, 10 Vroom, 509. And see Shields *v.* Bennett, 8 W. Va. 74; [S. *v.* Palmes, 23 Fla. 620, 3 S. R. 171.]

a general way, without entering into details; and all auxiliary provisions properly attaching to it, and constituting with it one whole, may be embraced within the enactment.[1]

[1] *Alabama.*— Miles *v.* S., 40 Ala. 39; Weaver *v.* Lapsley, 43 Ala. 224; Walker *v.* S., 49 Ala. 329; Lowndes *v.* Hunter, 49 Ala. 507; Tallassee Mfg. Co. *v.* Glenn, 50 Ala. 489; S. *v.* Price, 50 Ala. 568; Moses *v.* Mobile, 52 Ala. 198; Key *v.* Jones, 52 Ala. 238; Boyd *v.* S., 53 Ala. 601; Adler *v.* S., 55 Ala. 16; Watson *v.* S., 55 Ala. 158; [Montgomery *v.* S., 88 Ala. 141, 7 S. R. 51.]

Arkansas.— Fletcher *v.* Oliver, 25 Ark. 289; Worthen *v.* Badgett, 32 Ark. 496.

[*Colorado.*— Dallas *v.* Redman, 10 Colo. 297, 15 Pac. R. 397.]

[*Florida.*— S. *v.* Palmes, 23 Fla. 620, 3 S. R. 171.]

Georgia.—Bibb County Loan Ass'n *v.* Richards, 21 Ga. 592; Allen *v.* Tison, 50 Ga. 374; *Ex parte* Conner, 51 Ga. 571; Ayeridge *v.* Social Circle, 60 Ga. 404; [King *v.* Banks, 61 Ga. 20; McDuffie *v.* S., 87 Ga. 687.]

Illinois.— Neifing *v.* Pontiac, 56 Ill. 172; P. *v.* Wallace, 70 Ill. 680; Burke *v.* Monroe, 77 Ill. 610; Guild *v.* Chicago, 82 Ill. 472; Fuller *v.* P., 92 Ill. 182; [P. *v.* Nelson, 133 Ill. 565, 27 N. E. R. 217; Thompson *v.* Akin, 81 Ill. Ap. 62.]

Indiana.— Hatwood *v.* S., 18 Ind. 492; Gabbert *v.* Jeffersonville R. R. Co., 11 Ind. 365, [71 Am. D. 358;] Igoe *v.* S., 14 Ind. 239; S. *v.* Adamson, 14 Ind. 296: Thomasson *v.* S., 15 Ind. 449; S. *v.* Young, 47 Ind. 150, 154; Williams *v.* S., 48 Ind. 306; Henderson *v.* S., 50 Ind. 234; [Jett *v.* Richmond, 78 Ind. 316; Com'rs *v.* Baker, 80 Ind. 374.]

Iowa.— Williamson *v.* Keokuk, 44 Iowa, 88; Farmers' Ins. Co. *v.* Highsmith, 44 Iowa, 330.

Kansas.— Division of Howard, 15 Kan. 194; S. *v.* Bankers, etc. Benefit Ass'n, 23 Kan. 499; [Humboldt *v.* McCoy, 23 Kan. 249; Shepard *v.* Hellmann, 23 Kan. 504.]

Kentucky.— Gibson *v.* Belcher, 1 Bush, 145; Hind *v.* Rice, 10 Bush, 528; Collins *v.* Henderson, 11 Bush, 74; Fuqua *v.* Mullen, 13 Bush, 467; Howland Coal, etc. Works *v.* Brown, 13 Bush, 681; Allen *v.* Hall, 14 Bush, 85; [Burnside *v.* Court, 86 Ky. 423.]

Louisiana.— City Nat. Bank *v.* Mahan, 21 La. An. 751; S. *v.* Daniel, 28 La. An. 38; Police Jury of Plaquemines *v.* Packard, 28 La. An. 199; New Orleans *v.* Dunbar, 28 La. An. 722; S. *v.* Garrett, 29 La. An. 637; [S. *v.* Baurn, 33 La. An. 981.]

Maryland.— Washington *v.* Franklin R. R. Co., 34 Md. 159; McGrath *v.* S., 46 Md. 631; [Stiefel *v.* Blind Institution, 61 Md. 144.]

Michigan.— P. *v.* Wands, 23 Mich. 385; P. *v.* Hurlbut, 24 Mich. 44, 55, 57, [9 Am. R. 103;] P. *v.* Bradley, 36 Mich. 447; P. *v.* Young Men's, etc. Soc., 41 Mich. 67; [McKellar *v.* Detroit, 57 Mich. 158, 58 Am. R. 357, 23 N. W. R. 621.]

Minnesota.— Stuart *v.* Kinsella, 14 Minn. 524; S. *v.* Cassidy, 22 Minn. 312, 323, [21 Am. R. 765; Boyle *v.* Vanderhoof, 45 Minn. 31, 47 N. W. R. 396.]

Missouri.— S. *v.* Miller, 45 Mo. 495; S. *v.* Bank of the State, 45 Mo. 528; *In re* Goode, 3 Mo. Ap. 226; Murdock *v.* Woodson, 2 Dill. 188; [St. Louis *v.* Weitzell, 130 Mo. 616; S. *v.* Heege, 135 Mo. 112.]

Nebraska.— Smails *v.* White, 4 Neb. 353; S. *v.* Lancaster, 6 Neb. 474; [B. & M. R. R. Co. *v.* Sanders City, 9 Neb. 507; K. C. & O. Ry. Co. *v.* Frey, 47 N. W. R. 87.]

Nevada.— S. *v.* Silver, 9 Nev. 227.

New Jersey.— S. *v.* Union, 4 Vroom,

§ 36b. Other like provisions.— There are other like provisions in the constitutions of some of the states, but discussions of them are not desirable here.[1]

§ 37. Judicial knowledge and proof.— The public statutes are parts of the law of the land, whereof the courts take judi-

350; Rader *v.* Union, 10 Vroom, 509; [Vail *v.* Railway Co., 44 N. J. L. 237; S. *v.* Newton, 45 N. J. L. 469.]

New York.— Gloversville *v.* Howell, 7 Hun, 345; P. *v.* O'Brien, 38 N. Y. 193; P. *v.* Lawrence, 41 N. Y. 137; Gaskin *v.* Meek, 42 N. Y. 186; P. *v.* Rochester, 50 N. Y. 525; P. *v.* Briggs, 50 N. Y. 553; Harris *v.* P., 59 N. Y. 599; P. *v.* Willsea, 60 N. Y. 507; P. *v.* Banks, 67 N. Y. 568; P. *v.* Brinkerhoff, 68 N. Y. 259; Kerrigan *v.* Force, 68 N. Y. 381; Billings *v.* New York, 68 N. Y. 413; Gloversville *v.* Howell, 70 N. Y. 287; Sharp *v.* New York, 31 Barb. 572; Gaskin *v.* Anderson, 55 Barb. 259; Gaskin *v.* Meek, 8 Abb. Pr. (N. S.) 312; Central Cross-town R. R. Co. *v.* Twenty-third Street R. R. Co., 54 How. Pr. 168; Hardenbergh *v.* Van Keuren, 4 Abb. N. Cas. 43; Neuendorff *v.* Duryea, 6 Daly, 276; [*Re* Gas Light Co., 85 N. Y. 526; Harris *v.* Supervisors, 33 Hun, 279.]

Pennsylvania.— Allegheny County Home's Case, 77 Pa. St. 77; State Line, etc. Railroad's Appeal, 77 Pa. St. 429; City Sewage Utilization Co. *v.* Davis, 8 Phila. 625; West Philadelphia Passenger R. R. Co. *v.* Union Passenger R. R. Co., 9 Phila. 495; Com. *v.* Dickinson, 9 Phila. 561; [Washington *v.* McGeorge, 146 Pa. St. 248; *Re* Pottstown, 117 Pa. St. 538, 12 Atl. R. 573.]

South Carolina.— Morton *v.* Comptroller-General, 4 S. C. 430; [S. *v.* Hoover, 17 S. E. R. 752.]

Tennessee.— Cannon *v.* Mathes, 8 Heisk. 504; [Luehrman *v.* Dist., 2 Lea, 425, — Fed. R. —; Gilson County *v.* Pullman Car Co., 42 Fed. R. 572.]

Texas.— S. *v.* Deitz, 30 Tex. 511; S. *v.* Shadle, 41 Tex. 404; S. *v.* McCracken, 42 Tex. 383; Giddings *v.* San Antonio, 47 Tex. 548; Peck *v.* San Antonio, 51 Tex. 490; Albrecht *v.* S., 8 Tex. Ap. 216, [34 Am. R. 737;] Cox *v.* S., 8 Tex. Ap. 254, [34 Am. R. 746.]

West Virginia.— Shields *v.* Bennett, 8 W. Va. 74.

Wisconsin.— Mills *v.* Charleton, 29 Wis. 400; Evans *v.* Sharp, 29 Wis. 564, [9 Am. R. 578.]

[*United States.*— Jonesboro *v.* Railroad Co., 110 U. S. 192; Otoe County *v.* Baldwin, 111 U. S. 1.]

[1] **For example, as to amendatory statutes.**— Armstrong *v.* Berreman, 13 Ind. 422; Greencastle Southern Turnp. *v.* S., 28 Ind. 382; Jones *v.* Davis, 6 Neb. 33; Sovereign *v.* S., 7 Neb. 409; S. *v.* Parsons, 11 Vroom, 123; S. *v.* Liedtke, 9 Neb. 490; Plummer *v.* P., 74 Ill. 361; Blakemore *v.* Dolan, 50 Ind. 194; S. *v.* Cain, 8 W. Va. 720; Shields *v.* Bennett, 8 W. Va. 74.

As to special laws.— Devine *v.* Cook, 84 Ill. 590; Brown *v.* S., 23 Md. 503; Hart *v.* P., 89 Ill. 407; Welker *v.* Potter, 18 Ohio St. 85; *In re* Clinton Street, 2 Brews. 599; S. *v.* Cape Girardeau, etc. R. R. Co., 48 Mo. 468; S. *v.* Thileneus, 48 Mo. 479.

Uniform.— Brooks *v.* Hyde, 37 Cal. 366.

Style of enacting clause.— A clause of the constitution specifying the style of the enacting clause is held by some courts to be only directory. Cape Girardeau *v.* Riley, 52 Mo. 424, [14 Am. R. 427;] St. Louis *v.* Foster, 52 Mo. 513; by others, mandatory. S. *v.* Rogers, 10 Nev. 250, [21 Am. R. 738.]

cial notice; and, to some extent, by-laws and classes of statutes not public are made such by legislative mandate.[1] Private statutes always, under the common-law rules, require to be proved to the judge.[2] With us, the ordinary *prima facie* proof of statutory laws is by the production, in court, of a copy purporting to be printed by public authority.[3] Now,—

Looking into records.— If a public statute is in question, and there is a suggestion that it is not correctly printed, the court will inform itself of the true reading by referring to the original in the office of the secretary of state.[4] And the public record of it, kept by the proper officer, is by all opinions *prima facie* correct and the statute valid, and by a part of the opinions absolutely conclusive.[5] Still the legislative journals are records;[6] and some of our courts will look into them and into the engrossed bills, to learn whether an act received the constitutional majority,[7] and otherwise conformed to requirements which were

[1] *Post*, §§ 395, 406; 1 Greenl. Ev., §§ 5, 6, 480; Lane *v.* Harris, 16 Ga. 217; Sims *v.* Marryat, 17 Q. B. 281, 288, 292; Forman *v.* Dawes, Car. & M. 127; S. *v.* Bailey, 16 Ind. 46, [79 Am. D. 405;] Berliner *v.* Waterloo, 14 Wis. 378; Clare *v.* S., 5 Iowa, 509.

[2] Id.; Brett *v.* Beales, Moody & M. 416, 421, 425; Allegheny *v.* Nelson, 25 Pa. St. 332.

[3] 1 Greenl. Ev., § 480; Bound *v.* Wisconsin Central R. R. Co., 45 Wis. 543; Clark *v.* Janesville, 10 Wis. 136. See Needham *v.* Thresher, 49 Cal. 393.

[4] Clare *v.* S., 5 Iowa, 509; Evans *v.* Browne, 30 Ind. 514, [95 Am. D. 710;] Paine *v.* Lake Erie, etc. R. R. Co., 31 Ind. 283. And see *ante*, § 29; S. *v.* Lee, 37 Iowa, 402; Goldsmith *v.* Augusta, etc. R. R. Co., 62 Ga. 468; [*Re* Tipton, 28 Tex. Ap. 438, 8 L. R. A. 326, 13 S. W. R. 610.]

[5] Annapolis *v.* Harwood, 32 Md. 471; S. *v.* Fagan, 22 La. An. 545; Larrison *v.* Peoria, etc. R. R. Co., 77 Ill. 11; Louisiana State Lottery Co. *v.* Richoux, 23 La. An. 743, [8 Am. R. 602;] S. *v.* Swift, 10 Nev. 176, [21 Am. R. 721;] S. *v.* Rogers, 10 Nev. 250, [21 Am. R. 738;] English *v.* Oliver, 28 Ark. 317; Brodnax *v.* Groom, 64 N. C. 244; P. *v.* Marlborough, 54 N. Y. 276; S. *v.* Liedtke, 9 Neb. 462; Usener *v.* S., 8 Tex. Ap. 177; Bender *v.* S., 53 Ind. 254; Kilgore *v.* Magee, 85 Pa. St. 401; Blessing *v.* Galveston, 42 Tex. 641; Miller *v.* S., 3 Ohio St. 475; S. *v.* Sepion, 3 R. I. 119; Erie & North East R. R. Co. *v.* Casey, 26 Pa. St. 287; McCulloch *v.* S., 11 Ind. 424; P. *v.* Devlin, 33 N. Y. 269, [88 Am. D. 377; Standard Union Cable Co. *v.* Atty. Gen., 46 N. J. Eq. 270, 19 Atl. R. 733.]

[6] S. *v.* Smalls, 11 S. C. 262; Moody *v.* S., 48 Ala. 115, [17 Am. R. 28.]

[7] Sedgwick on Statutes, 68, 69, referring to Purdy *v.* P., 4 Hill (N. Y.), 384; De Bow *v.* P., 1 Denio, 9; Commercial Bank *v.* Sparrow, 2 Denio, 97; Jones *v.* Hutchinson, 43 Ala. 721; Com. *v.* Jackson, 5 Bush, 680; [Robertson *v.* P., 20 Colo. 279, 28 S. W. R. 711. An enrolled bill signed by the speaker of the house and by the president of the senate in open session is an official attestation that such bill has passed congress, and when, thus attested, it receives the approval of the president, and is deposited in the public archives, its

vital, and not merely directory;[1] holding it void when thus affirmatively shown not to have been duly enacted.

§ 37a. Estoppel — Admissions.—As private persons cannot make laws, they are not estopped[2] or otherwise bound by their admissions[3] on the question whether or not a statute has been constitutionally passed.

VI. Defects Other than Consitutional.

§ 38. Motives — (By-law).— Evil motives and bad faith are never to be imputed by a court to the legislative body; so that no statute, public or private, is held void on these grounds.[4] It is the same also of a city by-law.[5] And,—

Fraud.—In general, though not without some doubt as to purely private statutes,[6] a legislative enactment will not, it seems, be held void for fraud practiced on the legislature in procuring its passage.[7] If this is so, we have doubtless here

authentication is complete and unimpeachable. Field *v.* Clark, 143 U. S. 649.]

[1] Ramsey *v.* Heenan, 2 Minn. 330; Dew *v.* Cunningham, 28 Ala. 466, [65 Am. D. 362;] S. *v.* McBride, 4 Mo. 303, [29 Am. D. 636;] South Ottawa *v.* Perkins, 94 U. S. 260; Worthen *v.* Badgett, 32 Ark. 496; Brady *v.* West, 50 Miss. 68 (overruling Green *v.* Weller, 32 Miss. 650); Legg *v.* Annapolis, 42 Md. 203; Ryan *v.* Lynch, 68 Ill. 160; Opinion of Justices, 52 N. H. 622; P. *v.* Lœwenthal, 93 Ill. 191; Perry *v.* Selma, etc. R. R. Co., 58 Ala. 546; Berry *v.* Baltimore, etc. R. R. Co., 41 Md. 446, [20 Am. R. 69;] P. *v.* Hurlbut, 24 Mich. 44, 53, [9 Am. R. 103.] And see Blake *v.* National Banks, 23 Wall. 307, 321. For various questions relating to the manner of passing and approving bills, see Harpending *v.* Haight, 39 Cal. 189, [2 Am. R. 432;] S. *v.* Fagan, 22 La. An. 545; Solomon *v.* Cartersville, 41 Ga. 157; Danielly *v.* Cabaniss, 52 Ga. 211; S. *v.* Buckley, 54 Ala. 599; Hardee *v.* Gibbs, 50 Miss. 802; Division of Howard, 15 Kan. 194; Hull *v.* Miller, 4 Neb. 503. See also St. Louis *v.* Shields, 62 Mo. 247; O'Hanlon *v.* Myers, 10 Rich. 128.

[2] South Ottawa *v.* Perkins, 94 U. S. 260; Boyd *v.* Alabama, 94 U. S. 645. See Burrows *v.* Bashford, 22 Wis. 103; Green *v.* Green, 14 La. An. 39.

[3] Happel *v.* Brethauer, 70 Ill. 166, [22 Am. R. 70,] And see Jones *v.* Perry, 10 Yerg. 59, [30 Am. D. 430.]

[4] Kountze *v.* Omaha, 5 Dill. 443; S. *v.* Eau Claire, 40 Wis. 533; S. *v.* Fagan, 22 La. An. 545; Wright *v.* Defrees, 8 Ind. 298; P. *v.* Shepard, 36 N. Y. 285, 289. And see S. *v.* King, 12 La. An. 596; [Barbier *v.* Connolly, 113 U. S. 27.]

[5] Freeport *v.* Marks, 59 Pa. St. 253.

[6] 2 Bl. Com. 346; Com. *v.* Breed, 4 Pick. 460); Waterford, etc. Ry. Co. *v.* Logan, 14 Q. B. 672, 680.

[7] Broom, Leg. Max. (2d ed.) 42, referring to Stead *v.* Cary, 1 C. B. 496, 516, 522. See Charles River Bridge *v.* Warren Bridge, 7 Pick. 344; Jersey City, etc. R. R. Co. *v.* Jersey City, etc. R. R. Co., 6 C. E. Green, 61; [McLane *v.* Paschal (Tex. Civ. Ap.), 23 S. W. R. 711.]

the only exception to the rule that fraud vitiates the transactions into which it enters.

§ 39. Mistake.—It has been held that a statutory provision, inserted through pure inadvertence and mistake, will, on this fact clearly appearing, be disregarded.[1] In Illinois, by mistake, the governor signed a bill, and his private secretary, finding it on his table signed, sent, in the usual routine of business, a message to the house announcing his approval. Within twenty minutes the governor, discovering the error, transmitted to the speaker a notice of the facts, and it was read aloud. He then returned the bill to the proper branch of the legislature with his signature erased and with his objections thereto, it never having been out of his possession. It was held not to become a law. The court considered that, as it had not passed out of his custody, the writing of his name did not constitute final action upon it. "While within such control and custody, the right to reconsider is a necessary incident to the power to act."[2]

§ 39a. Acts not within legislative function.— We have seen that, with us, all power is in the people, who by written constitutions have given to the legislative bodies whatever they chose.[3] But, in fact, our state legislatures, unlike congress, have thus been endowed with all legislative power, subject merely to specified exceptions and limitations.[4] Still it results that the legislature cannot exercise a function not in its nature legislative; and, though a thing of this sort should be attempted in the form of a statute, it will be null. Now,—

§ 40. Statutes against fundamental justice.— While it would not be a legislative function to change the orbit of the earth, and statutes attempting it would be void, is it otherwise where the legislative endeavor is to subvert the fundamental principles of right and justice? In point of abstract theory the two cases are identical, and acts of the latter sort — that is, subversive of fundamental right and justice — are equally void with the former. Able judges in all ages have so declared.[5]

[1] Pond *v.* Maddox, 38 Cal. 572.

[2] P. *v.* Hatch, 19 Ill. 283, 288, opinion by Caton, C. J.

[3] *Ante*, § 33.

[4] Com. *v.* Drewry, 15 Grat. 1; P. *v.* Flagg, 46 N. Y. 401; Page *v.* Allen, 58 Pa. St. 338, [98 Am. D. 272; Perkins *v.* Philadelphia, 156 Pa. St. 554, 27 Atl. R. 356.]

[5] Day *v.* Savadge, Hob. 85, 87; Bonham's Case, 8 Co. 114*a*, 118*a*; Cromwell's Case, 4 Co. 12*a*, 13*a*; London *v.*

But, while astronomers agree as to what is the orbit of the earth, the professors of moral science differ more or less concerning the fundamental principles of justice. Legislators are to judge of the right and expediency of the laws they frame, and plainly the courts have not in general any jurisdiction to reverse their decision.[1] Therefore, as a practical question, rarely, if ever, will a considerate court so set its opinion against the legislative judgment on a point of morals as to hold a statute void on the ground now under consideration.[2] But —

Granting private property.— It has been held, for example, that a state, like an individual, cannot convey what it does not own; so that, independently of constitutional inhibitions, an act is void which attempts to transfer to one private person the vested property of another.[3] Again,—

§ 41. Impossible.— If the legislature enacts an impossibility, no court will undertake to carry it into effect.[4] Of this sort is a case of —

Repugnance.— Provisions in irreconcilable repugnance cannot stand together. Either all or a part, as the particular instance may require, will be held void.[5] Of a somewhat different nature is —

Ambiguity.— Where the statutory terms are of such uncertain meaning, or so confused, that the courts cannot discern

Wood, 12 Mod. 669, 687, 688; Baltimore *v.* S., 15 Md. 376, 469; Ham *v.* McClaws, 1 Bay, 93; Bowman *v.* Middleton, 1 Bay, 252; Morrison *v.* Barksdale, Harper, 101.

[1] Davis *v.* S., 2 Tex. Ap. 425; Stapp *v.* S., 3 Tex. Ap. 138, 140; Leonard *v.* Wiseman, 31 Md. 201. And see *Ex parte* Delaney, 43 Cal. 478; [Temmick *v.* Owings, 70 Md. 246, 16 Atl. R. 719; Millay *v.* White, 86 Ky. 170, 5 S. W. R. 429; Barker *v.* Torrey, 69 Tex. 7, 4 S. W. R. 646.]

[2] Bishop, First Book, §§ 88–91, where the authorities are more fully collected, and the question is discussed more at large; Dorman *v.* S., 34 Ala. 216, 235; P. *v.* Gallagher, 4 Mich. 224, 253; Flint, etc. Plank-road *v.* Woodhull, 25 Mich. 99, [12 Am. R. 233;] Jewell *v.* Weed, 18 Minn. 272; *In re* Lower Chatham, 6 Vroom, 497; P. *v.* Hayden, 50 N. Y. 525; P. *v.* Briggs, 50 N. Y. 553; P. *v.* Flagg, 46 N. Y. 401; P. *v.* Mahaney, 13 Mich. 481; Lee *v.* Bude, etc. Ry. Co., Law R. 6 C. P. 576, 582.

[3] Hoye *v.* Swan, 5 Md. 237, 244; Bowman *v.* Middleton, 1 Bay, 252. And see Williams *v.* Register, Cooke (Tenn.), 214; Hoke *v.* Henderson, 4 Dev. 1, [25 Am. D. 677;] Owens *v.* Rain, 5 Hayw. 106; Austin *v.* Trustees, 1 Yeates, 260; Ten Eyck *v.* Frost, 5 Cow. 346; Wilkinson *v.* Leland, 2 Pet. 627, 658.

[4] Van Alstine *v.* P., 37 Mich. 523; S. *v.* Douglass, 5 Sneed, 608.

[5] *Post*, § 65; U. S. *v.* Cantril, 4 Cranch, 167; Gillespie *v.* S., 9 Ind. 380; Albertson *v.* S., 9 Neb. 429; Sullivan *v.* Adams, 3 Gray, 476. And

with reasonable certainty what is intended, they will pronounce the enactment void.[1] Yet they will not do this on account of a mere slight inaccuracy of expression.[2]

see Scrinegrour *v.* S., 1 Chand. 48; [Albert *v.* Twohig, 35 Neb. 563, 53 N. W. R. 582.]

[1] McConvill *v.* Jersey City, 10 Vroom, 38; S. *v.* Boon, Taylor, 246; Cheezem *v.* S., 2 Ind. 149; King *v.* S., 2 Ind. 523. See Huntsville *v.* Phelps, 27 Ala. 55; Sullivan *v.* Adams, 3 Gray, 476; *Ex parte* George, T. U. P. Charl. 80; S. *ex rel.* McLean *v.* Liedtke, 9 Neb. 468; S. *v.* Craig, 23 Ind. 185.

[2] Evans *v.* Com., 3 Met. 453; Haynes *v.* S., 5 Humph. 120; S. *v.* Cooper, 5 Day, 250; P. *v.* Shepard, 36 N. Y. 285; S. *v.* Nichols, 12 Rich. 672. See *post*, §§ 79, 81, 145, 146.

CHAPTER VI.

THE SEVERAL CLASSES OF STATUTES DISTINGUISHED.

§ 42. In general.— Statutes are divided into a considerable number of classes; and some of the divisions are important, others are of little consequence. Not to enter minutely into this subject, we shall find the following helpful: —

Ancient and modern.— In England, the statutes prior to Edward II. are sometimes termed ancient, while the later ones are called modern.[1] But this is a distinction of no practical value with us. A division everywhere important is into —

§ 42a. Public and private — General and special.— These correlate terms are, in practical use, nearly synonymous.[2]

Public or general, defined.— A public or general statute is one which affects either all of the people of the state;[3] or all of a particular condition, class or locality therein, in distinction from individuals designated by name or description.[4] More specifically, —

Explained.— The distinction between public and private statutes is, in the old books, somewhat obscure, and considerable numbers of the cases are contradictory. Nor are perfect harmony and precision established in the modern law. But the later tendency of the courts, especially in our own country, is to enlarge, rather than restrict, the class of statutes deemed public;[5] and, on the whole, our definition above indicates, as nearly as general language can, the better modern doctrine. To illustrate, —

§ 42b. Local.— A local statute, whereof the precise bounds are not well defined, but it is one limited in its operation to some

[1] 1 Dwar. Stat. (2d ed.) 460; Wilb. Stat. 218.

[2] Wilb. Stat. 218; Jacob, Dict., Statute; Clark *v.* Janesville, 10 Wis. 136.

[3] Barrington's Case, 8 Co. 136*b*, 136*b*; [Anderson's Law Dictionary, 969.]

[4] Brooks *v.* Hyde, 37 Cal. 366; Cox *v.* S., 3 Tex. Ap. 254, 267, 289, [34 Am. R. 746;] S. *v.* Baltimore, 29 Md. 516; Jones *v.* Axen, 1 Ld. Raym. 119, 120; Samuel *v.* Evans, 2 T. R. 569; Wheeler *v.* Philadelphia, 77 Pa. St. 338; [*Re* Wyoming St., 137 Pa. St. 494.]

[5] Winooski *v.* Gokey, 49 Vt. 282.

minor locality within the state,[1] may be either public or private.[2] Now,—

Municipal charter.— By the prevailing modern authority in this country, perhaps contrary to the old rule,[3] a statutory charter of a municipal corporation is a public or general law.[4] And —

Other local statutes.— The broad doctrine may now be laid down, that, if otherwise a statute is public, it is so notwithstanding it has effect only in a particular locality or place.[5] So —

§ 42c. Classes of persons.— It has been sometimes deemed that statutes operating only on particular classes of persons are private;[6] but now, where they concern the class, in distinction from the individuals, they are treated as public.[7] Hence —

§ 42d. Private or special.— A private or special statute is one which affects only particular persons or things.[8] Thus,—

Charters of private corporations — are private or special laws.[9]

[1] Kerrigan *v.* Force, 68 N. Y. 381; P. *v.* O'Brien, 38 N. Y. 193, 195; Gaskin *v.* Anderson, 55 Barb. 259; S. *v.* Common Pleas, 21 Ohio St. 1; P. *v.* Allen, 1 Lans. 248; Troy *v.* Bacon, 2 Abb. Ap. 127; P. *v.* Harper, 91 Ill. 357; Healey *v.* Dudley, 5 Lans. 115; P. *v.* Hills, 35 N. Y. 449, 451; Gaskin *v.* Meek, 42 N. Y. 186. See Cox *v.* S., 8 Tex. Ap. 254, 257, [34 Am. R. 746.]

[2] Yellow River Imp. Co. *v.* Arnold, 46 Wis. 214, 222; Kerrigan *v.* Force, *supra;* Orr *v.* Rhine, 45 Tex. 345; P. *v.* Davis, 61 Barb. 456.

[3] S. *v.* Bergen, 5 Vroom, 438. See, as to the general nature of this sort of statute, Dwar. Stat. (2d ed.) 464, 465; S. *v.* Parsons, 11 Vroom, 1, 123; S. *v.* Newark, 11 Vroom, 297; P. *v.* Wallace, 70 Ill. 680; Brackett *v.* P., 72 Ill. 593; Kilgore *v.* Magee, 85 Pa. St. 401; P. *v.* Cooper, 83 Ill. 585.

[4] Winooski *v.* Gokey, 49 Vt. 282; Dill. Mun. Corp. (2d ed.), § 50; Fauntleroy *v.* Hannibal, 1 Dill. 118; Belmont *v.* Morrill, 69 Me. 314, 317.

[5] Levey *v.* S., 6 Ind. 281; *In re* Wakker, Edm. Sel. Cas. 575; Rawlings *v.* S., 2 Md. 201; Kerrigan *v.* Force, 9 Hun, 185; S. *v.* Rauscher, 1 Lea, 96; McCuen *v.* S., 19 Ark. 630; P. *v.* Davis, 61 Barb. 456; McLain *v.* New York, 3 Daly, 32; [Davies *v.* Los Angeles, 86 Cal. 37, 24 Pac. R. 771.]

[6] Ingram *v.* Foot, 1 Ld. Raym. 708, 709, 12 Mod. 611, 613; Dive *v.* Maningham, 1 Plow. 60, 65.

[7] Wheeler *v.* Philadelphia, 77 Pa. St. 338. See the old distinctions in Holland's Case, 4 Co. 75*a;* [Wibbert's Appeal, 21 Atl. R. 74.]

[8] Wheeler *v.* Philadelphia, *supra;* S. *v.* Cleland, 68 Me. 258; Estep *v.* Hutchman, 14 S. & R. 435; Wright *v.* Ware, 50 Ala. 549; [Anderson's Law Dictionary, 969.]

[9] Mandere *v.* Bonsignore, 28 La. An. 415; Burhop *v.* Milwaukee, 21 Wis. 258; Perry *v.* New Orleans, etc. R. R. Co., 55 Ala. 413, [28 Am. R. 740.] See Clark *v.* Janesville, 10 Wis. 136; S. *v.* Camden Common Pleas, 12 Vroom, 495.

§ 42e. Common-law modifications — Same under constitutions. — With these general distinctions, this chapter will close. The books disclose some modifications of common-law doctrines not necessary to be stated here. And, under our state constitutions, there are still further modifications and distinctions. But to discuss them would take us too far away from the principal object of this volume.

CHAPTER VII.

THE SEVERAL PARTS OF A STATUTE CONSIDERED.

§ 43. Introduction.
44–47. The title.
48–51. The preamble.
52–61. Purview and its subdivisions.
62–65. Precedence of provisions.
66, 67. Division into sections.

§ 43. How chapter divided.—We shall consider: I. The title; II. The preamble; III. The purview and its subdivisions; IV. The precedence of provisions; V. The division of a statute into sections.

I. The Title.

§ 44. Different sources of title and manner of making it.—The effect of the title, on the construction of a statute, must, in reason, be greater or less according to the manner of making it, by whom made, and its connection with the bill during its passage through the legislative body. In England, the ancient methods of enacting laws were not uniform, and they seem to have varied with the different dates, nor were they at any time the same as now.[1] "Formerly," it is said in Bacon's Abridgment, describing one of the old methods, "the bill was in the nature of a petition" from the commons to the king. "These petitions were entered upon the lords' rolls, and upon these rolls the royal assent was likewise entered. And upon this, as a groundwork, the judges used, at the end of the parliament, to draw up the act of parliament into the form of a statute, which was afterwards entered upon the rolls called the statute rolls, which was different from those called the lords' rolls or the rolls of parliament. Upon which statute rolls, neither the bill, nor petition from the commons, nor the answer of the lords, nor the royal assent, was entered, but only the statute, as it was drawn up and penned by the judges."[2]

[1] See Preface to Ruffhead's Statutes.

[2] Bac. Abr., Court of Parl. E.

If the act, as it appeared on the statute rolls, had a title, it was the work of the judges, not of parliament.[1] When afterward the statutes came to be drawn up in due form before being enacted, which was perhaps during the reign of Hen. VII.,[2] the title, though one was prefixed, did not "pass the same form as the rest of the act; only the speaker, after the act is passed, mentions the title, and puts the question upon it." Then it is changed if the members choose.[3] With us the title appears in the bill, subject to the same formalities as any other part of it, during its entire progress through the legislative body. Probably no serious consequences come from this difference, but it is properly to be borne in mind.

§ 45. No part of act.—Equally in ancient and modern times, in England and in this country, the title is regarded as not a part of the act, being likened to the title of a book, which is not a part of the book;[4] occupying, indeed, a position not unlike that of the caption of an indictment, explained in another connection.[5] Still,—

§ 46. Weight to be given title.—In construing a statute, we do not look upon the title as in all circumstances a mere nullity. Perhaps, in England, where it "is usually framed only by the clerk of that house in which the bill first passes, and is seldom read more than once,"[6] and the other peculiarities above described exist, it should have less weight in questions of construction than in this country. The doctrine seems indeed to have been there held, that it cannot be taken at all into the consideration.[7] Yet by the better opinion there, certainly here, it may be referred to in a doubtful case in aid of the inquiry into the legislative intent;[8] and, since such intent

[1] Attorney-General *v.* Weymouth, Amb. 20, 23; Dwar. Stat. (2d ed.) 500.

[2] The date is stated by Dwarris, as above, to be about the eleventh year of Henry VII. But it seems that the new practice came gradually into use, beginning at a still earlier period. And see 16 How. St. Tr. 743, note; 1 Bl. Com. 183.

[3] Attorney-General *v.* Weymouth, *supra*, at p. 23; Dwar. Stat. (2d ed.) 322, 323.

[4] Bac. Abr., Statute, A.; Mills *v.* Wilkins, 6 Mod. 62; Chance *v.* Adams, 1 Ld. Raym. 77; Rex *v.* Williams, 1 W. Bl. 93, 95; Bradford *v.* Jones, 1 Md. 351; Ogden *v.* Strong, 2 Paine, 584; S. *v.* Welsh, 3 Hawks, 404; Cohen *v.* Barrett, 5 Cal. 195; Plummer *v.* P., 74 Ill. 361; Com. *v.* Slifer, 53 Pa. St. 71.

[5] Crim. Pro., I, § 653 *et seq.*

[6] Dwar. Stat. (2d ed.) 501.

[7] Attorney-General *v.* Weymouth, Amb. 20, 22.

[8] Rex *v.* Cartwright, 4 T. R. 490;

may sometimes be controlling in the interpretation, the title may thus restrict the purview.[1] But the cases in which it so operates are exceptional; for commonly it will not extend or restrain any provision in the body of an act.[2] Further than as manifesting the legislative intent, it can have no force; therefore ordinarily, if the words of the enacting clause are larger in meaning than those of the title, they will prevail, even in a penal statute.[3] Where there is no ambiguity in the statute itself, the title is not to be regarded.[4]

Chapter headings, etc.— The chapter headings and the like, in the revisions of statutes and in codes, are deemed to be of somewhat greater effect than the ordinary titles to legislative acts.[5]

§ 47. Constitutional effect.— We have already seen that, in some of the states, a special effect is given to the title under a constitutional provision.[6]

II. The Preamble.

§ 48. Compared with title.— The preamble is similar to the title in its effect on the interpretation, yet of influence somewhat greater. Thus,—

Stradling *v.* Morgan, 1 Plow. 199, 203; Rex *v.* Gwenop, 3 T. R. 133, 137; Dwar. Stat. (2d ed.) 501, 502; S. *v.* Stephenson, 2 Bailey, 334; Burgett *v.* Burgett, 1 Ohio, 469, [13 Am. D. 634;] Chesapeake & Ohio Canal *v.* Baltimore & Ohio R. R. Co., 4 Gill & J. 1, 90, 91; U. S. *v.* Fisher, 2 Cranch, 358, 386; S. *v.* Fields, 2 Bailey, 554; S. *v.* Smith, Cheves, 157; Bradford *v.* Jones, 1 Md. 351; Ogden *v.* Strong, 2 Paine, 584; Cohen *v.* Barrett, 5 Cal. 195; Garrigus *v.* Parke, 39 Ind. 66; Connecticut Mutual Life Ins. Co. *v.* Albert, 39 Mo. 181; Nazro *v.* Merchants' Mutual Ins. Co., 14 Wis. 295; U. S. *v.* Union Pacific R. R. Co., 91 U. S. 72, 82.

[1] U. S. *v.* Palmer, 3 Wheat. 610, 631; S. *v.* Stephenson, 2 Bailey, 334; Field *v.* Gooding, 106 Mass. 310.

[2] Hadden *v.* The Collector, 5 Wall. 107; P. *v.* Abbott, 16 Cal. 358.

[3] U. S. *v.* Briggs, 9 How. (U. S.) 351; Bartlett *v.* Morris, 9 Port. 266; Blue *v.* McDuffie, Busbee, 131.

[4] Eastman *v.* McAlpin, 1 Kelley, 157; *In re* Boston Mining, etc. Co., 51 Cal. 624; Com. *v.* Slifer, 53 Pa. St. 71; U. S. *v.* McArdle, 2 Saw. 367. [The term "to regulate" in the title of a statute relating to the sale of intoxicating liquors does not include a provision to "prohibit." P. *v.* Gadway, 61 Mich. 285, 1 Am. St. R. 578, 28 N. W. R. 101. The title of a statute need not mention the penalty. Plumb *v.* Christie, 103 Ga. 686, 30 S. E. R. 759, 42 L. R. A. 181.]

[5] Barnes *v.* Jones, 51 Cal. 303; P. *v.* Molyneux, 40 N. Y. 113; Huff *v.* Alsup, 64 Mo. 51; Griffith *v.* Carter, 8 Kan. 565; Battle *v.* Shivers, 39 Ga. 405; S. *v.* Popp, 45 Md. 432; U. S. *v.* Fehrenback, 2 Woods, 175; Nicholson *v.* Mobile, etc. R. R. Co., 49 Ala. 205. And see *post*, § 61.

[6] *Ante*, § 36*a*.

No part of statute.— Though enacted with the statute, as the title is in our American legislation, like the latter it is deemed not to constitute of it a part.[1] Still,—

Weight.— As showing the inducements to the act, it may have a decisive weight in a doubtful case.[2] But where the body of the statute is distinct, it will prevail over a more restricted preamble.[3] More particularly,—

§ 49. Intent and reasons.— We look to this introductory matter for the general intent of the legislature,— the reasons and principles on which the law proceeds.[4] So that, to the extent to which these can influence the interpretation, the preamble becomes important. Hence,—

Not control, but explain.— It may, for example, explain an equivocal expression in the enacting clause.[5] It will seldom, at least, extend this clause;[6] in a doubtful case it may restrain it,[7] — propositions not in their nature absolute.[8] In the words of Ellenborough, C. J.: "In a vast number of acts of parliament, although a particular mischief is recited in the preamble, yet the legislative provisions extend far beyond the mischief

[1] Mills *v.* Wilkins, 6 Mod. 62; Bac. Abr., Statute, A.; [Yazoo & M. V. R. R. Co. *v.* Thomas, 132 U. S. 174; U. S. *v.* Oreg. etc. R. R. Co., 164 U. S. 526; Lackland *v.* Walker, 151 Mo. 210, 52 S. W. R. 414.]

[2] Mills *v.* Wilkins, *supra;* Mason *v.* Armitage, 13 Ves. 25, 36; Crespigny *v.* Wittenoom, 4 T. R. 790, 793; Gray *v.* Soanes, 2 Jur. 1040; The Salters' Company *v.* Jay, 3 Q. B. 109; Fellows *v.* Clay, 4 Q. B. 313, 339.

[3] Pattison *v.* Bankes, Cowp. 540, 543; Lees *v.* Summersgill, 17 Ves. 508; Mace *v.* Cammel, Lofft, 782; S. *v.* Butler, 3 McCord, 383; Rex *v.* Marks, 3 East, 157; Rex *v.* Athos, 8 Mod. 136, 144; Holbrook *v.* Holbrook, 1 Pick. 248, 251; Laidler *v.* Young, 2 Har. & J. 69; S. *v.* Findley, 1 Brev. 107; Blue *v.* McDuffie, Busbee, 131; U. S. *v.* Briggs, 9 How. (U. S.) 351; Sussex Peerage Case, 11 Cl. & F. 85, 143; Caledonian Ry. Co. *v.* North British Ry. Co., 6 Ap. Cas. 114, 122, 124.

[4] U. S. *v.* Webster, Daveis, D. C. 38; Fowler *v.* S., 5 Day, 81; Gray *v.* Soanes, 2 Jur. 1040; Pray *v.* Edie, 1 T. R. 313; Rex *v.* Corry, 5 East, 372. And see, as to both title and preamble, 1 Kent Com. 460; Salkeld *v.* Johnston, 1 Hare, 196, 207; Rex *v.* Sutton, 4 M. & S. 532; Halton *v.* Cove, 1 B. & Ad. 538, 558.

[5] Clark *v.* Bynum, 3 McCord, 298; Woodruff *v.* Gilchrist, 15 Johns. 89; Nash *v.* Allen, 4 Q. B. 784; [Tripp *v.* Goff, 1 N. E. R. 806.]

[6] Id.; Dwar. Stat. (2d ed.) 660, referring to Wilson *v.* Knubley, 7 East, 128.

[7] Dwar. Stat. (2d ed.) 661; Ryall *v.* Rolle, 1 Atk. 165, 174, 182. *Contra*, Copeman *v.* Callant, 1 P. Wms. 314, 320; Hughes *v.* Chester, etc. Ry. Co., 1 Drew. & S. 524; [Providence S. F. *v.* Jessup, 6 Kulp, 251.]

[8] Kearns *v.* Cordwainers, 6 C. B. (N. S.) 388; Pattison *v.* Bankes, Cowp. 540, 543; Wilmot *v.* Rose, 3 Ellis & B. 563; Mason *v.* Armitage, 13 Ves. 25, 36.

recited. And whether the words shall be restrained or not must depend on a fair exposition of the particular statute in each particular case, and not upon any universal rule of construction."[1] And, on the other hand, if the preamble should be found broader than the act itself, while of its own force it would not enlarge the meaning, it may do in this direction whatever can be accomplished by a consideration of the reasons which impelled the legislative mind.[2]

§ 50. Recitations of facts.—Commonly a preamble contains recitations of facts. In the interpretation of statutes, as of contracts,[3] the surroundings are taken into the account. And the recitations in the preamble must be accepted as, at least, *prima facie*, and perhaps conclusively, correct.[4] In a private act they are evidence only as between the state and the private party.[5] When viewed as a key to the interpretation they should in reason be deemed conclusive of the recited facts; because, whether really true or not, they explain the legislative perspective in enacting the statute, and only this is in any case gained by the interpreter in looking at the surroundings. Therefore, also, such matter is to have no other weight than is given it in other cases of construction, when it comes to the knowledge of the judge through other means.

§ 51. In general.—Dwarris[6] observes: "Lord Coke considered the rehearsal, or preamble, a key to open the understanding of the statute; and it is properly considered[7] a *good mean* for collecting the intent, and showing the mischiefs which the makers of the act intended to remedy. The civilians say *cessante legis proœmio, cessat et ipsa lex;* but English lawyers are aware how seldom the key will unlock the casket; how rarely

[1] In Rex *v.* Pierce, 8 M. & S. 62, 66. And see Trueman *v.* Lambert, 4 M. & S. 234, 239.

[2] And see Bywater *v.* Brandling, 7 B. & C. 643.

[3] Bishop, Con., § 371–373.

[4] Sedgw. Stat. Law, 56; Rex *v.* Sutton, 4 M. & S. 532; Elmondorff *v.* Carmichael, 3 Litt. 472, [14 Am. D. 86;] McReynolds *v.* Smallhouse, 8 Bush, 447, 456; Allison *v.* Louisville, etc. R. R. Co., 10 Bush, 1; Branson *v.* Wirth, 17 Wall. 32, 44. See Reg. *v.* Haughton, 1 Ellis & B. 501; U. S. *v.* Claflin, 97 U. S. 546.

Resolutions of legislature.—As to resolutions of the legislature, see Commissioners *v.* S., 9 Gill, 379; [Lackland *v.* Walker, 151 Mo. 210, 52 S. W. R. 414.]

[5] S. *v.* Beard, Smith (Ind.), 276, 1 Ind. 460; Branson *v.* Wirth, *supra*. See Edinburgh, etc. Ry. Co. *v.* Linlithgow, 3 Macq. H. L. Cas. 691, 704.

[6] Dwar. Stat. (2d ed.) 504.

[7] 4 Inst. 330.

the preamble is found to state, besides the primary occasion of the law, the full views of the proposer of it. A particular mischief is often alluded to; but that is soon lost sight of (*cessat procœmium*), wider objects are embraced and a general remedy is provided. 'It is nothing unusual in acts of parliament,' says Lawrence, J., 'for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.'[1] 'It certainly does appear, from the preamble of the act,' said Lord Ellenborough in the same case, 'as if it were mainly directed against combinations for purposes of mutiny and sedition; but there are words sufficient in the enacting part to satisfy the preamble, and, after dealing with offenses of that description, the act goes on in more extensive terms, and embraces other more general objects; and as there is no word of reference in the latter part (as *such*), I see no reason for restraining the common import of the words used.' 'Sometimes'—it is well expressed in another report[2]—'the legislature having a particular mischief in view, which was the primary object of the statute, merely state that in the preamble, and then go on in the body of the act to provide a remedy for general mischiefs of the same nature, but of different species, neither expressed in the preamble, nor perhaps then in immediate contemplation.'"

III. The Purview and its Subdivisions.

§ 52. Elsewhere.—Something of the subject of this sub-title appears in "Criminal Procedure," where the indictment on statutes is explained.[3] Yet we shall substantially avoid repetition.

Purview defined.—The purview is "that part of an act of the legislature which begins with the words 'Be it enacted,' etc., and ends with the repealing clause."[4] Such is the full meaning; but the term is sometimes employed in a narrower sense,[5] as excluding provisos, exceptions, and the like. Thus Dwarris says: "The parts of statutes are—in a popular, though not

[1] Rex *v.* Marks, 3 East, 157, 165.

[2] Mace *v.* Cammel, Lofft, 783. And see Fellowes *v.* Clay, 4 Q. B. 313, 339.

[3] Crim. Pro., I, § 634 *et seq.*

[4] Bouv. Law Dict., tit. Purview, referring to Cooke (Tenn.), 330; 3 Bibb, 181; [Anderson's Law Dictionary, 848.]

[5] Crim. Pro., I, § 634.

legal, sense — the title, the preamble, the purview or body of the act, clauses, provisos, exceptions."[1]

The parts — are chiefly designated as follows:

§ 53. Clause.— This is a word depending largely for its meaning on the connection in which it is employed.[2] It signifies less than "purview," yet not necessarily less than a sentence viewed grammatically. As, in grammar, the word "clause" denotes a part of a sentence, and qualifying words are required to show the particular part, and how much; so, in legal language, it is believed to indicate a part of a statutory provision; the particular part, and how much, to appear from the context. And, though the term "clause" almost always contemplates some portion of the purview, no reason appears why it may not refer also to a member of the preamble.

§ 54. Interpretation clause.— Not all statutes have an interpretation clause. But of late such a clause has become common, especially in England. Ordinarily it occupies one section, sometimes more; in some it is placed at the beginning, in others at the end. Its effect may be to require a different interpretation from what otherwise would be given the statute,[3] or even to impart a novel signification to particular words;[4] and whatever in this respect it provides, the courts, as a general proposition, to which there are possibly exceptions, are bound to accept.

§ 55. Interpreting this clause.— This clause is not always meant to render the meaning plainer. If commonly it is, it often fails in its object; for, first, it must itself be interpreted; and, secondly, the difficulty of interpreting the main provisions may be greater with the rule it furnishes than without.[5] In general this sort of clause, like other provisions in derogation of the common law,[6] is to be construed strictly;[7] though, on the other hand, it is said not always to be so.[8] Thus,—

Gaming — (*Lottery tickets*).— While the general doctrine requires criminal statutes to be subjected to a strict interpre-

[1] Dwar. Stat. (2d ed.) 500.
[2] Crim. Pro., I, § 634.
[3] Smith *v.* S., 28 Ind. 321; P. *v.* Soto, 49 Cal. 67.
[4] Crim. Pro., I, § 358.
[5] And see Dwar. Stat. (2d ed.) 509; Denman, C. J., in Reg. *v.* Cambridgeshire, 7 A. & E. 480; Meux *v.* Jacobs, Law R. 7 H. L. 481.
[6] *Post*, § 119.
[7] Sedgw. Stat. Law, 59.
[8] Dwar. Stat. (2d ed.) 509.

tation, it is provided in Tennessee,[1] Mississippi,[2] Virginia,[3] and probably in some other states, that those against gaming be remedially construed. But the acts which have thus changed the rule for this class of offenses appear themselves to be taken strictly; for they are not applied to subsequent statutes making designated kinds of gaming felony, all others having before been misdismeanor,[4] nor are they extended to statutes for the suppression of the sale of lottery tickets.[5]

§ 56. Enacting clause.— The words "enacting clause" are not often employed in discussions on the interpretation of statutes. In those relating to the indictment or declaration they are common, and in this view they are considered by the author in another connection.[6] Most frequently they refer to the main body of a statute or some leading provision, excluding its provisos; they may or not include an exception.[7]

§ 57. Proviso.— "A proviso[8] is something engrafted upon a preceding enactment,"[9] generally[10] introduced by the word "provided." It is commonly, in the absence of any contrary indication, construed to affect merely the one paragraph to which it is attached.[11] How it is regarded in pleading we saw in another connection.[12]

[1] McGowan *v.* S., 9 Yerg. 184, 197; Howlett *v.* S., 5 Yerg. 144, 152.

[2] Cain *v.* S., 13 Sm. & M. 456; Seal *v.* S., 13 Sm. & M. 286.

[3] Com. *v.* Chubb, 5 Rand. 715.

[4] McGowan *v.* S., 9 Yerg. 184.

[5] Com. *v.* Chubb, 5 Rand. 715, 722. See Cain *v.* S., *supra;* Seal *v.* S., *supra.*

[6] Crim. Pro., I, §§ 634, 635, and in subsequent sections.

[7] If we should seek an exact definition, it would be by following the language of learned courts in treating of indictments and declarations on statutes. A good illustration would be the opinion in Blasdell *v.* S., 5 Tex. Ap. 263. An abundance of this sort of matter is referred to in Crim. Pro., as above. [Clark's Appeal, 58 Conn. 207, 20 Atl. R. 456.]

[8] Dwar. Stat. (2d ed.) 514; [Chicago *v.* Insurance Co., 126 Ill. 276, 18 N. E. R. 668; Baggaly *v.* Iron Co., 90 Fed. R. 636.]

[9] Gregory's Case, 6 Co. 19*b;* Foster's Case, 11 Co. 56*b;* Rex *v.* Taunton Saint James, 9 B. & C. 831, 836.

[10] Carroll *v.* S., 58 Ala. 396.

[11] Spring *v.* Olney, 78 Ill. 101; Pearce *v.* Bank of Mobile, 33 Ala. 693; *Ex parte* Partington, 6 Q. B. 649, 653; Rex *v.* Newark-upon-Trent, 3 B. & C. 59, 71; Cushing *v.* Worrick, 9 Gray, 382.

Other questions.— Further as to the proviso, see Farmers' Bank *v.* Hale, 59 N. Y. 53; Bank for Savings *v.* The Collector, 3 Wall. 495; Roberts *v.* Yarboro, 41 Tex. 449; Lastro *v.* S., 3 Tex. Ap. 363; Waters *v.* Campbell, 4 Saw. 121; [Walsh *v.* Van Horn, 23 Ill. Ap. 170.]

[12] Crim. Pro., I, §§ 635, 637–639.

§ 58. **Exception.**— An exception is a clause similar to a proviso, and of a like effect on the pleadings,[1] ordinarily introduced by the word "except." It "can only operate where, but for the exception, that which is excepted would have been included in the prior enactment."[2]

§ 59. **Saving clause.**— "A saving in a statute is only an exemption of a special thing out of the general things mentioned."[3] There is no particular rule for its location, or its verbal form; but it is generally near or at the end, commencing, "Nothing in this act shall," etc. Nice questions of interpretation sometimes grow out of this clause,[4] but in pleading it is seldom or never regarded.

§ 60. **Other clauses.**— There are occasionally other clauses, not necessary to be dwelt upon in this connection; as, "an appeal clause, a clause showing to what places the operation of the act shall extend, a clause showing from what date the operation of the act is to commence and how long it shall continue in force."[5]

§ 61. **Marginal notes.**— The marginal notes to the sections, when abstracts of their contents, introduced to facilitate reference, are, in principle, and reasonably also in authority, of no weight in the interpretation if the mere work of an editor.[6] But where they are parts of the authentic record of the statute, and especially where they were in any way attached to the bill during its passage through the legislative body, they may be regarded similarly to the title.[7] And, beyond this, what is in form a marginal note may be a part of the statute itself.[8]

[1] Crim. Pro., I, §§ 635–639; Blasdell v. S., 5 Tex. Ap. 263; Woodward v. S., 5 Tex. Ap. 296; Smith v. S., 5 Tex. Ap. 318; [Gast v. Assessors, 43 La. An. 1004, 10 S. R. 184.]

[2] Dwar. Stat. (2d ed.) 516, referring to Zouch v. Moor, 2 Rol. 274, 280; 14 Vin. Abr., Grants, H. 13, pl. 61. Denied by Campbell, A. G., *arguendo*, 8 B. & A. 641; [Anderson's Law Dictionary, 425.]

[3] Dwar. Stat. (2d ed.) 513, referring to Halliswell v. Bridgewater, 2 Anderson, 190, 192.

[4] See P. v. Gill, 7 Cal. 356; Cochran v. Taylor, 13 Ohio St. 382; Downs v. Huntington, 35 Conn. 588.

[5] Dwar. Stat. (2d ed.) 512.

[6] Claydon v. Green, Law R. 3 C. P. 511, 521, 522. See Attorney-General v. Great Eastern Ry. Co., 11 Ch. D. 449, 465; Birtwhistle v. Vardill, 7 Cl. & F. 895, 920.

[7] *In re* Venour's Settled Estates, 2 Ch. D. 522, 525.

[8] Rex v. Milverton, 5 A. & E. 841, 854.

IV. The Precedence of Provisions.

§ 62. Construed together.— In another connection we shall see that, though there are on a subject various statutes passed at different dates, all should be construed together as parts of one whole.[1] *A fortiori*, therefore, should all the clauses and sections of each separate statute. And,—

Purview to prevail.— We have already seen that, in a case of conflict between the purview and the title or preamble, the former is to prevail.[2] But how is it where the parts of the purview cannot be reconciled?

§ 63. Conflicts in purview, on principle.— When all the statutes of a given parliament appeared in the rolls without dates, and all were referred to the day of its original assembling,[3] the fact was still known that they were enacted at different times. And the presumption was, and it was reasonable, that each successive clause came subsequently to the one next preceding it; so that, in a case of irreconcilable conflict, the later took precedence of the earlier. With us, and in England, in modern times, the several parts of each particular statute are enacted simultaneously, and they appear so by the legislative records. So, in reason, there is no room for the former presumption; and the rule now ought to be that the location of a clause in the purview is immaterial; and, if two clauses are irreconcilably repugnant, this may vitiate the whole, or the part to which the clauses relate,[4] or the one or the other may be made to give way, according to the nature of the case; the particular locality of the clauses not being an element in the account. Let us, however, look a little at what has been laid down.

§ 64. Parts controlling one another.— It is common doctrine, never questioned, that, for the purpose of interpretation, all the parts of a statute are to be looked at together, and one part may control another. If possible, they are to be reconciled.[5] Thus,—

General and particular.—Where there are words expressive of a general intention, and then of a particular intention incompatible with it, the particular must be taken as an excep-

[1] *Post*, §§ 82, 86 *et seq.*
[2] *Ante*, §§ 46, 48, 49.
[3] *Ante*, § 44. And see *ante*, § 28.
[4] *Ante*, § 41.
[5] Ebbs *v.* Boulnois, Law R. 10 Ch. Ap. 479, 484; Gye *v.* Felton, 4 Taunt. 876; Scott *v.* S., 22 Ark. 369.

tion to the general, and so all the parts of the act will stand.[1] And, as a broad proposition, general words in one clause may be restrained by the particular words in a subsequent clause of the same statute.[2] This doctrine applies even to statutes enacted at different dates, and it will be more fully illustrated in other connections.[3] Again,—

In harmony with other laws.— If still conflicting clauses are reconcilable, the one will be preferred which best harmonizes with the other laws and with the justice of the case.[4]

§ 65. Irreconcilable.— There are assumed to be cases which will baffle all attempts at reconciling the repugnant parts. For such the doctrine is laid down that what is last in the order of the words shall nullify the irreconcilable matter before.[5] Further as to which,—

Proviso and saving clause.— A proviso directly contrary to the purview has, on this distinction, been permitted to stand to the overturning of the purview; "because it speaks the later intention of the legislature."[6] We have seen[7] that this reason, however good at one time in England, is not so now; consequently the result derived from it is not good. Generally a saving clause is located after the main purview,[8] so in this sense is the last expression of the legislative will, but it has been adjudged to give way to the purview in a case of irreconcilable conflict.[9] Kent points out that the distinction between the saving clause and the proviso has no just foundation, and observes: "The true principle undoubtedly is, that the sound

[1] Stockett *v.* Bird, 18 Md. 484; Churchill *v.* Crease, 5 Bing. 177, 180; [Waddill *v.* Com'rs, 84 Ky. 276, 1 S. W. R. 480; Chicago, M. & St. P. Ry. Co. *v.* U. S., 127 U. S. 406.]

[2] Covington *v.* McNickle, 18 B. Monr. 262; Long *v.* Culp, 14 Kan. 412; [U. S. *v.* Garretson, 42 Fed. R. 22; Marquis *v.* Chicago, 27 Ill. Ap. 251; St. Joseph *v.* Porter, 29 Mo. Ap. 605.]

[3] See *post*, §§ 112*a*, 112*b*, 126, 131, 152, 156.

[4] Kansas Pacific Ry. Co. *v.* Wyandotte, 16 Kan. 587; [Leavitt *v.* Loverin, 64 N. H. 607, 1 L. R. A. 58, 15 Atl. R. 414; Turnpike *v.* Fletcher, 104 Ind. 97.]

[5] Packer *v.* Sunbury & Erie R. R. Co., 19 Pa. St. 211, 219; Ryan *v.* S., 5 Neb. 276; Gibbons *v.* Brittenum, 56 Miss. 232; [Albertson *v.* S., 9 Neb. 429; Branagan *v.* Dulaney, 8 Colo. 408; Com'rs *v.* Brenock, 18 Ill. Ap. 559.]

[6] Townsend *v.* Brown, 4 Zab. 80, 86; Atty. Gen. *v.* Chelsea Water-works, Fitzg. 195; Farmers' Bank *v.* Hale, 59 N. Y. 53.

[7] *Ante*, § 63.

[8] *Ante*, § 59.

[9] Washingham's Case, 2 Plow. 565; Wood's Case, 1 Co. 40*a*, 47*a*. See Yarmouth *v.* Simmons, 10 Ch. D. 518.

interpretation and meaning of the statute, on a view of the enacting clause, saving clause and proviso, taken and construed together, are to prevail."[1] Now, following these views, and considering the particular natures of saving clauses and provisos, we shall practically find that, since a saving clause "is only an exemption of a special thing out of the general things mentioned" in the purview,[2] if it stands, and the purview is rejected, the whole statute is destroyed, not even the saving clause itself being of any effect. Hence, necessarily it must yield to the purview. But a proviso is somewhat different;[3] and, under various circumstances, it may prevail over the purview without working the destruction of the entire enactment. When this is so, the question of precedence cannot be one of rule, but it must depend on considerations special to the individual case.

V. The Division of a Statute into Sections.

§ 66. Origin of sections.— There are no sections in the parliamentary rolls either of the ancient or of the comparatively modern English enactments.[4] But it is provided by 13 and 14 Vict., ch. 21, § 2, "that all acts shall be divided into sections," etc. Before this, the English sectioning seems to have been simply the work of editors. Generally, with us, bills of sufficient length have been drawn in sections, and in this form enacted. Still,—

§ 67. Effect.— While plainly, where the division is only made by an editor, it can have no effect on the interpretation,[5] it is believed not to be greatly different where it is the work of the draughtsman, and is retained in the statute as passed. In other connections[6] and from various cases[7] we see that, while our courts sometimes speak of the sections as though the distinction had something to do with the interpretation, at other times nothing is perceptible from which such inference could be drawn. On the whole, little depends on this matter, beyond mere convenience of citation.

[1] 1 Kent, Com. 463, and note.

[2] *Ante*, § 59.

[3] *Ante*, § 57.

[4] Wells *v.* Iggulden, 3 B. & C. 186, 189; Rex *v.* Threlkeld, 4 B. & Ad. 229, 235, 236.

[5] Rex *v.* Threlkeld, 4 B. & Ad. 229, 235, 236; Rex *v.* Newark-upon-Trent, 3 B. & C. 59, 63.

[6] *Post*, § 251; Crim. Pro., I, § 639, and note.

[7] As, see Long *v.* Culp, 14 Kan. 412; Thompson *v.* Bulson, 78 Ill. 277; S. *v.* Williams, 8 Tex. 255; Gibbons *v.* Brittenum, 56 Miss. 232; S. *v.* Walters, 64 Ind. 226; Fowler *v.* Pirkins, 77 Ill. 271.

BOOK II.

THE INTERPRETATION OF WRITTEN LAWS ABSOLUTE AND WITH THE UNWRITTEN.

CHAPTER VIII.

THE PURPOSE AND MEANS OF INTERPRETATION.

§ 68, 69. Introduction.
70–73. What interpretation seeks.
74–77. Into what interpreter looks.

§ 68. Scope of this series of chapters.— In the chapters constituting the present Book, we shall call to mind those universal doctrines of interpretation which it is necessary for every lawyer to understand, whatever may be his special department. If some of them appear more particularly applicable to civil causes and others to criminal, still all to be here given of each class are essential to a proper apprehension of those of the other class.

§ 69. How this chapter divided.—We shall consider, I. What it is that interpretation seeks; II. Into what, besides the written words, the interpreter looks.

I. What it is that Interpretation Seeks.

§ 70. Meaning of maker.— Laws are expounded and enforced, not made, by the courts. The makers are entitled to have their real meaning, if it can be ascertained, carried out. Hence the primary object of all rules for interpreting statutes is to ascertain the legislative intent;[1] or, exactly, the meaning

[1] Wilkinson *v.* Leland, 2 Pet. 627, 662; Brown *v.* Thorndike, 15 Pick. 388, 402; Winslow *v.* Kimball, 25 Me. 493; Riddick *v.* Governor, 1 Mo. 147; Beall *v.* Harwood, 2 Har. & J. 167, [3 Am. D. 532;] The Sussex Peerage, 11 Cl. & F. 85, 143; Bidwell *v.* Whitaker, 1 Mich. 469; Ogden *v.* Strong, 2 Paine, 584; Crocker *v.* Crane, 21 Wend. 211, [34 Am. D. 228;] Kilby Bank, Petitioner, 23 Pick. 93; Opinion of the Justices, 22 Pick. 571; Si-

which the subject is authorized to understand the legislature intended.[1] Hence, also,—

Personal views of judges.— If the courts can ascertain the legislative meaning, their duty is to give it effect, whatever may be the personal opinions of the incumbents of the bench on the policy of the law.[2]

§ 71. Interpretation indispensable.— Were the courts not to interpret the laws, they could not administer them. For, in the words of Lord Chief Justice Eyre, "let the proposition in an act of parliament be what it may, more or less distinct, it is always a question of law what is the meaning and the true import of that act of parliament, and whether any case of fact that can be stated is a case that comes within the meaning of that act of parliament. . . . No distinction can be taken in this case, because it happens that the description of the offense in the statute . . is comprised in two or three words; the law may be clearer upon that account; but the rule of construc-

monds *v.* Powers, 28 Vt. 354; McIntyre *v.* Ingraham, 35 Miss. 25; Riddick *v.* Walsh, 15 Mo. 519; Ingraham *v.* Speed, 30 Miss. 410; P. *v.* Dana, 22 Cal. 11; Parkinson *v.* S., 14 Md. 184, [74 Am. D. 522;] P. *v.* Potter, 47 N. Y. 375; Smith *v.* P., 47 N. Y. 330; P. *v.* Weston, 3 Neb. 312; Jones *v.* S., 1 Kan. 273; U. S. *v.* Athens Armory, 2 Abb. (U. S.) 129, 137; Albrecht *v.* S., 8 Tex. Ap. 313; S. *v.* Blair, 32 Ind. 313; George *v.* Board of Education, 33 Ga. 344; Emporia *v.* Norton, 16 Kan. 236; Dwar. Stat. (2d ed.) 556; [Reynolds *v.* Holland, 35 Ark. 56; S. *v.* Mack, 23 Nev. 367; *In re* Salisbury, 44 N. Y. Sup. 291; Edwards *v.* Morton (Tex.), 46 S. W. R. 792; Rose *v.* Wortham, 95 Tenn. 505, 32 S. W. R. 458; Turcott *v.* R. R. Co., 101 Tenn. 106; Bonds *v.* Greer, 56 Miss. 710; S. *v.* Hostetter, 137 Mo. 636; S. *v.* Slover, 126 Mo. 652, 29 S. W. R. 718; Lamb *v.* Dunwoody, 94 Ga. 58, 20 S. E. R. 637; S. *v.* Ross, 20 Nev. 61, 14 Pac. R. 827; Roland Park *v.* S., 80 Md. 448, 31 Atl. R. 298; Bixby *v.* Mayor, 61 Hun, 496, 16 N. Y. Sup. 364: *In re* Board, 62 Hun, 499, 16 N. Y. Sup. 894; Williams *v.* Com., 78 Ky. 93; Wheeler *v.* Wheeler, 134 Ill. 530, 25 N. E. R. 588; Soby *v.* P., 134 Ill. 71, 25 N. E. R. 109; P. *v.* Blackwelder, 21 Ill. Ap. 254; Hogg *v.* P., 15 Ill. Ap. 288; Shonkweiler *v.* Stewart, 104 Iowa, 67.]

[1] And see Manuel *v.* Manuel, 13 Ohio St. 458; Johnson *v.* Hudson River R. R. Co., 49 N. Y. 455; P. *v.* Schoonmaker, 63 Barb. 44, 49; Barker *v.* Esty, 19 Vt. 131; S. *v.* King, 44 Mo. 283; Cearfoss *v.* S., 42 Md. 403; Maxwell *v.* S., 40 Md. 273; Horton *v.* Mobile, 43 Ala. 598, 604.

[2] *Post*, § 235; 1 Bishop, Mar., Div. & S., §§ 45, 46; S. *v.* Clarke, 54 Mo. 17, [14 Am. R. 471;] Horton *v.* Mobile, 43 Ala. 598, 604. In Pray *v.* Edie, 1 T. R. 313, 314, Lord Mansfield said: "Whatever doubts I may have in my own breast with respect to the policy and expedience of this law, yet, as long as it continues in force, I am bound to see it executed according to its meaning." [Com. *v.* Shopp, 1 Woodw. 129; Aultman *v.* Daggs, 50 Mo. Ap. 280; S. *v.* Willott, 54 Mo. Ap. 310; Smith *v.* Bowman, 41 Ohio St. 37; Thompson *v.* Buckley, 1 Tex. 85.]

tion, with reference to the question whether it should be taken to be the construction of law, a mere matter of fact, is exactly the same."[1] Still,—

§ 72. Limit of interpretation — (Meaning plain).— Like everything else, interpretation has its limits, beyond which it cannot legitimately go.[2] Where the legislative meaning is plain, there is not only no occasion for rules to aid the interpretation, but it is contrary to the rules to employ them. The judges have simply to enforce the statute according to its obvious terms.[3] Yet —

§ 73. Importance of rules.— There are large classes of cases dependent even upon technical rules of interpretation. And there are others, not quite like these, wherein still the rules are very helpful. Every statute is presumed to have been penned and enacted by persons familiar with them;[4] so that, without a

[1] Horne Tooke's Case, 25 How. St. Tr. 1, 726; *post*, § 116.

[2] *Post*, § 81.

[3] Douglass *v.* Chosen Freeholders, 9 Vroom, 214; Hyatt *v.* Taylor, 42 N. Y. 258, 260; Sussex Peerage Case, 11 Cl. & F. 85, 143; Benton *v.* Wickwire, 54 N. Y. 226; Rosenplaenter *v.* Roesale, 54 N. Y. 262; Woodbury *v.* Berry, 18 Ohio St. 456; Burgett *v.* Burgett, 1 Ohio, 469, 477, [13 Am. D. 634]; Procureur *v.* Bruneau, Law Rep. 1 P. C. 169, 191; Bosley *v.* Mattingly, 14 B. Monr. 89; Ezekiel *v.* Dixon, 3 Kelly, 146; Farrel Foundry *v.* Dart, 26 Conn. 376; Swift *v.* Luce, 27 Me. 285; U. S. *v.* Ragsdale, Hemp. 497; [Reese *v.* S., 73 Ala. 19; Bartlett *v.* Morris, 9 Port. (Ala.) 266; McGowan *v.* Insurance Co., 60 N. J. L. 200; Whiting *v.* Mastin, 62 Mo. Ap. 647; Rex *v.* Banbury, 1 A. & E. 142; Case *v.* Wildridge, 4 Ind. 51; S. *v.* Liedtke, 9 Neb. 469, 4 N. W. R. 61; Fitzpatrick *v.* Gebhart, 7 Kan. 35; Lake Co. *v.* Rollins, 130 U. S. 671, 32 L. ed. 1060; U. S. *v.* Fisher, 2 Cranch, 358; Bate Co. *v.* Sulzburger, 157 U. S. 1, 39 L. ed. 601; Choctaw R. R. Co. *v.* Alexander (Okl.), 54 Pac. R. 421; *In re* Manning, 71 Hun, 236, 24 N. Y. Sup. 1039; Bank *v.* Colgate, 120 N. Y. 394, 24 N. E. R. 799; Brown *v.* R. R. Co., 44 L. R. A. 579, 102 Wis. 137; Ayers *v.* Commission, 37 Kan. 240; W. U. Tel. Co. *v.* Hewitt, 4 Mackey (D. C.), 424; Smith *v.* S., 66 Md. 215, 7 Atl. R. 49. *A verbis legis non est recedendum.* Macon R. R. Co. *v.* R. R. Co., 86 Ga. 85. The duty of the court in such cases is to say "*ita lex scripta*," and obey it. Miller *v.* Childress, 2 Humph. (Tenn.) 320. It is not allowable to interpret that which has no need of interpretation. Vattel, § 263. In recent times courts are less disposed than formerly to depart from or qualify the plain words of a statute in favor of what is termed an equitable construction. Karst *v.* Gane, 136 N. Y. 316, 32 N. E. R. 1073. *Cf.* also Selden *v.* Hall, 21 Mo. Ap. 452; Smith *v.* S., 66 Md. 215, 7 Atl. R. 49; Ayers *v.* Trego, 37 Kan. 240, 15 Pac. R. 229; Ohio R. R. Co. *v.* P., 123 Ill. 467, 14 N. E. R. 874; Martin *v.* Swift, 120 Ill. 488, 12 N. E. R. 201. A departure from the language of an ambiguous statute is an exercise of legislative power. Newell *v.* Muxlow, 115 N. Y. 170, 21 N. E. R. 1048.]

[4] *Post*, § 74.

knowledge of these rules, no one can intelligently practice or administer the laws.

II. Into What, Besides the Written Words, the Interpreter Looks.

§ 74. Judicial cognizance.— Obviously, in reason, a court in construing a statute is not required to stultify itself; but it may take into the account any pertinent matter whereof it has judicial cognizance.[1] Hence, among other things,—

Rules of interpretation.— Knowing the rules of interpretation, it presumes that the legislature also understood them; and, omitting to prescribe other rules, intended the courts should follow them.[2] Then,—

§ 75. In position of legislature.— The court should put itself in the position of the legislature,— stand, in contemplating the statute, where the maker of it stood,[3] — the better to discern the reason and scope of the provision. They who voted for the measure must have had in mind a meaning for the enacted words; and the meaning, thus perceived, must be given them by the court.[4] Thus,—

Time.— If the statute is old, or if it is modern, the court should transport itself back to the time when it was framed, consider the condition of things then existing, and give it the meanings which the language as then used, and the other considerations, require.[5] Again,—

Prior law.— The court, knowing the present law, knows also its history, and the prior law Such prior law the legis-

[1] See S. *v.* Nicholls, 30 La. An. 980; Fretwell *v.* Troy, 18 Kan. 271; Keyport, etc. Steamboat Co. *v.* Farmers' Trans. Co., 3 C. E. Green, 13; P. *v.* Schoonmaker, 63 Barb. 44. For a synopsis of what a court takes judicial notice of, see 1 Greenl. Ev., §§ 4–6.

[2] Com. *v.* Churchill, 2 Met. 118, 124; S. *v.* Brooks, 4 Conn. 446. [Rules of construction are the law itself, and it is presumed that when the legislature intends to change the rules of construction, it will do so. Sydnor *v.* Chambers, Dall. (Tex.) 605. Whenever a statute affects a contract, not only the statute itself, but the legal construction by the courts, enter into and form a part of the contract. Smith *v.* Elliott, 39 Tex. 211.]

[3] *Ante*, § 50.

[4] *Ante*, § 70.

[5] McWilliam *v.* Adams, 1 Macq. Ap. Cas. 120; Montrose Peerage, 1 Macq. Ap. Cas. 401; Keyport, etc. Steamboat Co. *v.* Farmers' Trans. Co., 3 C. E. Green, 13; U. S. *v.* Union Pacific R. R. Co., 91 U. S. 72, 79; Logan *v.* Courtown, 13 Beav. 22; [Holy Church *v.* U. S., 143 U. S. 463, 36 L. ed. 226; Clyde Trustees *v.* Laird, 8 App. Cas. 673; Smith *v.* Lindo, 4 C. B. (N. S.) 395.

lature, being presumed to know it, must have had in mind in enacting the statute, therefore in the construction the court should take it into the account.[1] And this is, in general, specially essential.[2]

§ 76. Motives and intent.— The individual motives and purposes of the legislators are not judicially known, nor is the court permitted to ascertain them from any private source, nor are they to be regarded in the interpretation. But the court may and should look into so much of the intent of the act as is discoverable from its words, and from the permissible surroundings.[3] Among the surroundings are —

Legislative opinions.— How far opinions promulgated in connection with the making of a statute are to be regarded in its interpretation is an inquiry more easily answered on principle than on authority. Practical obscurities arise from the fact that commonly there are two dissimilar aspects from which such opinions are to be viewed. Courts properly look into legal treatises, whose only weight consists in their citation of authorities and the learning of their authors.[4] In like manner, they sometimes give attention to opinions of learned lawyers in the various other ways expressed.[5] In this aspect, it is evi-

[1] Reg. *v.* Watford, 9 Q. B. 626, 635; Jones *v.* Brown, 2 Exch. 329, 332; Kellock's Case, Law R. 3 Ch. Ap. 769, 781; O'Byrnes *v.* S., 51 Ala. 25; Cota *v.* Ross, 66 Me. 161; S. *v.* Brewer, 22 La. An. 273; Converse *v.* U. S., 21 How. (U. S.) 463; Noble *v.* S., 1 Greene (Iowa), 325; [*Ex parte* Kent County, 60 L. J. Q. B. 435. Where the legislature has introduced words upon which a case has been decided, they must be taken to have known the interpretation that had been put on them in that case. Clark *v.* Welland, 52 L. J. Q. B. 321. It is the safe and well-known rule that if an act of parliament uses the same language which was used in a former act of parliament referring to the same subject and passed for the same purpose, we may assume that parliament is acquainted with and uses those words in their adjudged sense. Greaves *v.* Tofield, 14 Ch. D. 563, 571. Where an amendment avoids using the old language, a change of meaning is presumed. U. S. *v.* Bashaw, 50 Fed. R. 749. Motives of legislature are immaterial. Parker *v.* S., 31 N. E. R. 1114, 132 Ind. 419.]

[2] 2 Inst. 308, 309; Fellowes *v.* Clay, 4 Q. B. 313, 326.

[3] *Ante*, § 38; Barker *v.* Esty, 19 Vt. 131; U. S. *v.* Union Pacific R. R. Co., 91 U. S. 72, 79; S. *v.* Paterson, 6 Vroom, 196; Tynan *v.* Walker, 35 Cal. 634, [95 Am. D. 152;] S. *v.* King, 12 La. An. 593; P. *v.* Schoonmaker, 63 Barb. 44; Parkinson *v.* S., 14 Md. 184, [74 Am. D. 522;] P. *v.* Essex, 70 N. Y. 228; Gas Co. *v.* Wheeling, 8 W. Va. 320; Jones *v.* S., 1 Kan. 273; U. S. *v.* Athens Armory, 2 Abb. (U. S.) 129, 137.

[4] Bishop, First Book, §§ 202–205.

[5] Id., § 449; P. *v.* Liscomb, 60 N. Y. 559, 580.

dently proper for them to look, if they choose, into discussions by lawyers in the legislative body, the views of the draughtsman of a bill, of the revisers of statutes, and of the legislature passing an act. As authority, this sort of matter is not admissible. As opinion to persuade, it varies with the particular circumstances.[1] *A fortiori*, the opinion of a subsequent legislature is entitled to no more consideration than that of any other men of equal numbers and intelligence.[2]

§ 77. Compared with private writings — (Contract). — The doctrine as to private writings — for example, contracts — seems applicable also to this question of the statutes. Evidence of parol declarations, made by the parties at the time when a contract was entered into, is not admissible in explanation of its meaning.[3] Therefore the like declarations, uttered in the legislative body, are not, except as explained in the last paragraph, receivable on a question of the interpretation of a statute. Now,—

Doctrine summarized — (Legislative doings, journals, etc.). — Excepting as thus explained, and inquiring for what may control the interpretation, the rule of law is distinct, that the courts cannot resort to the opinions of the individual legislators, the legislative journals, the reports of committees, or the speeches made at the time an act was passed;[4] their sole guide being the

[1] Keyport, etc. Steamboat Co. *v.* Farmers' Trans. Co., 3 C. E. Green, 13; Leese *v.* Clark, 20 Cal. 387; S. *v.* Nicholls, 30 La. An. 980. And see cases cited to the next section.

[2] Bingham *v.* Winona, 8 Minn. 441.

[3] Bishop, Con., § 169; 1 Greenl. Ev., § 275.

[4] Reg. *v.* Whittaker, 2 Car. & K. 636, 640; Bank of Pennsylvania *v.* Com., 19 Pa. St. 144; Southwark Bank *v.* Com., 26 Pa. St. 446; Aldridge *v.* Williams, 3 How. (U. S.) 9, 24; Ratcliff *v.* Ratcliff, 1 Swab. & T. 467, 470; Coleman *v.* Dobbins, 8 Ind. 156. [Opinion of draftsman as to meaning cannot be taken into consideration. Richmond *v.* County, 2 S. E. R. 21, 83 Va. 204. Where punctuation is important courts will look at the enrolled bill. Ward *v.* Beale, 91 Ky. 60, 14 S. W. R. 967. In construing statutes the language of the debates cannot be much, if at all, regarded. Bernier *v.* Bernier, 72 Mich. 43, 40 N. W. R. 50; Cumberland *v.* Boyd, 113 Pa. St. 52, 4 Atl. R. 346; U. S. *v.* Association, 166 U. S. 290, 41 L. ed. 1007; Bate *v.* Sulzburger, 157 U. S. 42, 39 L. ed. 601; U. S. *v.* R. R. Co., 57 Fed. R. 426. While the court cannot recur to views expressed by individual members in debate, yet they may, perhaps, advert to statements made by such members as a part of the history of the times and for the purpose of refutation. U. S. *v.* Wilson, 58 Fed. R. 768.]

language,[1] illumined simply as already shown.[2] They do not close their eyes to what they know of the history of the country and of the law, of the condition of the law at the particular time, of the public necessities felt, and other like things.[3] For a summary of the doctrine as held in England,[4] the reader is re-

[1] "Intention of the legislature apparent upon its face," that is, face of the act. Wilkinson *v.* Leland, 2 Pet. 627, 662; P. *v.* Utica Ins. Co., 15 Johns. 358, 380, [8 Am. D. 243;] Barnes *v.* Mobile, 19 Ala. 707; The Paulina *v.* U. S., 7 Cranch, 52.

[2] Story, Const., § 406; Horton *v.* Mobile, 43 Ala. 598, 604.

[3] Rex *v.* Hodnett, 1 T. R. 96; Sibley *v.* Smith, 2 Mich. 486; Henry *v.* Tilson, 17 Vt. 479; U. S. *v.* Union Pac. R. R. Co., 91 U. S. 72, 79; Greer *v.* S., 54 Miss. 378. [A statute should be construed with reference to the business habits prevalent among those to whom it applies. Higgins *v.* Rinker, 47 Tex. 401. *Cf.* also Parvin *v.* Wimberg, 130 Ind. 561, 30 N. E. R. 790; Storm *v.* Stevens, 104 Ind. 46, 3 N. E. R. 401; Board *v.* Board, 128 Ind. 295, 27 N. E. R. 133; Caldwell *v.* Ward, 83 Mich. 13, 46 N. W. R. 1024; *In re* Opinion Justices, 66 N. H. 629, 33 Atl. R. 1076; Garland *v.* Board, 87 Ala. 223, 6 S. R. 402; Com. *v.* Munson, 127 Mass. 461; Holy Church *v.* U. S., 143 U. S. 463, 36 L. ed. 226. When a statute is obscure the history and purpose of its enactment may be considered. Funk *v.* R. R. Co., 61 Minn. 435. The court will resort in the interpretation of statutes to the common knowledge of the public at large of conditions which led to its adoption, but will not resort to extraneous conditions to defeat the act, unless where personal liberty is involved or private property is sacrificed. P. *v.* Sturges, 156 N. Y. 580, 51 N. E. R. 295. In construing a statute, especially where, like the interstate commerce law, it is in the nature of experimental legislation, the courts will take notice of the history of the legislation, and, out of possible constructions, select and apply the one that best comports with the genius of our institutions, and may therefore be supposed to have been the construction intended by the legislature. T. & P. R. R. Co. *v.* Com., 162 U. S. 197, 40 L. ed. 940. The fact that a specified circular was mailed to the members of the legislature cannot be considered. Browne *v.* Turner, 174 Mass. 150. *Cf.* also *Re* Bresdin, 45 Hun, 210; S. *v.* Underground Co., 46 N. J. Eq. 270, 18 Atl. R. 581; Smith *v.* Townsend, 148 U. S. 490, 37 L. ed. 533; Lane *v.* Kolb, 92 Ala. 636, 9 S. R. 873; Western R. R. Co. *v.* S. (Ga.), 14 L. R. A. 438; *In re* Schilling, 53 Fed. R. 81. Where the statements in the *errata* prefixed to the statutes do not agree with the enrolled bill, the courts will examine and be guided by the latter. Ollis *v.* Kirkpatrick, 2 Idaho, 976, 28 Pac. R. 435.]

[4] Wilberforce (Stat. Law, 105–107) says: "If a statute is not clearly worded, its parliamentary history is 'wisely inadmissible' to explain it. Reg. *v.* Hertford College, 3 Q. B. D. 693, 707. The court cannot consider what was the intention of the member of parliament by whom any measure was introduced. See McMaster *v.* Lomax, 2 Myl. & K. 32; Cameron *v.* Cameron, 2 Myl. & K. 289. It cannot look at the reports of commissions which preceded the passing of statutes, and upon which those statutes were founded. Thus it was held that the reports and recommendations of the real property commissioners, Salkeld *v.* Johnson, 2 C. B. 749, 756, per Tindal, C. J.;

ferred to the note. It would seem to be, at least, equally strict there as with us.

Farley *v.* Bonham, 2 Johns. & H. 177, 30 Law J. Ch. 239, of the ecclesiastical commissioners, *In re* Dean of York, 2 Q. B. 1, 34, of the common law, Martin *v.* Hemming, 24 Law J. Exch. 3, 5, 18 Jur. 1002, 1004; Arding *v.* Bonner, 2 Jur. (N. S.) 763, 764, and of the chancery, Ewart *v.* Williams, 3 Drewry, 21, 24, commissioners were not legitimate guides to the construction of statutes. So, too, the plans and sections of intended lines of railway, or of other works which are exhibited during the passage of bills through parliament, are not, unless they are incorporated by reference in the acts when passed, to be regarded in their construction. North British Ry. Co. *v.* Tod, 12 Cl. & F. 722; Reg. *v.* Caledonia Ry. Co., 16 Q. B. 19; Beardmer *v.* London, etc. Ry. Co., 1 Macn. & G. 112, 1 Hall & T. 161; Attorney-General *v.* Great Eastern Ry. Co., Law Rep. 7 Ch. Ap. 475, Law Rep. 6 H. L. 367; Edinburgh Street Tramways *v.* Black, Law Rep. 2 Sc. Ap. 336; Ware *v.* Regent's Canal, 3 De G. & J. Ch. 212, 28 Law J. Ch. 153; Reg. *v.* Wycombe Ry. Co., Law Rep. 2 Q. B. 310, 321, 322. The court cannot look at the history of a clause, or of the introduction of a proviso, Barbat *v.* Allen, 7 Exch. 609, 616; Reg. *v.* Capel, 12 A. & E. 382, 411, nor at debates in parliament, Reg. *v.* Whittaker, 2 Car. & K. 636, 640; Gorham *v.* Bishop of Exeter, 5 Exch. 630, 667, nor at amendments and alterations made in committee, Donegall *v.* Layard, 8 H. L. Cas. 460, 465, 472, 473; Attorney-General *v.* Sillem, 2 H. & C. 431, 521, 522, nor at the principles which govern houses of parliament in passing private bills, Rex *v.* London Dock, 5 A. & E. 163, 175." [There are now, both in England and in each of the United States, laws governing statutory interpretation, more or less extensive. They are so large in bulk as to prevent their summarization here, which indeed would be of doubtful utility; for these the reader must consult his own statute books.]

CHAPTER IX.

SOME LEADING RULES OF INTERPRETATION EPITOMIZED.

§ 78. Here—Elsewhere.—For the convenience of the reader, the more common rules of interpretation will be collected into this chapter in a condensed form. Such of them as require, not all, will be further explained in subsequent chapters. And various rules, not mentioned here, will be brought to view further on.

Punctuation.— The statutes in England are not punctuated in the original rolls;[1] but more or less marks of punctuation appear in them as printed by authority. With us, the punctuation is the work of the draftsman, the engrosser, or the printer. In the legislative body, the bill is *read;* so that the ear, not the eye, takes cognizance of it. Therefore the punctuation is not, in either country, of controlling effect in the interpretation.[2] Still a judge cannot avoid seeing the marks, and they seem to have been permitted to turn the scale in an evenly balanced case.[3]

[1] Barrow *v.* Wadkin, 24 Beav. 327.

[2] Barrow *v.* Wadkin, *supra;* Shriedley *v.* S., 23 Ohio St. 130, 140; Cushing *v.* Worrick, 9 Gray, 382, 385; U. S. *v.* Isham, 17 Wall. 496, 502.

So **quotation marks,**— in an indictment, used in setting out the copy of an instrument relied on, were held not to show that the tenor, rather than the purport, was intended. Forbes, J., observed: "The practice in arraignments is to read the indictment to the prisoner, and then to receive his plea. His knowledge of the charge against him is derived ordinarily from hearing the indictment read, and not from the inspection of it. But these indications of the meaning of the pleader are addressed to the eye: they are not perceptible to the ear," etc. Com. *v.* Wright, 1 Cush. 46, 65. [For a valuable monograph on punctuation, see 45 Cent. L. J. 229; Union Co. *v.* Lynch, 18 Utah, 378, 55 Pac. R. 639; Brown *v.* Turner, 174 Mass. 150; Tyrrell *v.* N. Y., 159 N. Y. 239; Stiles *v.* Guthrie, 3 Okl. 26, 41 Pac. R. 383; Murray *v.* S., 21 Tex. Ap. 620, 1 S. W. R. 522; Albright *v.* Payne, 43 Ohio St. 8, 1 N. E. R. 16; Archer *v.* Ellison, 28 S. C. 238, 5 S. E. R. 713; U. S. *v.* Lacher, 134 U. S. 624, 33 L. ed. 1080; Martin *v.* Gleason, 139 Mass. 183, 29 N. E. R. 664; Baker *v.* Payne, 22 Oreg. 335, 29 Pac. R. 787; Manger *v.* Board (Md.), 45 Atl. R. 891; Cook *v.* S., 110 Ala. 40; Ford *v.* Delta Co., 164 U. S. 662, 41 L. ed. 1095; Ward *v.* Beale, 91 Ky. 60, 14 S. W. R. 967; Gwathmey *v.* Clisby, 31 Fed. R. 220.]

[3] Cummings *v.* Akron Cement, etc.

§ 79. **Clerical errors.**— As in an indictment,[1] so in a statute, clerical errors do not avoid what to the common understanding is plain. If the true reading is evident, and the meaning is, notwithstanding the errors, certain, the statute stands, and is to be interpreted as though they were corrected.[2] Still this doctrine cannot be carried to all lengths; but,—

§ 80. **To be accepted as enacted.**— Except as thus pointed out, a statute must be taken to be what the authoritative record makes it.[3] We cannot, to bring it to our views, import into it words not used by the law-makers;[4] or control it, when unambiguous, though we think it is not what it should be;[5] and, in those cases in which we may bend the meaning of particular words and phrases to the general intent or the like, there is a degree beyond which the process cannot be carried.[6] The degree differs with the circumstances; and to ascertain both is a leading object of these chapters on interpretation. Again,—

§ 81. **False grammar.**—Like an indictment,[7] a statute is not rendered inoperative by false grammar,[8] and inelegancies and impurities of expression. For example,—

Co., 6 Blatch. 509, 511; U. S. *v.* Three Railroad Cars, 1 Abb. (U. S.) 196; Randolph *v.* Bayue, 44 Cal. 366; Morrill *v.* S., 38 Wis. 428. [20 Am. R. 12.]

[1] Crim. Pro., I, § 357.

[2] See, and compare, Moody *v.* Stephenson, 1 Minn. 401; Stoneman *v.* Whaley, 9 Iowa, 390; Bostick *v.* S., 34 Ala. 266; Gardner *v.* S., 25 Md. 146; Nazro *v.* Merchants' Mutual Insurance Co., 14 Wis. 295; Sparrow *v.* Davidson College, 77 N. C. 35; Tollett *v.* Thomas, Law Rep. 6 Q. B. 514, 518; Graham *v.* Charlotte, etc. R. R. Co., 64 N. C. 631; Rolland *v.* Com., 82 Pa. St. 306, 326, [22 Am. R. 758;] Angell *v.* Angell, 9 Q. B. 328, 360; Haney *v.* S., 34 Ark. 263; Turner *v.* S., 40 Ala. 21; Lindsley *v.* Williams, 5 C. E. Green, 93; [Landrum *v.* Flannigan, 60 Kan. 436; Paxton *v.* Farmers Co., 45 Neb. 884, 64 N. W. R. 343; Hooper *v.* Birchfield, 115 Ala. 226; Hutchings *v.* Bank (Va. Ap.), 20 S. E. R. 950; Western Co. *v.* Murray (Ariz.), 56 Pac. R. 728; S. *v.* Swift, 35 W. Va. 542, 14 S. E. R. 135; S. *v.* Stillman, 81 Wis. 124, 51 N. W. R. 260; *In re* Frey (Pa. St.), 18 Atl. R. 478; Com. *v.* Grimstead (Ky.), 55 S. W. R. 720.]

[3] *Ante*, § 72; *post*, §§ 145, 146.

[4] Dwar. Stat. (2d ed.) 579; King *v.* Burrell, 12 A. & E. 460, 468; Lamond *v.* Eiffe, 3 Q. B. 910; Rex *v.* Vandeleer, 1 Stra. 69; Rex *v.* Pereira, 2 A. & E. 375, 380; Bloxam *v.* Elsee, 6 B. & C. 169, 176.

[5] Bidwell *v.* Whitaker, 1 Mich. 469; Bartlett *v.* Morris, 9 Port. 266; Sibley *v.* Smith, 2 Mich. 486; Green *v.* Cheek, 5 Ind. 105.

[6] Putnam *v.* Longley, 11 Pick. 487, 490; Pitman *v.* Flint, 10 Pick. 504, 506; Reg. *v.* Simpson, 10 Mod. 341, 344; Rex *v.* The Poor Law Commissioners, 6 A. & E. 1, 7; Rex *v.* Stoke Dameral, 7 B. & C. 563; Dwar. Stat. (2d ed.) 583 *et seq.*, 595, 598; U. S. *v.* Warner, 4 McLean, 463.

[7] Crim. Pro., I, §§ 348–355.

[8] Garrigus *v.* Parke, 39 Ind. 66. [Grammatical accuracy not so im-

Disjunctive and conjunctive.— Conjunctive sentences, describing different branches of the same offense, will be construed as conjunctive or disjunctive according to the evident meaning of the law-makers.[1] And —

Inaccurate.—Words and expressions inaccurately used will be given the sense intended where it appears on the whole face of the act.[2] Even in opposition to the strict letter, the clear purpose of the legislature, as apparent on inspection of the statute itself, will be carried out.[3] But —

Limit.— This doctrine applies only where the true intent is manifest in the act itself, or in it compared with other acts on the same subject.[4] Now,—

§ 82. **Group of doctrines.**— Bearing in mind the cardinal purpose of all interpretation,— namely, to ascertain the true legislative intent,[5]— and remembering that each particular rule stands in subordination to this purpose, and is to be followed only when and so far as it contributes to this result, let us arrange around it, as in a cluster, some of the subordinate rules. Thus,—

Harmony with intent.— The statute should, if possible, be construed in a way to render each separate provision harmonious with its general intent.[6]

portant as apparent intent. Pease *v.* Fish, 70 Ill. Ap. 188. Mere grammatical errors will not vitiate a law; and a transposition of words and clauses may be invoked to furnish meaning. Murray *v.* S., 21 Tex. Ap. 620, 2 S. W. R. 757; Leavitt *v.* Lovering, 64 N. H. 607, 15 Atl. R. 414.]

[1] *Post*, § 243; S. *v.* Myers, 10 Iowa, 448.

[2] Rex *v.* Bullock, 1 Taunt. 71; Crocker *v.* Crane, 21 Wend. 211, [34 Am. D. 228;] Alexander *v.* Worthington, 5 Md. 471; Erwin *v.* Moore, 15 Ga. 361. See P. *v.* Clute, 12 Abb. Pr. (N. S.) 399; Thorp *v.* Schooling, 7 Nev. 15; Nichols *v.* Halliday, 27 Wis. 406.

[3] Ingraham *v.* Speed, 30 Miss. 410.

[4] *Ante*, § 72; Ezekiel *v.* Dixon, 3 Kelly, 146: Swift *v.* Luce, 27 Me. 285; Riddick *v.* Walsh, 15 Mo. 519.

[5] *Ante*, § 70; Mardre *v.* Felton, Phillips (N. C.), 279; Leoni *v.* Taylor, 20 Mich. 148; Encking *v.* Simmons, 28 Wis. 272, 276; Frye *v.* Chicago, etc. R. R. Co., 73 Ill. 399; Sussex Peerage, 11 Cl. & F. 85; [Miller *v.* S., 106 Ind. 415, 7 N. E. R. 209; Anderson *v.* Railroad Co., 117 Ill. 26, 7 N. E. R. 129; Selden *v.* Hall, 21 Mo. Ap. 452; Middleton *v.* Greeson, 106 Ind. 18, 5 N. E. R. 755; Boody *v.* Watson, 64 N. H. 162, 9 Atl. R. 794; U. S. *v.* Morrissey, 32 Fed. R. 147; Power *v.* Choteau, 7 Mont. 82, 14 Pac. R. 658; S. *v.* Hayes, 61 N. H. 264; Vermont Loan Co. *v.* Whithed, 2 N. Dak. 82, 49 N. W. R. 818; Columbus Co. *v.* Wright, 89 Ga. 574, 15 S. E. R. 293; St. Louis *v.* Lane, 110 Mo. 254, 19 S. W. R. 553; Barnard *v.* Gall, 43 La. An. 959, 10 S. R. 5; S. *v.* Moore, 45 Neb. 12, 63 N. W. R. 130; *Re* Salisbury, 44 N. Y. Supp. 291; Hooper *v.* Creager, 84 Md. 195.]

[6] Dwar. Stat. (2d ed.) 582, 597;

Every word and clause a meaning.— Every word and clause should, if possible, have assigned to it a meaning, leaving no useless words.[1] And,—

Giving effect to whole.— *A fortiori*, the construction should be such as will not leave the entire enactment without effect.[2]

Repugnancy.— Nor should an interpretation be admitted, if avoidable, which will render one clause repugnant to another, but all should stand.[3]

Absurdity — Injustice — Inconvenience.— The interpretation should lean strongly to avoid absurd consequences,[4] injustice,[5]

Arthur *v.* Bokenham, 11 Mod. 148, 161; Mendon *v.* Worcester, 10 Pick. 235, 242; Com. *v.* Cambridge, 20 Pick. 267, 271; U. S. *v.* Fisher, 2 Cranch, 358, 399; S. *v.* Stinson, 17 Me. 154; Holbrook *v.* Holbrook, 1 Pick. 248; Livingston *v.* Indianapolis Ins. Co., 6 Blackf. 133; Scofield *v.* Collins, 3 Cow. 89, 96; S. *v.* Smith, Cheves, 157; Com. *v.* Slack, 19 Pick. 304; Wilson *v.* Biscoe, 6 Eng. 44; George *v.* Board of Education, 33 Ga. 344; [Cincinnati *v.* Guckenberger, 60 Ohio St. 353, 54 N. E. R. 376; P. *v.* Town Clerk, 56 N. Y. Supp. 64; School Board *v.* Board of Education, 157 N. Y. 566, 52 N. E. R. 583; Hall *v.* S., 39 Fla. 637; Johnson *v.* Schlosser, 146 Ind. 509; Crete Bank *v.* Bartley, 39 Neb. 353, 58 Fed. R. 172.]

[1] Bac. Abr., Statute, I, 2; Powlter's Case, 11 Co. 29*a*, 34*a*; Rawson *v.* S., 19 Conn. 292; Wilson *v.* Biscoe, 6 Eng. 44; U. S. *v.* Warner, 4 McLean, 463; Opinion of Justices, 22 Pick. 571, 573; Att. Gen. *v.* Detroit & Erin Plank Road, 2 Mich. 138; James *v.* Dubois, 1 Harrison, 285; Hutchen *v.* Niblo, 4 Blackf. 148; Green *v.* Cheek, 5 Ind. 105; Gates *v.* Salmon, 35 Cal. 576, [95 Am. D. 139]; Hagenbuck *v.* Reed, 3 Neb. 17; P. *v.* Burns, 5 Mich. 114; Lacy *v.* Moore, 6 Coldw. 348; P. *v.* King, 28 Cal. 265; [McIntosh *v.* Johnson, 51 Neb. 33; S. *v.* Mitchell, 50 Kan. 289, 33 Pac. R. 104; Jackson *v.* Kittle, 34 W. Va. 207, 12 S. E. R. 484; Root *v.* Sinnock, 24 Ill. Ap. 537; S. *v.* Babcock, 21 Neb. 599, 33 N. W. R. 247.]

[2] Nichols *v.* Halliday, 27 Wis. 406; Bailey *v.* Com., 11 Bush, 688; Manis *v.* S., 3 Heisk. 315, 316. [That construction will always, where possible, be given to a statute which will make it valid. Cole Mfg. Co. *v.* Falls, 90 Tenn. 466, 16 S. W. R. 1045; Ferguson *v.* Stanford, 60 Conn. 432, 22 Atl. R. 782; S. *v.* Williams, 35 Mo. Ap. 227; Chapman *v.* State, 16 Tex. Ap. 76; Ter. *v.* Ashenfelter (N. M.), 12 Pac. R. 879.]

[3] Dwar. Stat. (2d ed.) 568, 577, 578, 594; 1 Bl. Com. 89; San Francisco *v.* Hazen, 5 Cal. 169; Brooks *v.* Mobile, 31 Ala. 227; [Bernier *v.* Bernier, 147 U. S. 242, 37 L. ed. 152; Kane *v.* Railroad Co., 112 Mo. 34, 20 S. W. R. 532; Burlington R. R. Co. *v.* Dey, 82 Iowa, 312, 48 N. W. R. 98; *Ex parte* Joffee, 46 Mo. Ap. 360.]

[4] 1 Bl. Com. 91; Dwar. Stat. (2d ed.) 587; Bailey *v.* Com., 11 Bush, 688; Rex *v.* Banbury, 1 A. & E. 136, 142; Com. *v.* Loring, 8 Pick. 370; Jeffersonville *v.* Weems, 5 Ind. 547; Henry *v.* Tilson, 17 Vt. 479; S. *v.* Clark, 5 Dutcher, 96; [Lau Ou Ben *v.* U. S., 144 U. S. 47, 36 L. ed. 340; Hawthorn *v.* County, 5 Ind. Ap. 280, 30 N. E. R. 16; Haggerty *v.* Wagner, 148 Ind. 625, 48 N. E. R. 366, 39 L. R. A. 384.]

[5] Magdalen College Case, 11 Co. 66*b*, 73*b*; Co Lit. 360; Com. *v.* Slack, 19

and even great inconvenience;[1] for the legislative meaning is to be carried out, and it cannot be supposed to be any of these. So,—

Doubtful power.— The exercise even of a doubtful power will not be attributed to the legislature; therefore construction will lean against it.[2] And,—

Expressed intent—Implied.—If the legislature has expressed its intent in the act, it will be carried out, though to the overriding of the ordinary rules of interpretation;[3] as, in like manner, will its intent in any other way sufficiently appearing.[4]

Litigation.— An interpretation not opening the door to litigation will be preferred.[5] Also,—

Retrospective.— Though statutes are often applied retrospectively, they are not so in general, and in most circumstances construction will lean against it.[6] On the other hand,—

Pick. 304; Meade *v.* Deputy Marshal, 1 Brock. 324; Murray *v.* Gibson, 15 How. (U. S.) 421; Ham *v.* McClaws, 1 Bay, 93, 98; Robinson *v.* Varnell, 16 Tex. 382; The Ohio *v.* Stunt, 10 Ohio St. 582; [Lime City Ass'n *v.* Black, 136 Ind. 544, 35 N. E. R. 829; Carolina Bank *v.* Evans, 28 S. C. 521, 6 S. E. R. 321.]

[1] U. S. *v.* Fisher, 2 Cranch, 358, 386; Hughes *v.* Hughes, Carter, 125, 136; Ayers *v.* Knox, 7 Mass. 306, 310; Putnam *v.* Longley, 11 Pick. 487, 490; Associates of Jersey *v.* Davison, 5 Dutcher, 415. [A construction which would impose a vain and evidently unnecessary proceeding is unauthorized. People's Bank *v.* Batchelder, 51 Fed. R. 130. A construction will not be adopted which would disfranchise a considerable number of voters, unless such construction is unavoidable. S. *v.* Van Camp, 36 Neb. 9, 54 N. W. R. 113. Still no mere general notions that the statute is unjust, impolitic or oppressive, or conflicts with the spirit of the constitution, will justify the court in setting a statute aside. Sawyer *v.* Dooley, 21 Nev. 390, 32 Pac. R. 437.]

[2] Mardre *v.* Felton, Phillips (N. C.), 279; [Stanley *v.* R. R. Co., 100 Mo. 435, 13 S. W. R. 709; Sykes *v.* Columbus, 55 Miss. 143.]

[3] Farmers' Bank *v.* Hale, 59 N. Y. 53; Chapin *v.* Crusen, 31 Wis. 209.

[4] *Ante*, §§ 70, 72, 81; Stowel *v.* Zouch, 1 Plow. 353, 365; Arthur *v.* Bokenham, 11 Mod. 148, 161; McDermut *v.* Lorillard, 1 Edw. Ch. 273, 276; Ayers *v.* Knox, 7 Mass. 306; Dwar. Stat. (2d ed.) 593; S. *v.* Harkness, 1 Brev. 276; Castner *v.* Walrod, 83 Ill. 171, 179, [25 Am. R. 369;] Smith *v.* P., 47 N. Y. 330; S. *v.* King, 44 Mo. 283.

[5] Gale *v.* Laurie, 5 B. & C. 156, 164. [The courts will not impute to the legislature a purpose to act against religion. Rector *v.* U. S., 92 U. S. 698, 23 L. ed. 690.]

[6] *Post*, §§ 83–85*b*; Thompson *v.* Lack, 3 C. B. 540, 551; 1 Bishop, Mar., Div. & S., §§ 99–103; Moon *v.* Durden, 2 Exch. 22; s. c. *nom.* Moore *v.* Durden, 12 Jur. 138; Plumb *v.* Sawyer, 21 Conn. 351; Hooker *v.* Hooker, 10 Sm. & M. 599; Bruce *v.* Schuyler, 4 Gilman, 221, [46 Am. D. 447;] Barnes *v.* Mobile, 19 Ala. 707; Torrey *v.* Corliss, 33 Me. 333; Murray *v.* Gibson, 15 How. (U. S.) 421, 423; Pritchard *v.* Spencer, 2 Ind. 486; Garrett *v.* Wiggins, 1

Eluded — Defeated.— The court will endeavor so to shape the meaning of a statute that it can neither be eluded [1] nor its purposes defeated.[2]

The parts, and other laws and acts, together.— All its parts,[3] and all acts,[4] "though made at different times or even expired"[5] or repealed,[6] and the entire system of laws,[7] and the common law,[8] touching the same matter, must be taken together;[9] and,

Scam. 335; Quackenbush *v.* Danks, 1 Denio, 128; Hastings *v.* Lane, 15 Me. 134; Forsyth *v.* Marbury, R. M. Charl. 324; Guard *v.* Rowan, 2 Scam. 499; Dash *v.* Van Kleeck, 7 Johns. 477, [5 Am. D. 291;] Von Schmidt *v.* Huntington, 1 Cal. 55; Mason *v.* Finch, 2 Scam. 223; Alexander *v.* Worthington, 5 Md. 471; Belleville R. R. Co. *v.* Gregory, 15 Ill. 20, [58 Am. D. 589;] Stewart *v.* S., 13 Ark. 720; Buckner *v.* Street, 1 Dill. 248; Ryan *v.* Hoffman, 26 Ohio St. 109; White *v.* Blum, 4 Neb. 555; P. *v.* Strack, 3 Thomp. & C. 165, 1 Hun, 96; Morgan *v.* Perry, 51 N. H. 559; [S. *v.* McNally (Ark.), 55 S. W. R. 1104.]

[1] 2 Rol. 127; Dwar. Stat. (2d ed.) 568; Moore *v.* Hussey, Hob. 93, 97; Magdalen College Case, 11 Co. 66, 73*b*; Powlter's Case, 11 Co. 29, 34*a*; Winter *v.* Jones, 10 Ga. 190, [54 Am. D. 379;] Anonymous, 12 Co. 89.

[2] Thompson *v.* S., 20 Ala. 54; Cook *v.* Hamilton, 6 McLean, 112.

[3] *Post*, § 86; Bac. Abr., Statute, I. 2; Adams *v.* Woods, 2 Cranch, 336, 341; Com. *v.* Robertson, 5 Cush. 438; Magruder *v.* Carroll, 4 Md. 335; Torrance *v.* McDougald, 12 Ga. 526; Ogden *v.* Strong, 2 Paine, 584; Brown *v.* Wright, 1 Green (N. J.), 240; *In re* Murphy, 3 Zab. 180; Van Riper *v.* Essex Public Road, 9 Vroom, 23; Albrecht *v.* S., 8 Tex. Ap. 313. In reference to this rule it was observed in Massachusetts that the revised statutes were all passed at one time, and so constitute one act. Com. *v.* Goding, 3 Met. 130. Such is said also to be the rule respecting statutes passed at one session. Peyton *v.* Moseley, 3 T. B. Monr. 77.

[4] Le Roy *v.* Chabolla, 2 Abb. (U. S.) 448; S. *v.* Stewart, 47 Mo. 382; P. *v.* Weston, 3 Neb. 312.

[5] Lord Mansfield in Rex *v.* Loxdale, 1 Bur. 445, 447; Coleman *v.* Davidson Academy, Cooke (Tenn.), 258.

[6] Church *v.* Crocker, 3 Mass. 17, 21; Bank for Savings *v.* The Collector, 3 Wall. 495.

[7] McDougald *v.* Dougherty, 14 Ga. 674; *ante*, §§ 7, 62, 64; S. *v.* Jackson, 36 Ohio St. 281; [Cincinnati *v.* Conner, 55 Ohio St. 82, 44 N. E. R. 582; Crawfordsville *v.* Fletcher, 104 Ind. 97, 2 N. E. R. 243; S. *v.* Casteel, 110 Ind. 174, 11 N. E. R. 219; Lutz *v.* Crawfordsville, 109 Ind. 466, 10 N. E. R. 411; Viterbo *v.* Friedlander, 120 U. S. 707, 30 L. ed. 776.]

[8] *Post*, §§ 86, 88. [A statute using common-law terms is presumed to use them in their common-law meaning. W. U. Tel. Co. *v.* Scircle, 103 Ind. 227, 2 N. E. R. 604; Heiskell *v.* Baltimore, 65 Md. 125, 4 Atl. R. 116.]

[9] 1 Bac. Abr., Statute, I. 3; Dwar. Stat. (2d ed.) 569; Duck *v.* Addington, 4 T. R. 447, 450; *Ex parte* Drydon, 5 T. R. 417, 419; Ailesbury *v.* Pattison, 1 Doug. 28, 30; Mendon *v.* Worcester, 10 Pick. 235, 242; Goddard *v.* Boston, 20 Pick. 407, 409; Wilde *v.* Com., 2 Met. 408; Howlett *v.* S., 5 Yerg. 144; Holland *v.* Makepeace, 8 Mass. 418, 423; Holbrook *v.* Holbrook, 1 Pick. 248, 254; S. *v.* Baldwin, 2 Bailey, 541; S. *v.* Fields, 2 Bailey, 554; Thayer *v.* Bond, 3 Mass. 296; White *v.* Johnson, 23 Miss. 68; Rex *v.* Morris, 1 B. & Ad.

if one part standing by itself is obscure, it may be aided by another which is clear.[1]

Prior law — Mischief — Remedy.— The interpreter should consider and take into the account what was the law before,[2] which Coke says is "the very lock and key to set open the windows of the statute;"[3] the mischief against which the law did not provide; the nature of the remedy proposed, and the true reason of the remedy.[4] It has been said that we may learn the mischief "from our knowledge of the state of the law at the time, and of the practical grievances generally complained of."[5]

Public and private interests.— Great public interests will not needlessly be put at hazard by the interpretation;[6] and even private hardships will, when they may, be avoided.[7] And —

441; S. *v.* Wilbor, 1 R. I. 199, [36 Am. D. 245;] De Ormas Case, 10 Mart. (La.) 158, 172; P. *v.* Hart, 1 Mich. 467; S. *v.* Garthwaite, 3 Zab. 143; The Harriet, 1 Story, 251; Scott *v.* Searles, 1 Sm. & M. 590; S. *v.* Mister, 5 Md. 11; U. S. *v.* Freeman, 3 How. (U. S.) 556; Hayes *v.* Hanson, 12 N. H. 284; Berry *v.* S., 10 Tex. Ap. 315; Goodrich *v.* Russell, 42 N. Y. 177; [Peterson *v.* Gittings, 107 Iowa, 306, 77 N. W. R. 1056; U. S. *v.* Goldenburg, 168 U. S. 95, 42 L. ed. 394; Scaife *v.* Stovall, 67 Ala. 237; Freeman *v.* P., 4 Denio, 9, 47 Am. D. 216; Hamilton *v.* Rathbone, 175 U. S. 419; Heydon's Case, 3 Fed. R. 76; Platt *v.* R. R. Co., 99 U. S. 48, 25 L. ed. 424; Thornly *v.* U. S., 118 U. S. 310, 28 L. ed. 999; Lake Co. *v.* Rollins, 130 U. S. 662, 32 L. ed. 1060.]

[1] Rex *v.* Palmer, 1 Leach (4th ed.), 352, 355; Com. *v.* Slack, 19 Pick. 304; Crespigny *v.* Wittenoom, 4 T. R. 790.

[2] *Ante*, § 6; Bac. Abr., Statutes, I. 4; Dwar. Stat. (2d ed.) 563, 564. [Prior acts may be cited to solve but not to create an ambiguity. Hamilton *v.* Rathbone, 175 U. S. 419; U. S. *v.* Hirsch, 100 U. S. 33, 25 L. ed. 539; U. S. *v.* Bowen, 100 U. S. 508, 25 L. ed. 631. When the meaning in the revision is plain the court cannot consult the old statutes to see if congress has erred in the revision; but may do so when necessary to construe doubtful language. U. S. *v.* Bowen, 100 U. S. 508, 25 L. ed. 631; Cambria Co. *v.* Ashburn, 118 U. S. 54, 30 L. ed. 60; Deffeback *v.* Hawke, 115 U. S. 392, 29 L. ed. 423; U. S. *v.* Averill, 130 U. S. 335, 32 L. ed. 977; U. S. *v.* Lacher, 134 U. S. 624, 33 L. ed. 1080.]

[3] 2 Inst. 308.

[4] Heydon's Case, 3 Co. 7; Winslow *v.* Kimball, 25 Me. 493; Pray *v.* Edie, 1 T. R. 313; Rex *v.* Hodnett, 1 T. R. 96, 100; 1 Bl. Com. 87; Jortin *v.* South-eastern Ry. Co., 3 Eq. Rep. 281, 1 Jur. (N. S.) 433, 31 Eng. L. & Eq. 320; P. *v.* Greer, 43 Ill. 213; Huffman *v.* S., 29 Ala. 40; Parkinson *v.* S., 14 Md. 184, [74 Am. D. 522.]

[5] Lyde *v.* Barnard, 1 M. & W. 101, 114. And see S. *v.* Smith, Cheves, 157.

[6] P. *v.* Illinois, etc. Canal, 3 Scam. 153; Burbank *v.* Fay, 65 N. Y. 57; Van Loon *v.* Lyon, 4 Daly, 149; [S. *v.* Garrett, 76 Mo. Ap. 295; Rector *v.* U. S., 92 U. S. 698, 23 L. ed. 690; Coosaw Co. *v.* S., 144 U. S. 550, 36 L. ed. 537.]

[7] Collins *v.* Carman, 5 Md. 503; Broadbent *v.* S., 7 Md. 416; Metropolitan Asylum Dist. *v.* Hill, 6 Ap. Cas. 193; P. *v.* Hodgdon, 55 Cal. 72, [36 Am. R. 30;] Keeran *v.* Griffith, 34 Cal. 580. And see S. *v.* Bank of the State, 1 S. C. 63; Chapin *v.* Persse,

Public policy.— Considerations of public policy are always pertinent in the interpretation.[1]

Title — Preamble — Outside of statute.— For these several purposes, we may take into view, as already seen,[2] what is said in the title and preamble; and may consult any other source[3] of a nature proper for the cognizance of the courts.[4]

etc. Paper Works, 30 Conn. 461, [79 Am. D. 263;] Pittsburg, etc. R. R. Co. *v.* South West Pa. Ry. Co., 77 Pa. St. 173; Randolph *v.* Middleton, 11 C. E. Green, 543.

[1] Baxter *v.* Tripp, 12 R. I. 310; Mobile *v.* Stein, 54 Ala. 23; Probasco *v.* Moundsville, 11 W. Va. 501. And see S. *v.* Clarke, 54 Mo. 17, [14 Am. R. 471; Yale *v.* New Haven, 71 Conn. 316, 42 Atl. R. 87; Jersey Gas Co. *v.* Consumers' Co., 40 N. J. Eq. 427, 2 Atl. R. 922; Glass *v.* Cedar Rapids, 68 Iowa, 207.]

[2] *Ante*, §§ 44–51; [S. *v.* Robinson, 32 Oreg. 43, 48 Pac. R. 357; Garrick *v.* R. R. Co., 53 S. C. 448, 31 S. E. R. 334; South Park Com. *v.* Bank, 177 Ill. 234, 52 N. E. R. 365; Choctaw R. R. Co. *v.* Alexander, 7 Okl. 579, 52 Pac. R. 944; *Re* Boston Co., 51 Cal. 624; Ter. *v.* Hopkins (Okl.), 59 Pac. R. 976. A recital of a fact in the title is conclusive. Hare *v.* Kennedy, 83 Ala. 608, 3 S. R. 683. The operation of the act clear in its terms cannot be restrained by preamble. Tripp *v.* Goff, 15 R. I. 299, 3 Atl. R. 591.]

[3] U. S. *v.* Webster, Daveis (D. C.), 38.

[4] *Ante*, §§ 74–77; 1 Greenl. Ev., §§ 4–6.

CHAPTER X.

PROSPECTIVE AND RETROSPECTIVE LEGISLATION AND INTERPRETATION.

§ 83. All legislation, in a sense, prospective.— There is a sense in which, in the nature of things, no legislation is or can be other than prospective. The records of the past cannot be reversed; the present can in no way deal otherwise than with itself and the future. But this is not the sort of view of things with reference to which we speak of prospective and retrospective legislation. In the practical sense,—

Prospective and retrospective, defined.— As the terms are commonly used in the law, prospective legislation is such as provides rules for facts thereafter to transpire; retrospective, for those which have partly or fully occurred. Prospective interpretation restricts the application of the new law to facts arising after its enactment; retrospective, applies it to the past and present facts as well as the future.

§ 83a. Distinctions — (Constitutional — Politic and probable — And the reverse).— Under our written constitutions, some forms of retrospective legislation are by their terms or construction forbidden;[1] and then a statute embodying it will be, to this extent, inoperative, and no question can arise as to what the legislature intended.[2] To be distinguished from these

[1] Crim. Law, I, § 279; *post*, § 85.

[2] Strong *v.* Clem, 12 Ind. 37, [74 Am. D. 200;] Logan *v.* Walton, 12 Ind. 639; Frantz *v.* Harrow, 13 Ind. 507; Strong *v.* Dennis, 13 Ind. 514; Douglass *v.* Pike, 101 U. S. 677; Hoagland *v.* Sacramento, 52 Cal. 142; Dequindre *v.* Williams, 31 Ind. 444; Lathrop *v.* Brown, 1 Woods, 474; Hart *v.* S., 40 Ala. 32, [88 Am. D. 752;] Finn *v.* Haynes, 37 Mich. 63; Jordan *v.* Wimer, 45 Iowa, 65; Brothers *v.* S., 2 Cold. 201; Cook *v.* Mutual Ins. Co., 58 Ala. 37; S. *v.* Doherty, 60 Me. 504; Dubois *v.* McLean, 4 McLean, 486; Grammar School *v.* Burt, 11 Vt. 632; Dash *v.* Van Kleeck, 7 Johns. 477, [5 Am. D. 291;] Gunn *v.* Barry, 15 Wall. 610; Union Iron Co. *v.* Pierce, 4 Bis. 327; Houston *v.* Bogle, 10 Ire. 490; Lambertson *v.* Hogan, 2 Pa. St. 22; Ahl *v.* Rhoads, 84 Pa. St. 319; [Purdy *v.* R. R. Co., 56 N. E. R. (N. Y.) 508.]

cases are those wherein, while a retrospective construction is not prohibited, it is a question whether or not the legislature meant its act to be so applied;[1] and whether such application would accord with sound policy, and with the other rules of interpretation.[2] Then it will be construed the one way or the other as these considerations require.

§ 84. Rule for interpretation, in general.— In the absence of any special indication or reason, and as the common rule, a statute will not be applied retrospectively, even where there is no constitutional impediment.[3] Some of the cases appear to

[1] Sturgis *v.* Hull, 48 Vt. 302; Baldwin *v.* Newark, 9 Vroom, 158; Wilson *v.* Red Wing School Dist., 22 Minn. 488; Ballard *v.* Ward, 89 Pa. St. 358.

[2] Reg. *v.* Vine, Law Rep. 10 Q. B. 195; Reed *v.* Rawson, 2 Litt. 189; Wilder *v.* Lumpkin, 4 Ga. 208; Cook *v.* Sexton, 79 N. C. 305; Austin *v.* Stevens, 24 Me. 520; Miller *v.* Moore, 1 E. D. Smith, 739; Bronson *v.* Newberry, 2 Doug. (Mich.) 38; Smith *v.* Kibbee, 9 Ohio St. 563; Johnson *v.* Johnson, 26 Ind. 441; Annable *v.* Patch, 3 Pick. 360, 363; Miller *v.* Miller, 16 Mass. 59; S. *v.* Wolfarth, 42 Conn. 155; S. *v.* Wilmington, etc. R. R. Co., 74 N. C. 143; S. *v.* Smith, 38 Conn. 397; Perry *v.* Com., 3 Grat. 632; Bensley *v.* Ellis, 39 Cal. 309.

[3] Cases cited *ante*, §§ 82, 83*a*; also Eakin *v.* Raub, 12 S. & R. 330; Saunders *v.* Carroll, 12 La. An. 793; Brown *v.* Wilcox, 14 Sm. & M. 127; Briggs *v.* Hubbard, 19 Vt. 86; S. *v.* Bradford, 36 Ga. 422; Dewart *v.* Purdy, 29 Pa. St. 113; Hopkins *v.* Jones, 22 Ind. 310; Seamans *v.* Carter, 15 Wis. 548, [82 Am. D. 696;] P. *v.* San Francisco, 21 Cal. 668; Jarvis *v.* Jarvis, 3 Edw. Ch. 462; Head *v.* Ward, 1 J. J. Mar. 280; U. S. *v.* Starr, Hemp. 469; Aurora and Laughery Turnpike *v.* Holthouse, 7 Ind. 59; S. *v.* Atwood, 11 Wis. 422; Reynolds *v.* S., 1 Kelly, 222; P. *v.* San Francisco, 4 Cal. 127; Whitman *v.* Hapgood, 10 Mass. 437, 439; Somerset *v.* Dighton, 12 Mass. 383, 385; Medford *v.* Learned, 16 Mass. 215; Van Rensselaer *v.* Livingston, 12 Wend. 490; *Ex parte* Graham, 13 Rich. 277; S. *v.* Scudder, 3 Vroom, 203; Taylor *v.* Mitchell, 57 Pa. St. 209; Moon *v.* Durden, 2 Exch. 22; Reg. *v.* Ipswich Union, 2 Q. B. D. 269; *In re* Suche, 1 Ch. D. 48, 50; Western Union R. R. Co. *v.* Fulton, 64 Ill. 271; Reg. *v.* Gratrex, 12 Cox C. C. 157, 2 Eng. Rep. 210; Reis *v.* Graff, 51 Cal. 86; P. *v.* O'Neil, 51 Cal. 91; P. *v.* Kinsman, 51 Cal. 92; P. *v.* McCain, 51 Cal. 360; P. *v.* Peacock, 98 Ill. 172; Gardner *v.* Lucas, 3 Ap. Cas. 582, 600, 601, 603; [Westheimer *v.* Goodkind (Mont.), 60 Pac. R. 813; Berg *v.* Berg (Ky.), 48 S. W. R. 432; Cassard *v.* Tracy, 52 La. An. —, 27 S. R. 368; Commercial Bank *v.* Eastern Co., 51 Neb. 766, 71 N. W. R. 1024; McIntosh *v.* Johnson, 51 Neb. 33, 70 N. W. R. 522; Wright *v.* Railroad Co., 80 Fed. R. 260; Knight *v.* Burnham, 99 Me. 294, 38 Atl. R. 168; Northwestern Co. *v.* Seaman, 80 Fed. R. 357; S., Joachim *v.* Point Claire Co., 24 Can. S. C. 486; Todd *v.* Commissioners, 104 Mich. 480, 64 N. W. R. 496; Scott *v.* Scott, 148 N. Y. 588, 42 N. E. R. 1079; McCless *v.* Meekins, 117 N. C. 34, 23 S. E. R. 99; *Re* Chapman, 73 L. T. R. 658; *Re* Collateral Tax, 88 Me. 587, 34 Atl. R. 530; Peabody *v.* Stetson,

hold that, to work an exception to this rule, the retrospective intent must affirmatively appear in the words themselves.[1] But, at least by the better doctrine,—

Exceptions.— Some statutes extend to past transactions, even where their words are not direct to this effect.[2] Thus,—

Procedure (*including remedy*).— Enactments regulating the procedure in the courts and the remedy are commonly applied to the enforcement of rights already accrued,[3] and even to causes actually in progress.[4] But, in special circumstances, and especially as to causes in progress, this exception, which is

88 Me. 273, 34 Atl. R. 74; Yates *v.* Milwaukee, 92 Wis. 352, 66 N. W. R. 248; Voight *v.* Kersten, 164 Ill. 314, 45 N. E. R. 543; S. *v.* Sears, 29 Oreg. 530, 46 Pac. R. 795; Chicago Co. *v.* O'Marr, 18 Mont. 568, 46 Pac. R. 899; Swampland Dist. *v.* Glide, 112 Cal. 85, 44 Pac. R. 451; Burns *v.* Woolery, 15 Wash. 134, 45 Pac. R. 894; *Re* Heilbronn, 14 Wash. 536, 45 Pac. R. 153; Reed *v.* Swan, 123 Mo. 100, 34 S. W. R. 488; S. *v.* Kearney, 49 Neb. 237, 70 N. W. R. 255; City Co. *v.* Railroad Co., 166 U. S. 557, 41 L. ed. 1114; Wisdom *v.* Reeves, 110 Ala. 418, 18 S. R. 13.]

[1] S. *v.* Hays, 52 Mo. 578; S. *v.* Newark, 11 Vroom, 92; S. *v.* Thompson, 41 Mo. 25; Smith *v.* Humphrey, 20 Mich. 398; P. *v.* Columbia, 43 N. Y. 130; La Salle *v.* Blanchard, 1 Bradw. 635; Finney *v.* Ackerman, 21 Wis. 268; S. *v.* Ferguson, 62 Mo. 77.

[2] See Watkins *v.* Haight, 18 Johns. 138; P. *v.* Carnal, 2 Seld. 463; P. *v.* Clark, 3 Seld. 385; Von Schmidt *v.* Huntington, 1 Cal. 55; Adams *v.* Chaplin, 1 Hill Ch. 265; Baldwin *v.* Newark, 9 Vroom, 158; Sturgis *v.* Hull, 48 Vt. 302.

[3] *Post*, § 175; Gardner *v.* Lucas, 3 Ap. Cas. 582, 601, 603; Rockwell *v.* Hubbell, 2 Doug. (Mich.) 197, [45 Am. D. 246;] P. *v.* Peacock, 98 Ill. 173; Edmonds *v.* Lawley, 6 M. & W. 285; [*Re* Davis, 149 N. Y. 539, 44 N. E. R. 185; Hennepin Co. *v.* Baldwin, 62 Minn. 518, 65 N. W. R. 80; Fitzgerald *v.* Phelps, 42 W. Va. 570, 26 S. E. R. 315; Bradley *v.* Norris, 63 Minn. 156, 65 N. W. R. 357; P. *v.* Hawker, 152 N. Y. 234, 46 N. E. R. 607; Phœnix Co. *v.* Shearman, 17 Tex. Civ. Ap. 456, 43 S. W. R. 1063; First M. E. Church *v.* Fadden, 8 N. D. 162, 77 N. W. R. 615.]

[4] Mercer *v.* S., 17 Ga. 146; Jacquins *v.* Com., 9 Cush. 279; Sampeyreac *v.* U. S., 7 Pet. 222 (but see P. *v.* Carnal, 2 Seld. 463, and P. *v.* Clark, 3 Seld. 385); Blair *v.* Cary, 9 Wis. 543; McNamara *v.* Minnesota Cent. Ry. Co., 12 Minn. 388; Com. *v.* Bradley, 16 Gray, 241; Henschall *v.* Schmidtz, 50 Mo. 454; Walston *v.* Com., 16 B. Mon. 15; Rivers *v.* Cole, 38 Iowa, 677; Brock *v.* Parker, 5 Ind. 538; Indianapolis *v.* Imberry, 17 Ind. 175. "When the effect of an enactment is to take away a right, *prima facie* it does not apply to existing rights; but where it deals with procedure only, *prima facie* it applies to all actions pending as well as future." Kimbray *v.* Draper, Law R. 3 Q. B. 160, 163, by Blackburn, J., on the authority of Wright *v.* Hale, 6 H. & N. 227; [Butler *v.* U. S. Loan Co., 97 Tenn. 679, 37 S. W. R. 565; Golden City *v.* Hall, 68 Mo. Ap. 627.]

the rule for the litigation within it, gives way to the other and general rule.[1] Again,—

§ 84a. Reason of the law — (Divorce).— The doctrine — at least the better doctrine — is believed to be general, that, whenever the reason of the new law includes alike past transactions and future ones, and no injustice will result, and no constitutional restriction interposes, general words will be construed both retrospectively and prospectively.[2] Of this sort, by the better opinion, are divorce laws.[3] And —

Liquor laws.— A statute prohibiting the unlicensed sale of intoxicating liquors extends as well to those owned when it is enacted as to subsequent purchases.[4] And one disqualifying

[1] Bradford *v.* Barclay, 42 Ala. 375; Mann *v.* McAtee, 37 Cal. 11; Merwin *v.* Ballard, 66 N. C. 398; S. *v.* Smith, 38 Conn. 397; Simco *v.* S., 8 Tex. Ap. 406; Lee *v.* Cook, 1 Wy. 413; Chaney *v.* S., 31 Ala. 342; Mabry *v.* Baxter, 11 Heisk. 682.

Wagers.— Statutes restrictive of suits on wagers are prospective only, not affecting transactions prior to their passage. Doolubdass *v.* Ramboll, 7 Moore P. C. 239, 15 Jur. 257, 3 Eng. L. & Eq. 39.

And, generally, of **rights of action.**— No statute, however broad its words, will be construed to interfere with existing rights of action, unless this intent is expressly stated. Berley *v.* Rampacher, 5 Duer, 183; Rutherford *v.* Greene, 2 Wheat. 196.

Qualifications of jurors.— A statute regulating the qualifications of jurors is applied as well to past as to subsequent offenses. Reid *v.* S., 20 Ga. 681.

But, **Costs.**— In Missouri, a statute providing that, if the jury fail to declare by which party in a prosecution of a county the costs shall be paid, the court shall render judgment for them against the prosecutor, is held not to apply to a prosecution begun before its passage. S. *v.* Berry, 25 Mo. 355.

Transfer of jurisdiction.— Where, after the commission of a felony, the jurisdiction to punish it is transferred from one court to another, the offender, if afterward arrested, should be sent for trial to the latter court. Ewing's Case, 5 Grat. 701. And see S. *v.* Solomons, 3 Hill (S. C.), 96. [Where a statute provides that statutes in derogation of the common law should be construed liberally, it does not apply to transactions had under the old rule of strict construction. Westheimer *v.* Goodkind (Mont.), 60 Pac. R. 813.]

[2] And see Tilton *v.* Swift, 40 Iowa, 78; Riggins *v.* S., 4 Kan. 178. Indeed, under some circumstances, it is required by the mere behests of justice to give the statute a retrospective operation; then, by construction, it will have such an operation if the words permit. Miller *v.* Graham, 17 Ohio St. 1; [Conn. Ins. Co. *v.* Talbot, 113 Ind. 373, 14 N. E. R. 586; P. *v.* Spicer, 99 N. Y. 225, 1 N. E. R. 680; Larkins *v.* Saffarans, 15 Fed. R. 147; Excelsior Mfg. Co. *v.* Keyser, 62 Miss. 155; Baldwin *v.* Newark, 38 N. J. L. 158.]

[3] 1 Bishop, Mar., Div. & S., §§ 1477–1486, 1487–1491.

[4] Com. *v.* Logan, 12 Gray, 136.

"every person convicted of felony" to be a retailer includes alike past and future convictions.[1] So —

Fencing railroad.—A statutory mandate to railroads to fence lands taken for their track extends as well to existing as to subsequently chartered ones.[2]

§ 85. Ex post facto.—A statute which is *ex post facto* is rendered null by two clauses of the United States constitution, the one referring to the national and the other to the state legislative power.[3] But —

Simply retrospective.—A statute may be retrospective without being *ex post facto;* and, when it is, if it does not impair the obligation of contracts,[4] it does not violate the constitution of the United States. In some of the state constitutions there are provisions directly forbidding it, but in most there are not;[5] or, it is valid in some circumstances,[6] and invalid in others.[7] In accord with what has been said,[8] where such a statute is not constitutionally prohibited, the courts will give effect to its express terms;[9] where it is, they will hold it void.[10] Some of the distinctions are that,—

§ 85a. Rights vested — Not vested.— According to the terms or effect of most or all of our constitutions, a statute

[1] Reg. *v.* Vine, Law R. 10 Q. B. 195; [P. *v.* Hawker, 152 N. Y. 234, 46 N. E. R. 607. The time of taking effect of the statute, and not the time of its enactment, determines what is a past transaction. Galveston R. R. Co. *v.* S., 81 Tex. 572, 17 S. W. R. 67.]

[2] Wilder *v.* Maine Cent. R. R. Co., 65 Me. 332, [20 Am. R. 698.] And see Gorman *v.* Pacific R. R. Co., 26 Mo. 441, [72 Am. D. 220;] Bank of Toledo *v.* Toledo, 1 Ohio St. 622.

[3] Crim. Law, I, § 279; Const. U. S., art. 1, §§ 9, 10; Calder *v.* Bull, 3 Dall. 386, 389; Watson *v.* Mercer, 8 Pet. 88, 110; Bennett *v.* Boggs, Bald. 60, 74.

[4] Reed *v.* Beall, 42 Miss. 274; Lane *v.* Nelson, 79 Pa. St. 407.

[5] 1 Bishop, Mar., Div. & S., § 1487 *et seq.;* S. *v.* Squires, 26 Iowa, 340; Smith *v.* Van Gilder, 26 Ark. 527.

[6] Crim. Law, I, § 279; Sedgwick *v.* Bunker, 16 Kan. 498; Kunkle *v.* Franklin, 13 Minn. 127, [97 Am. D. 226;] Comer *v.* Folsom, 13 Minn. 219; Wilson *v.* Buckman, 13 Minn. 441; Tilton *v.* Swift, 40 Iowa, 78; S. *v.* Newark, 3 Dutcher, 185; S. *v.* Scudder, 3 Vroom, 208; Hess *v.* Johnson, 3 W. Va. 645; Stine *v.* Bennett, 13 Minn. 153; U. S. *v.* Samperyac, Hemp. 118; Stokes *v.* Rodman, 5 R. I. 405.

[7] Bruce *v.* Schuyler, 4 Gilman, 221, [46 Am. D. 447;] Gordon *v.* Inghram, 1 Grant (Pa.), 152; West Branch Broom Co. *v.* Dodge, 31 Pa. St. 285; Dillon *v.* Dougherty, 2 Grant (Pa.), 99; S. *v.* Atwood, 11 Wis. 422; Kennett's Petition, 4 Fost. (N. H.) 139; McManning *v.* Farrar, 46 Mo. 376.

[8] *Ante,* § 83*a*.

[9] Barton *v.* Morris, 15 Ohio, 408; New Orleans *v.* Clark, 95 U. S. 644; P. *v.* Ulster, 63 Barb. 83; Hagerstown *v.* Sehner, 37 Md. 180.

[10] Bank of the State *v.* Cooper, 2 Yerg. 599, [24 Am. D. 517.]

cannot divest vested rights;[1] yet can take away such as are not vested.[2] And,—

Remedy.— At the legislative pleasure it can change the remedy,[3] yet not to the denial of all remedy,[4] or even to such a reduction of it as will leave any essential part of the right practically unavailable.[5]

§ 85b. Directing construction of statute.— The legislature cannot direct the courts how to construe a statute, so as to affect past transactions; for such construction is a judicial, not a legislative, question. But the direction, if in adequate terms, will operate as an amendment of the statute for cases on future facts.[6]

[1] Crim. Law, I, § 279; *post*, § 178; Burch *v.* Newbury, 6 Seld. 374; Peters *v.* Goulden, 27 Mich. 171. In England, where there are no written constitutions, a statute is not commonly construed to divest vested rights. Couch *v.* Jeffries, 4 Bur. 2460, 2462; Moore *v.* Phillips, 7 M. & W. 536; Gilmore *v.* Shuter, T. Jones, 108; s. c. *nom.* Helmore *v.* Shuter, 2 Show. 16.

[2] Harris *v.* Glenn, 56 Ga. 94; Rottenberry *v.* Pipes, 53 Ala. 447; Leib *v.* Wilson, 51 Ind. 550; Ware *v.* Owens, 42 Ala. 212, [94 Am. D. 642;] Coffin *v.* S., 7 Ind. 157; Noel *v.* Ewing, 9 Ind. 37; Bachman *v.* Chrisman, 23 Pa. St. 162; P. *v.* Frisbie, 26 Cal. 135; Languille *v.* S., 4 Tex. Ap. 312; Norfolk *v.* Chamberlaine, 29 Grat. 534; Sparks *v.* Clapper, 30 Ind. 204.

[3] Templeton *v.* Horne, 82 Ill. 491; Petition of Penniman, 11 R. I. 333; Caperton *v.* Martin, 4 W. Va. 138, [6 Am. R. 270;] Fullerton *v.* McArthur, 1 Grant (Pa.), 232; S. *v.* Shumpert, 1 S. C. 85; Brown *v.* Gilmor, 8 Md. 322; Carnes *v.* Red River Parish, 29 La. An. 608; Young *v.* Ledrick, 14 Kan. 92; Smith *v.* Judge, 17 Cal. 547; Tennessee *v.* Sneed, 96 U. S. 69; Hardeman *v.* Downer, 39 Ga. 425; Fearing *v.* Irwin, 55 N. Y. 486; Bacon *v.* Howard, 20 How. (U. S.) 22; S. *v.* Union, 4 Vroom, 350; Leggett *v.* Hunter, 19 N. Y. 445; Mills *v.* Charleton, 29 Wis. 400, [9 Am. R. 578;] Barton *v.* School Commissioners, Meigs, 585. ["Without impairing the obligation of the contract, the remedy may be modified as the wisdom of the nation may direct." Marshall, C. J., in Sturges *v.* Crowninshield, 4 Wheaton, 122; Whitehead *v.* Latham, 83 N. C. 232.]

[4] *Post*, § 178; Seibert *v.* Copp, 62 Mo. 182; Fisher *v.* Cockerill, 5 T. B. Mon. 129.

[5] *Post*, § 178; Holland *v.* Dickerson, 41 Iowa, 367; Josephine *v.* S., 39 Miss. 613; Smith *v.* Morse, 2 Cal. 524; Musgrove *v.* Vicksburg, etc. R. R. Co., 50 Miss. 677; Morton *v.* Valentine, 15 La. An. 150; Smith *v.* Packard, 12 Wis. 371; Edwards *v.* Kearzey, 96 U. S. 595; [Baldwin *v.* Newark, 38 N. J. L. 158; Augusta Bank *v.* Augusta, 49 Me. 507.]

[6] Dequindre *v.* Williams, 31 Ind. 444; Union Iron Co. *v.* Pierce, 4 Bis. 327; Haley *v.* Philadelphia, 68 Pa. St. 45, [8 Am. R. 153;] The Governor *v.* Porter, 5 Humph. 165; Kelsey *v.* Kendall, 48 Vt. 24; P. *v.* New York, 16 N. Y. 424; Cambridge *v.* Boston, 130 Mass. 357; U. S. *v.* Gilmore, 8 Wall. 330; [Lambertson *v.* Hogan, 2 Pa. St. 25; Salters *v.* Tobias, 3 Paige, 338.]

CHAPTER XI.

CONSTRUING THE VARIOUS LAWS TOGETHER.

§ 86. Here — Elsewhere — (Importance of doctrine).— Having already called to mind the doctrine, in its general terms, that all laws are to be construed together as parts of one whole,[1] we shall in this chapter descend a little into detail; presenting the chief fragmentary forms of the doctrine, and drawing its bounds. In a chapter further on,[2] we shall see, through the help of lines of decisions projected through the legal field, something of the immensity of the conservative force of this doctrine in our jurisprudence, and its overwhelming importance in interpretation.

Full doctrine defined.— The completed doctrine, resulting from a bringing together of its parts, is that all laws, written and unwritten, of whatever sorts and at whatever different dates established, are to be construed together, contracting, expanding, limiting, and extending one another into one system of jurisprudence, as nearly harmonious and rounded as it can be made without violating unyielding written or unwritten terms.

Some of the parts.— The emergencies of particular cases do not, in the majority of instances, call for a consideration of the full doctrine, as thus defined. Sometimes it is only necessary to bear in mind that all the parts of the one statute, or the enacting part and the preamble, or some two or more sections or clauses, are to be read and construed together;[3] sometimes,

[1] *Ante*, §§ 5–10, 82.

[2] *Post*, § 122 *et seq.*

[3] *Ante*, § 82; Rex *v.* Palmer, 1 Leach, 352, 355; Holbrook *v.* Holbrook, 1 Pick. 248; Burke *v.* Monroe, 77 Ill. 610; St. Peter's Church *v.* Scott, 12 Minn. 395; Crone *v.* S., 49 Ind. 538.

More broadly expressed. — The true rule for the construction of a statute has been said to be to look into the whole and every part of it, the apparent intention derived from the whole, the subject-matter, the effects and consequences, and its reason and spirit; and the meaning of the legislature thus ascertained will prevail, though in conflict with the literal sense of the words. Ryegate *v.* Wardsboro, 30 Vt. 746; [Stump *v.*

that the original act and its amendments are to be interpreted as one, no portion of either being left inoperative, if without violence to the words effect can be given to the whole;[1] sometimes, that a subsequent statute may be looked into for help in discovering the true intent of an earlier one,[2]— a doctrine to be received with caution, and limited in its application; sometimes, that all acts passed at the same session will be construed as one;[3] or that all passed on the same day will be;[4] or that, when a statute is made in addition to another on the same subject, without repealing any part of it, both are to be considered together.[5] But the cases equally admit of wider forms of expression; as, that all acts on the same subject, termed *in pari materia*, including even those which are repealed, are to be interpreted together, and, as far as may be, in harmony with one another.[6]

Hornback, 94 Mo. 26, 6 S. W. R. 356; Chicago R. R. Co. *v.* Zernecke (Neb.), 32 N. W. R. 26; Standard Co. *v.* Fox, 85 Ill. Ap. 389.

[1] Harrell *v.* Harrell, 8 Fla. 46; Robbins *v.* Omnibus R. R. Co., 32 Cal. 472; Griffin's Case, Chase Dec. 364.

[2] McAfee *v.* Southern R. R. Co., 36 Miss. 669.

[3] Cain *v.* S., 20 Tex. 355; S. *v.* Rackley, 2 Blackf. 249. And see Atty. Gen. *v.* Brown, 1 Wis. 513.

[4] P. *v.* Jackson, 30 Cal. 427. And see Fouke *v.* Fleming, 13 Md. 392; Planters' Bank *v.* Black, 11 Sm. & M. 43.

[5] Pearce *v.* Atwood, 13 Mass. 324, 344.

[6] *Ante*, § 82; *post*, § 124; S. *v.* Commissioner of Railroad Taxation, 8 Vroom, 228; Merrill *v.* Gorham, 6 Cal. 41; U. S. *v.* Collier, 3 Blatch. 325; Bryan *v.* Dennis, 4 Fla. 445; Wakefield *v.* Phelps, 37 N. H. 295; Harrison *v.* Walker, 1 Kelly, 32; Billingslea *v.* Baldwin, 23 Md. 85; McLaughlin *v.* Hoover, 1 Oreg. 31; Reg. *v.* St. Giles, 3 Ellis & E. 224; Mitchell *v.* Duncan, 7 Fla. 13; Bruce *v.* Schuyler, 4 Gilman, 221, [46 Am. D. 447;] Isham *v.* Bennington Iron Co., 19 Vt. 230; Smith *v.* P., 47 N. Y. 330; Forqueran *v.* Donnally, 7 W. Va. 114; Bryant *v.* Livermore, 20 Minn. 313; Rex *v.* Palmer, *supra*, at p. 355; *Ex parte* Copeland, 2 De G., M. & G. 914; McWilliam *v.* Adams, 1 Macq. Ap. Cas. 120; Tennyson *v.* Yarborough, 7 Moore, 258, 1 Bing. 24; Bradshaw *v.* U. S., 14 Ct. of Cl. 145; Mobile, etc. R. R. Co. *v.* Malone, 46 Ala. 391; Com. *v.* Brennan, 103 Mass. 70; S. *v.* Lisles, 58 Mo. 359; S. *v.* Currie, 35 Tex. 17; Com. *v.* Desmond, 123 Mass. 407; [Gartner *v.* Cohen, 51 N. J. L. 125, 16 Atl. R. 684; S. *v.* Babcock, 21 Neb. 599, 33 N. W. R. 247; Hurt *v.* R. R. Co., 121 Ill. 644, 19 L. R. A. 649, 13 N. E. R. 176; Dawson County *v.* Clark, 58 Neb. 756, 79 N. W. R. 822; Noerr *v.* Schmidt, 151 Ind. 579, 51 N. E. R. 332. Statutes relating to the same thing or to the same general subject-matter are *in pari materia*, and must be construed together no matter when passed. S. *v.* Gerhardt, 145 Ind. 439, 44 N. E. R. 469; S. *v.* Klein, 116 Mo. 259, 22 S. W. R. 693; Cooper *v.* Ferguson, 113 U. S. 727, 28 L. ed. 1137; U. S. *v.* Trans-Missouri Co., 58 Fed. R. 58; Syracuse Water Co. *v.* Syracuse, 116 N. Y. 167, 22 N. E. R. 381; P. *v.* Raymond, 18

It would not ordinarily be relevant to the question in hand to take into view enactments on other subjects; yet, should a case occur in which the relevancy was manifest, plainly this would be permissible. Illustrations of interpreting statutes together might be multiplied without end. Thus,—

§ 87. Term of office.— The term of an office newly created may be derivable from the prior general law.[1] So,—

Appeal.— If a new jurisdiction is given a court from which the law provides an appeal, the right of appeal attaches to the new case.[2] And,—

Powers recited, then conferred.—Where an act confers powers recited in another act, the former is to be construed as though the latter were a part of it.[3] Again,—

Limitations.— A statute of limitations may be applied to an offense created by a subsequent statute.[4]

Intent from prior laws.— If the intent of the legislature can be gathered from prior laws and from the prevailing tone of other sections of the same act, conflicting words may be bent from their literal meanings to harmonize with those more explicit, or so restricted or enlarged as to carry out such intent.[5]

Notice.—Where by one section a certain notice is to be published for ten days in succession, and by another all notices are to be published daily, Sundays excepted, the two sections should be read togther; meaning, that the Sundays be included for enumeration, but not for publication.[6] Moreover,—

Restraining provision.— As the several parts of a statute are to be made harmonious with each other and with the object of the whole,[7] particular provisions are not to be extended beyond the general scope unless manifestly intended.[8]

Colo. 242, 19 L. R. A. 649, 32 Pac. R. 429; U. S. *v.* Benson, 31 Fed. R. 896; S. *v.* Sloss, 83 Ala. 93, 3 S. R. 745; Gibbons *v.* Brittenum, 56 Miss. 251; Graham *v.* Gunn, 87 Tenn. 458, 11 S. W. R. 214. Civil statutes *in pari materia* may explain a criminal enactment. Braun *v.* S., 49 S. W. R. (Tex.) 620.]

[1] P. *v.* Colton, 6 Cal. 84.

[2] Com. *v.* Messenger, 4 Mass. 462, 468. And see Stewart *v.* Walters, 9 Vroom, 274.

[3] Turney *v.* Wilton, 36 Ill. 385. And see Canastota, etc. R. R. Co. *v.* Parkill, 50 Barb. 601.

[4] Johnson *v.* U. S., 3 McLean, 89.

[5] Noble *v.* S., 1 Greene (Iowa), 325.

[6] Taylor *v.* Palmer, 31 Cal. 240.

[7] *Ante*, § 86; Ellison *v.* Mobile & Ohio R. R. Co., 36 Miss. 572.

[8] Ticknor's Estate, 13 Mich. 44; *post*, § 151.

§ 88. Common law with statute.—The common law, as prevailing at the time when a statute is passed, is as much to be taken into the account in the construction of the latter as is a prior enactment.[1] Numerous illustrations of this proposition will appear in other connections.[2] For present illustration,—

Aiders in poaching.— An English statute (9 Geo. 4, ch. 69, § 9) against night poaching made it punishable "if any persons to the number of three or more together shall by night unlawfully *enter or be in any land*, whether open or inclosed, for the purpose," etc. And, by the common law, one who is constructively or actively present encouraging another while committing a crime is himself a principal offender. Applying this common-law doctrine to the statute, the result was that, if one of a party of poachers was found actually within the particular grounds and the rest were upon adjoining land co-operating with this one, "all," in the language of Gurney, B., "may be said to be found in the clover field, within the meaning of the statute,"[3]— a conclusion impossible but for the help of the common law. And —

Acting by deputy —(*Constable*).— It was held in California, that, as by the common law officers who exercise only ministerial functions may act by deputy, constables, being such officers, have this power.[4] It is believed that not in all the states are the statutes in terms to admit of this conclusion.

§ 89. Statute with constitution.— Our written constitutions are, as already seen,[5] laws; and not the less so because they are

[1] *Ante*, §§ 5–7, 82.

[2] See *post*, §§ 131–144.

[3] Rex *v.* Andrews, 2 Moody & R. 87, 88; Rex *v.* Lockett, 7 Car. & P. 300; Rex *v.* Passey, 7 Car. & P. 282.

[4] Jobson *v.* Fennell, 35 Cal. 711. I do not mean to express any opinion as to the correctness of this doctrine in general American law. It is, I presume, beyond real question, that, by the English common law, a constable can appoint a deputy. Toml. & Jacob's Law Dict., "Constable," "Deputy;" Burn Just., "Constable;" Midhurst *v.* Waite, 3 Bur. 1259, 1262; Rex *v.* Hope Mansell, Cald. 252. And the reason commonly assigned is, that the office is ministerial. But, in Coke's Reports, this sort of doctrine is put as follows: "When an officer has power to make assignees, he may *implicite* make deputies; for *cui licet quod majus est, non debet quod minus est non licere*. And, by consequence, when an office is granted to one and his heirs, thereby he may make an assignee, and by consequence a deputy." Shrewsbury's Case, 9 Co. 46*b*, 48*b*. These are only suggestions toward the investigation of the question. It is familiar doctrine that, in this country, offices are not assignable.

[5] *Ante*, §§ 11*a*, 12, 16.

supreme over the statutes. For the same reason, therefore, that statutes are to be construed with statutes and with the unwritten law, they are also to be construed with the constitution.[1] Thus, to repeat an illustration from "Criminal Procedure,"—

Giving appeal.— A system of statutory law having provided for appeals from justices of the peace to courts sitting with juries (they being without juries), a new enactment conferred on them jurisdiction over an offense of a sort entitling the accused to a jury trial. And the court held that, to secure the jury trial, the constitution, operating with the statute, gave the right of appeal.[2] But —

§ 90. Partial conflict.— The flexibility with which statutes, in partial conflict, will sometimes yield to one another without much regard to the comparative dates of their enactment, does not extend to the like conflicts between a statute and a written constitution. The constitution will never give way; while, on the other hand, if there are two possible constructions of the statute, the one harmonious with the constitution and the other opposed, the harmonious must be adopted.[3] And —

Presumed legislative purpose.— The courts will presume the legislature intended its acts to be reasonable, constitutional and just; and, when possible, consistently with any fair rendering of the words, will so construe them as not to make them otherwise.[4] But this rule will not be carried to the ex-

[1] Eskridge *v.* S., 25 Ala. 30; Crim. Proc., I, § 894.

[2] Crim. Proc., I, § 894; Johnson's Case, 1 Greenl. 230.

[3] Duncombe *v.* Pringle, 12 Iowa, 1; Roosevelt *v.* Godard, 52 Barb. 533; Colwell *v.* May's Landing Water Power Co., 4 C. E. Green, 245; New Orleans *v.* Salamander Co., 25 La. An. 650; Slack *v.* Jacob, 8 W. Va. 612; Camp *v.* Rogers, 44 Conn. 291; P. *v.* Peacock, 98 Ill. 172; Sutherland *v.* De Leon, 1 Tex. 250, [46 Am. D. 100; Bassett *v.* Mills, 89 Tex. 162, 34 S. W. R. 93; Stanley *v.* Wabash, 100 Mo. 435, 13 S. W. R. 709; Quartlebaum *v.* S., 79 Ala. 1; P. *v.* Hayne, 83 Cal. 111, 23 Pac. R. 1; Wilkins *v.* S., 113 Ind. 514, 16 N. E. R. 192; Wells *v.* Mo. P. R. R. Co., 110 Mo. 286, 19 S. W. R. 530; S. *v.* Simmons' Hardware Co., 109 Mo. 118, 18 S. W. R. 1125; Rosenberg *v.* Weekes, 67 Tex. 578, 4 S. W. R. 399; Ferguson *v.* Stamford, 60 Conn. 432, 22 Atl. R. 782; S. *v.* Haring, 55 N. J. 327, 26 Atl. R. 915.]

[4] U. S. *v.* Coombs, 12 Pet. 72; Parsons *v.* Bedford, 3 Pet. 433; Ham *v.* McClaws, 1 Bay, 93, 98; Murray *v.* Gibson, 15 How. (U. S.) 421; Com. *v.* Getchell, 16 Pick. 452; McMullen *v.* Hodge, 5 Tex. 34; Scott *v.* Smart, 1 Mich. 295; Com. *v.* Edwards, 9 Dana, 447; Eason *v.* S., 6 Eng. 481; Hogg *v.* Zanesville Canal & Mfg. Co., 5 Ohio, 410, 417; Iowa Homestead Co. *v.*

tent of giving the enactment a meaning plainly repugnant to its terms.[1]

Webster, 21 Iowa, 221; Newland v. Marsh, 19 Ill. 376; U. S. v. Benecke, 98 U. S. 447; New York, etc. R. R. Co. v. Van Horn, 57 N. Y. 473; Lucas v. Tippecanoe, 44 Ind. 524; Broom, Leg. Max. (2d ed.) 28; [S. v. Clark, 29 N. J. L. 96; Easley v. Whipple, 57 Wis. 485, 14 N. W. R. 904; Learned v. Cooley, 43 Miss. 687; Potter v. Douglas Co., 87 Mo. 239; Haney v. S., 34 Ark. 268; Small v. Small, 129 Pa. St. 366, 18 Atl. R. 497; Carolina Bank v. Evans, 28 S. C. 521, 6 S. E. R. 321; Union Co. v. Short, 77 Ill. Ap. 448.]

[1] French v. Teschemaker, 24 Cal. 518; Bailey v. Philadelphia, etc. R. R. Co., 4 Harring. (Del.) 389, [44 Am. D. 593;] Att. Gen. v. Eau Claire, 37 Wis. 400. See *post*, §§ 145, 146; [Home Ass'n v. Nolan, 21 Mont. 205, 53 Pac. R. 738.]

CHAPTER XII.

THE INTERPRETATION OF WRITTEN CONSTITUTIONS.

§ 91. Elsewhere.— We have just seen that a statute will, when possible, be so interpreted as to harmonize with the written constitution.[1] And in other connections the doctrine of pronouncing a statute void, in whole or in part, when in conflict with the constitution, is explained.[2] Thus, we saw that,—

Duty of courts.— When a statute is void, as in conflict with a constitutional inhibition, the courts should pronounce it so.[3] But —

Duty of legislature.— The members of the legislature are, equally with the judges, sworn to support the constitution; if not so uniformly learned in the law, many of them are; and it is no more permissible for the one body to pass an unconstitutional enactment than for the other to enforce it. So that —

Legislative decision.— The decision of the legislature on the meaning and effect of the constitution, necessarily involved in the making of a statute, should be respected by the courts when afterward they are required to determine whether or not it is constitutional. Practically, judges differ on this question; some manifesting little or no regard for the opinions of the law-makers. Greater numbers, with a higher respect for a co-ordinate branch of the government, refuse to annul a statute as unconstitutional until, after giving full weight to the legislative decision, they discern distinctly and affirmatively that it is wrong. And such is plainly, in reason, and overwhelmingly in weight of authority,

[1] *Ante*, § 90.

[2] *Ante*, §§ 12, 16, 83, 87.

[3] Fletcher *v.* Peck, 6 Cranch, 87; University *v.* Williams, 9 Gill & J. 365, 384, [31 Am. D. 72;] 1 Kent, Com. 448; Bailey *v.* Philadelphia, etc. R. R. Co., 4 Harring. (Del.) 389, [44 Am. D. 593. But no one can take advantage of an unconstitutional provision in a statute who has no interest in, and is not affected by, the provision. S. *v.* McNulty, 7 N. Dak. 169, 73 N. W. R. 87; P. *v.* Rensselaer, 15 Wend. 113; Stickrod *v.* Com., 86 Ky. 285, 5 S. W. R. 580; S. *v.* Snow, 3 R. I. 64; Smith *v.* Inge, 80 Ala. 283; Black *v.* Fleece, 2 Lea (Tenn.), 566; Gilbreath *v.* Gilliland, 95 Tenn. 383, 32 S. W. R. 250.]

the true rule. Said a learned judge: "Instances are not lacking to show that the judiciary, in essaying to shield the constitution against the presumed aggressions of the legislature, has itself become the greater aggressor." And he added: "If there exist upon the mind of the court a reasonable doubt, that doubt must be given in favor of the law."[1] Again,—

§ 91a. Particular provision.—No mere general considerations will authorize a court to nullify a statute as unconstitutional.[2] Therefore he who asks such judgment should point out the particular provision or clause violated.[3] "It will not do," said Wallace, J., "to talk about the 'spirit of the constitution' as imposing a limitation upon the legislative power."[4]

[1] Cotten *v.* Leon, 6 Fla. 610, 613, opinion by Dupont, J.; Cheney *v.* Jones, 14 Fla. 587; Cutts *v.* Hardee, 38 Ga. 350; P. *v.* San Francisco, etc. R. R. Co., 35 Cal. 606; Lafayette *v.* Jenners, 10 Ind. 70; Gillespie *v.* S., 9 Ind. 380; S. *v.* Cooper, 5 Blackf. 258; Santo *v.* S., 2 Iowa, 165, [63 Am. D. 487;] Baltimore *v.* S., 15 Md. 376; Tyler *v.* P., 8 Mich. 320; Rich *v.* Flanders, 39 N. H. 304; Boston *v.* Cummins, 16 Ga. 102; Inkster *v.* Carver, 16 Mich. 484; Astor *v.* New York, 62 N. Y. 567, 575; Kerrigan *v.* Force, 68 N. Y. 381; Pennsylvania R. R. Co. *v.* Riblet, 66 Pa. St. 164, [5 Am. R. 360;] Territory *v.* Lee, 2 Mont. 124; Chicago, etc. R. R. Co. *v.* Smith, 62 Ill. 268, [14 Am. R. 99;] Gutman *v.* Virginia Iron Co., 5 W. Va. 22; Osburn *v.* Staley, 5 W. Va. 85, [13 Am. R. 640;] Smithee *v.* Garth, 33 Ark. 17; *In re* Clinton Street, 2 Brews. 599; Coyne *v.* Weaver, 84 N. Y. 386. In a California case Sanderson, J., observed: "It is well settled that every act deliberately passed by the legislature must be regarded by the courts as valid, unless it is clearly and manifestly repugnant to some provision of the constitution." P. *v.* Sassovich, 29 Cal. 480, 482. Said Frazer, J., in Indiana: "The courts should never strike down a statute unless its conflict with the constitution is clear. Then, too, the judiciary ought to accord to the legislature as much purity of purpose as it would claim for itself; as honest a desire to obey the constitution, and, also, a high capacity to judge of its meaning. Hence, its action is entitled to a respect which should beget caution in attempting to set it aside." Brown *v.* Buzan, 24 Ind. 194, 197; [Life Ins. Co. *v.* Ray, 50 Tex. 519; Lawton *v.* Waite, 79 N. W. R. 321 (Wis.); McGovern *v.* Hope, 42 Atl. R. 830 (N. J.); Wentworth *v.* Racine Co., 99 Wis. 26, 74 N. W. R. 551; Cummings *v.* Hyatt, 54 Neb. 635, 74 N. W. R. 818; Lyman *v.* Gramercy Club, 50 N. Y. Sup. 1004; S. *v.* Marion Co., 128 Mo. 427, 30 S. W. R. 103.]

[2] *Ante*, §§ 38–41. [A statute is not unconstitutional because it is unjust. Praigg *v.* Western Co., 143 Ind. 358, 42 N. E. R. 750. The burden is on him who alleges unconstitutionality to prove it beyond a doubt. S. *v.* Addington, 77 Mo. 110.

[3] Davis *v.* S., 3 Lea, 376, 378; Stockton, etc. R. R. Co. *v.* Stockton, 41 Cal. 147; Beyman *v.* Black, 47 Tex. 558; Brown *v.* Fifield, 4 Mich. 322.

[4] Stockton, etc. R. R. Co. *v.* Stockton, *supra*, p. 162; [Lommen *v.* Minneapolis Co., 65 Minn. 196, 68 N. W. R. 53.]

§ 92. Interpreted similarly to statutes.— Our constitutions, being, like statutes, written instruments and laws,[1] are, in the main, similarly interpreted.[2] There are minor differences sometimes recognized;[3] as,—

Less technical.— Partaking more of the nature of popular writings, it is not unfrequently observed that meanings less technical may be given to their words and phrases.[4]

State and United States, contrasted.— The constitution of the United States consists chiefly in a grant of enumerated powers; hence, in interpreting it, the courts presume the existence of no power not expressly or impliedly conferred. On the other hand, a state constitution proceeds on the idea that all legislative functions are in the legislature; therefore, in its interpretation, the powers not taken away by the United States constitution are presumed, except as expressly or by implication denied.[5] In reason, these propositions require, at least, the limitation that, where the power in controversy relates to international intercourse, to jurisdiction on the high seas, or to any other thing beyond the state territory, its existence among the functions of

[1] *Ante*, §§ 4, 11*a*, 89.

[2] P. *v.* Potter, 47 N. Y. 375; Springfield *v.* Edwards, 84 Ill. 626, 643; P. *v.* Fancher, 50 N. Y. 288, 291; Daily *v.* Swope, 47 Miss. 367; Hess *v.* Pegg, 7 Nev. 23; Leavenworth *v.* Miller, 7 Kan. 479, [12 Am. R. 425;] Walker *v.* Cincinnati, 21 Ohio St. 14, [8 Am. R. 24;] Brown *v.* Fifield, 4 Mich. 322; P. *v.* Wall. 68 Ill. 75; P. *v.* Gardner, 45 N. Y. 812.

[3] Carroll *v.* S., 58 Ala. 396. See Wolcott *v.* Wigton, 7 Ind. 44.

[4] Manly *v.* S., 7 Md. 135; Greencastle Township *v.* Black, 5 Ind. 557: S. *v.* Mace, 5 Md. 337; P. *v.* Fancher, *supra;* Cronise *v.* Cronise, 54 Pa. St. 255. [Narrow and technical reasoning is not to be applied to constitutions, inasmuch as they are instruments framed by the people for themselves, "upon which," as charts, "every man, learned or unlearned, may be able to trace the leading principles of government." Cooley, Const. Lim. 59; Morrison *v.* Bachert, 112 Pa. St. 322, 5 Atl. R. 739; Com. *v.* Clark, 7 W. & S. 127; Henshaw *v.* Foster, 9 Pick. 312; St. Louis R. R. Co. *v.* Evans, 85 Mo. 307.]

[5] P. *v.* Flagg, 46 N. Y. 401; Page *v.* Allen, 58 Pa. St. 338, [98 Am. D. 272;] Bushnell *v.* Beloit, 10 Wis. 195; P. *v.* Coleman, 4 Cal. 46, [60 Am. D. 581;] McMillen *v.* Lee, 6 Iowa, 391; *In re* Clinton Street, 2 Brews. 599; Lafayette, etc. R. R. Co. *v.* Geiger, 34 Ind. 185; Leavenworth *v.* Miller, 7 Kan. 479, [12 Am. R. 425;] Walker *v.* Cincinnati, 21 Ohio St. 14; Cotten *v.* Leon, 6 Fla. 610, 619; Woods' Appeal, 75 Pa. St. 59. [Unlike that of the United States, the constitution of the state is not a grant of power. The state legislature is to be regarded as possessing inherently all power, and the constitution is a limit, not a grant. Henley *v.* S., 98 Tenn. 681; Stratton *v.* Morris, 98 Tenn. 511; R. R. Co. *v.* Hicks, 9 Bax. 446.]

the United States, and non-existence among those of the state, should be the *prima facie* presumption.

§ 92a. Instances of same rules as for statutes.— Some instances of interpreting a constitution by the same rules as a statute are —

Retrospective.— Commonly a constitutional provision is not applied to annul what a prior statute, valid when enacted, had established, however contrary to its newly-ordained rule.[1] Yet often — doubtless more frequently than with statutes — a retrospective application will be required to carry out the evident intention of the makers, or the obvious reason for a clause, and then such application will be made.[2] And —

Intent of makers — History, etc.— The rule that the intent of the makers, as appearing on the face of the particular provision and the entire instrument, illumined by pertinent historical facts and surroundings,[3] yet not by individual declarations, such as the debates in the convention which framed it,[4] shall prevail over the latent meanings of words and phrases, but not to the disregard of the true import of what is plain,[5] is applied to constitutions the same as to statutes.[6]

§ 92b. Requiring legislation or not.— As already seen,[7] some constitutional provisions bind only the legislative conscience until statutes to carry them out are enacted, and others operate at once as laws. The question depends on their terms and the subject. A plain instance is a declaration that "the privilege of the debtor to enjoy the necessary comforts of life

[1] Indiana *v.* Agricultural Soc., 85 Pa. St. 357; Herman *v.* Phalen, 14 How. (U. S.) 79; League *v.* De Young, 11 How. (U. S.) 185. And see Com. *v.* Collis, 10 Phila. 430; Doddridge *v.* Stout, 9 W. Va. 703.

[2] *In re* Lee & Co.'s Bank, 21 N. Y. 9. [The rule that a law is, in the absence of clearly apparent intent to the contrary, prospective only, applies to constitutions. S. *v.* Greer, 78 Mo. 188; Leete *v.* State Bank, 115 Mo. 184, 21 S. W. R. 788.]

[3] P. *v.* Gies, 25 Mich. 83; P. *v.* Fancher, 50 N. Y. 288.

[4] Beardstown *v.* Virginia, 76 Ill. 34; Taylor *v.* Taylor, 10 Minn. 107; [Com. *v.* Balph, 111 Pa. St. 365, 3 Atl. R. 220; P. *v.* May, 9 Colo. 80, 10 Pac. R. 641; P. *v.* Chapman, 61 Cal. 262; S. *v.* Closkey, 5 Sneed, 484; Luehrman *v.* Taxing Dist., 3 Lea (Tenn.), 431.]

[5] Hills *v.* Chicago, 60 Ill. 86; Springfield *v.* Edwards, 84 Ill. 626, 643.

[6] P. *v.* Potter, 47 N. Y. 375; S. *v.* Parsons, 11 Vroom, 1; S. *v.* Newark, 11 Vroom, 71, 550. [The same rules of construction apply to constitutions as to statutes. P. *v.* Potter, 47 N. Y. 375; *In re* N. Y. District R. R. Co., 42 Hun, 621; Oakland Co. *v.* Hilton, 69 Cal. 479, 11 Pac. R. 8.]

[7] *Ante*, §§ 11*a*, note, 14.

shall be recognized by wholesome laws;" the courts that enforce laws, not make them, cannot give effect to this provision without legislative aid.[1] On the other hand, it is equally plain that no legislation is necessary to enable the supreme court of the United States to take original jurisdiction of a suit between two states, under the clause of the constitution that the judicial power shall extend "to controversies between two or more states."[2] If some other cases are less clear, still the principle which controls these will determine how the result should be.[3]

§ 92c. Other doctrines,— applicable to the interpretation alike of statutes and constitutions,— appear in the discussions in other chapters. The foregoing are sufficient here as explaining the similarities and differences.

[1] Green *v.* Aker, 11 Ind. 223.

[2] Const. U. S., art. 3, § 2; Kentucky *v.* Ohio, 24 How. (U. S.) 66.

[3] Jackson *v.* Collins, 16 B. Monr. 214; S. *v.* Weston, 6 Neb. 16; Com. *v.* Harding, 87 Pa. St. 343; *Ex parte* S., 52 Ala. 231; Com. *v.* Collis, 10 Phila. 430; Doddridge *v.* Stout, 9 W. Va. 703, 705. See, as illustrative, *ante*, § 14; Gilbert *v.* U. S., 8 Wall. 358; Parish *v.* U. S., 8 Wall. 489. [Constitutional provisions which are prohibitive are self-executing, *proprio vigore*, and requiring no legislative action to execute them. Oakland Co. *v.* Hilton, 69 Cal. 479, 11 Pac. R. 8; Householder *v.* Kansas City, 88 Mo. 488.]

CHAPTER XIII.

THE MEANINGS OF THE LANGUAGE.

§ 92d. Flexibility of language.— The possible forms of thought are, like the source whence the thinking mind proceeds, or the universe it is fashioned to mirror, infinite. If hitherto the actual in thought has had its limit, the reason is simply that the end of the progress of the mind through eternity is not reached. Language is the offspring of the past, but its life is in and for the ever opening and progressive future. Its principal mission is to convey, from one mind to another, the new thoughts as they arise; for the old is continually dying, while the new is being born. If each word had a single fixed and unchanging meaning, and if there were simply certain established collocations of words, each with its one signification, the powers of language would be very limited, and it could never express a new idea. It would be completely unadapted to human use. As things are, it is one of the most marvelous of the mysteries attendant on human life. "There is," said a learned judge, "no word in the English language which does not admit of various interpretations."[1] And no bound can be set to the ever-varying combinations of words, conveying both the old thoughts and the new,— thoughts which the inventors of the words had, and those which they had not. Thus wonderfully flexible is language! Hence,—

§ 93. Statute as words in combination.— In interpreting a statute we do not contemplate it as a series of words, each with its particular signification, but as words combined to convey what they could not singly. While we do not shut our eyes to the letter, we look most of all for the spirit — the effect of the combination in the circumstances and connections wherein it was made. "The letter killeth, but the spirit giveth life."[2] Says an old maxim, *qui hæret in litera hæret in cortice*, if we

[1] Pollock, C. B., in Reg. *v.* Skeen, Bell C. C. 97, 134.

[2] 2 Cor. iii. 6.

adhere to the letter, we go only skin-deep into the meaning.[1] One minor form of this doctrine is that —

Intent gathered from whole.— The intention of a statute, gathered from the whole of it, will prevail over the strict sense of its terms, when such construction will not work injustice or involve an absurdity.[2] And —

Reasonable.— "All laws," said Field, J., speaking for the supreme court of the United States, "should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."[3] Still,—

Meanings of words.— The meanings of the words are not to be lost sight of. They will vary with the subject, context and other circumstances;[4] yet the legislature will be presumed to

[1] Broom, Leg. Max. (2d ed.) 534; Scofield *v.* Collins, 3 Cow. 89, 96; P. *v.* Utica Ins. Co., 15 Johns. 358, [8 Am. D. 243;] Minor *v.* Mechanics' Bank, 1 Pet. 46, 64; Bac. Abr., Stat. I, 5, 6; 1 Bl. Com. 61; S. *v.* Savage, 32 Me. 583: 1 Domat (Cush. ed.), p. 84; Eyston *v.* Studd, 2 Plow. 459, 465, where it is said: "It is not the words of the law, but the internal sense of it, that makes the law; and our law, like all others, consists of two parts, namely, of body and soul. The letter of the law is the body of the law, and the sense and reason of the law is the soul of the law; . . . and it often happens that when you know the letter you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive." Dwar. Stat. (2d ed.) 552; Holbrook *v.* Holbrook, 1 Pick. 248, 254; Church *v.* Crocker, 3 Mass. 17, 21; S. *v.* Lane, 8 Ired. 256; New Orleans, etc. R. R. Co. *v.* Hemphill, 35 Miss. 17; Direct U. S. Cable Co. *v.* Anglo-American Tel. Co., 2 Ap. Cas. 394, 412; Murray *v.* New York Central R. R. Co., 3 Abb. Ap. 339; Bailey *v.* Com., 11 Bush, 688.

[2] *Ex parte* Ellis, 11 Cal. 222; San José *v.* San José, etc. R.. R. Co., 53 Cal. 475; [Hooper *v.* Creager, 84 Md. 195, 35 Atl. R. 967, 35 L. R. A. 202; Chandler *v.* Lee, 1 Idaho (N. S.), 351; U. S. *v.* Snow, 4 Utah, 321, 9 Pac. R. 697; Smith *v.* P., 47 N. Y. 330; Jerome Park *v.* Board, 11 Abb. N. C. 342; P. *v.* Commissioner, 95 N. Y. 554; P. *v.* Lacombe, 99 N. Y. 43, 1 N. E. R. 599. This rule is especially applicable to the code of civil procedure. Harbeck *v.* Pupin, 55 Hun, 335, 8 N. Y. Sup. 695; P. *v.* Buffalo, 57 Hun, 577, 11 N. Y. Sup. 314. See also Chippewa Supervisors *v.* Attorney-General, 65 Mich. 408, 32 N. W. R. 651; Peninsular Co. *v.* Duncan, 28 Mich. 130; Chouteau *v.* Rowse, 90 Mo. 191, 2 S. W. R. 209; Wabash *v.* Binkert, 106 Ill. 298; Reinecke *v.* P., 15 Ill. Ap. 241.]

[3] U S. *v.* Kirby, 7 Wall. 482, 486, 487; Matthews *v.* Coldwell, 2 Disney, 279; P. *v.* Admire, 39 Ill. 251.

[4] McIntyre *v.* Ingraham, 35 Miss. 25; Simonds *v.* Powers, 28 Vt. 354;

have intended what it said and to have understood the significance of language.[1] And such presumed intent will be carried out in the construction unless another, in some legitimate way, affirmatively appears.[2]

§ 94. Unity of meaning.— In a book not strictly of the legal class we read: "No sentence or form of words can have more than one 'true sense;' and this only one we have to inquire for. This is the very basis of all interpretation. . . . Every man or body of persons, making use of words, does so in order to convey a certain meaning; and to find this precise meaning is the object of all interpretation. To have two meanings in view is equivalent to having no meaning, and amounts to absurdity. . . . The fictitious law case, composed by Pope and Fortescue, as having ensued in consequence of Sir John Swale having bequeathed to his friend Mr. Straggling 'all my black and white horses,' when there were found six black horses, six white ones, and six that were black and white, or pied horses, is certainly entertaining. Yet the question ought never to have arisen 'whether the pied horses were included in the legacy,' as was assumed by those gentlemen. As there can be but one meaning attached to any sentence, the testator could not have meant by his words all black and all white horses, and, at the same time, all black and white horses. The only difficulty arising from this will could be this: whether the testator meant to bequeath to Mr. Straggling all black and all white horses, *or* all black and white horses."[3] So, applying this doctrine to a statute,—

§ 95. Illustrations.— If the legislature should direct the officers of a court in a particular emergency to *sit or stand*, the meaning could not be that a part might sit while the rest stood; because this interpretation would give a duplicate sense to the

Smith *v.* Randall, 6 Cal. 47, [65 Am. D. 475;] P. *v.* Hoffman, 37 N. Y. 9; Whitney *v.* Whitney, 14 Mass. 88, 92; Holbrook *v.* Holbrook, 1 Pick. 248; Somerset *v.* Dighton, 12 Mass. 383; S. *v.* Judge of Ninth Judicial District, 12 La. An. 777; Caledonian Ry. Co. *v.* North British Ry. Co., 6 Ap. Cas. 114, 122.

[1] *Ante*, §§ 72, 80; Woodbury *v.* Berry, 18 Ohio St. 456; Direct U. S. Cable Co. *v.* Anglo-American Tel. Co., 2 Ap. Cas. 394, 412; Thurman *v.* S., 18 Ala. 276; The Sam Slick, 2 Curt. C. C. 480.

[2] Lane *v.* Schomp, 5 C. E. Green, 82; Garrigus *v.* Parke, 39 Ind. 66.

[3] Lieber, Legal and Political Hermeneutics, pp. 86–88. And see S. *v.* Layman, 8 Blackf. 330; Reg. *v.* Hamilton, 1 Car. & K. 212.

simple expression. Or, if the provision was that no fees be taken for executing *a mandamus or a capias*, the meaning could not be to forbid fees for one, to be elected, not for the other; since here also, to work this result, a duplicate signification must be drawn from one compact form of language. There can be no doubt of the soundness of this doctrine when applied to such a writing as a statute. And,—

Further of doctrine.— If one says that his *time and money are valuable*, he cannot mean that his money is valuable in a serious sense, and his time ironically so; though he may intend to be understood either as serious or as ironical in the entire expression. Still there are writings,— as, for example, compositions in poetry or prose intended to instruct or amuse by way of suggestion rather than exact delineation or precept,— the efficacy of which consists in giving various and perhaps conflicting meanings to a single sentence, or even a single word, where the reader is to accept all the meanings, or as many of them as he has capacity for, or to choose between them.

§ 95a. Same word in same statute, etc.— In a sort of general way it is sometimes worth considering, that, if a particular word occurs repeatedly in a statute, or in different statutes on the same subject, the meaning may, *prima facie*, be deemed identical in all the places. This doctrine is occasionally expressed in even stronger terms.[1] The presumption is in no form held to be conclusive,[2] and the fact is sometimes very

[1] Courtauld *v.* Legh, Law Rep. 4 Ex. 126, 130; James *v.* Dubois, 1 Harrison, 285; Com. *v.* Morrison, 2 A. K. Mar. 75, 82; Pitte *v.* Shipley, 46 Cal. 154; [Rhodes *v.* Weldy, 46 Ohio St. 234, 20 N. E. R. 461; Toedtmeier *v.* County, 34 Oreg. 66, 54 Pac. R. 954; Postal Tel. Co. *v.* Railroad Co., 96 Va. 661, 32 S. E. R. 468; Brown *v.* Turner (Mass.), 54 N. E. R. 510; Collins *v.* Wiehoit, 35 Mo. Ap. 585; Henry *v.* Trustees, 48 Ohio St. 671, 30 N. E. R. 1122. When the legislature has made use of one word or a particular expression, the same words, in other proceedings, *unless the contrary manifestly appears*, should receive the same construction. White *v.* Hunt, 1 Halst. 415; Koch *v.* Vanderhoof, 49 N. J. L. 621, 9 Atl. R. 771; Hoag *v.* Howard, 55 Cal. 564; Gunning *v.* P., 86 Ill. Ap. 174.]

Subsequent on same subject.— Where, in a subsequent statute on the same subject, the legislature uses different language in the same connection, an intended change of the law may be presumed. Lehman *v.* Robinson, 59 Ala. 219; Rich *v.* Keyser, 54 Pa. St. 86; [Stump *v.* Hornback, 94 Mo. 26, 6 S. W. R. 356; Burwell *v.* Tullis, 12 Minn. 572; Heinsen *v.* S., 14 Colo. 228, 23 Pac. R. 995.]

[2] Texas *v.* White, 7 Wall. 700; Fea-

palpably otherwise.[1] Even the same word in a single sentence creating an offense has been adjudged to have different meanings in different parts of the sentence.[2] Of course, the rule is not applicable to statutes on different subjects; the subjects will govern the meanings, and they may be very different.[3] Vattel, writing of treaties, states what is believed to be equally sound in statutory interpretation. "If," he says, "any one of those expressions which are susceptible of different significations occurs more than once in the same piece, we cannot make it a rule to take it everywhere in the same signification. For we must take such expression, in each article, according as the subject requires,—*pro substrata materia*, as the masters of the art say. The word *day*, for instance, has two significations. If therefore it be said in a convention that there shall be a truce of fifty days, on condition that commissioners from both parties shall, during eight successive days, jointly endeavor to adjust the dispute,— the fifty days of the truce are civil days of twenty-four hours; but it would be absurd to understand them in the same sense in the second article, and to pretend that the commissioners should labor eight days and nights without intermission."[4]

§ 96. Legal meaning.— A statute being a law,[5] words in it which have acquired a particular legal meaning are, in the absence of circumstances otherwise controlling them,[6] given this meaning in the interpretation.[7] Frequent illustrations of this doctrine occur in cases of —

gin *v.* Comptroller, 42 Ala. 516, 522; Rupp *v.* Swineford, 40 Wis. 28; Reg. *v.* Kent, 2 Q. B. 686, 692.

[1] Angell *v.* Angell, 9 Q. B. 328, 356.

[2] Reg. *v.* Allen, Law Rep. 1 C. C. 367, 371, 373.

[3] *Post*, § 98*a*; East India Interest, 3 Bing. 193, 196; River Wear Commissioners *v.* Adamson, 2 Ap. Cas. 743, 763; Jolliffe *v.* Rice, 6 C. B. 1, 9; Rupp *v.* Swineford, *supra;* Feagin *v.* Comptroller, *supra;* Caldwell's Case, 19 Wall. 264; Jones *v.* Dexter, 8 Fla. 276; [S. *v.* Knowles (Md.), 45 Atl. R. 877.]

[4] Vattel, Law of Nations, b. 2, ch. 17, § 281.

[5] *Ante*, §§ 7, 11*a*.

[6] *Post*, § 204.

[7] Apple *v.* Apple, 1 Head, 348; Stephenson *v.* Higginson, 3 H. L. Cas. 638; S. *v.* Mace, 5 Md. 337; Merchants' Bank *v.* Cook, 4 Pick. 405; Adams *v.* Turrentine, 8 Ire. 147; U. S. *v.* Magill, 1 Wash. C. C. 463; *Ex parte* Vincent, 26 Ala. 145, [62 Am. D. 714;] *post*, § 242; [Bedell *v.* Janney, 4 Gilm. 193; Steere *v.* Brownell, 124 Ill. 27, 15 N. E. R. 26; Herring *v.* Poritz, 6 Ill. Ap. 208; McNichol *v.* Agency, 74 Mo. 457; Robbins *v.* Omnibus Co., 82 Cal. 472.]

§ 97. Re-enacted statutes, phrases, and words.— If, therefore, a statute employs terms or modes of expression which had acquired a definite signification in previous enactments on the same or some analogous subject, the established interpretation will, in the absence of any special indication to the contrary, prevail.[1] And it is the same where an entire statute, having received a judicial interpretation, expires or is repealed and is afterward re-enacted in the same language: here the legislature, being presumed to know the prior law,[2] is presumed to have adopted the meaning already given it by the courts.[3] But,—

Adopted from other state or country.— Where the adopted provision is, with its construction, foreign, one of the elements of the problem is different. The courts do not know the laws of other states and countries except when proved to them;[4] neither, *a fortiori*, does the legislature. Yet they know the laws of England prior to the settlement of this country, and perhaps to some extent the later ones; and under statutes those of sister states are generally provable by simple methods.[5] When, therefore, a statutory provision is adopted from another state or country, the following of the foreign construction may, in reason, be presumably intended in some circumstances, not

[1] The Abbotsford, 98 U. S. 440; U. S. *v.* Gilmore, 8 Wall. 330; Williams *v.* Lear, Law R. 7 Q. B. 285; Whitcomb *v.* Rood, 20 Vt. 49; U. S. *v.* Wilson, Bald. 78, 95; Sheppard *v.* Gosnold, Vaugh. 159; McKee *v.* McKee, 17 Md. 352; Ruckmaboye *v.* Mottichund, 8 Moore, P. C. 4, 32 Eng. L. & Eq. 84; County Seat of Linn, 15 Kan. 500; S. *v.* Brewer, 22 La. An. 273; Woolsey *v.* Cade, 54 Ala. 378, [25 Am. R. 711.]

[2] *Ante*, §§ 74, 75. [Prior repealed statutes may be used to ascertain the meaning of terms. U. S. *v.* Le Bris, 121 U. S. 278, 30 L. ed. 946.]

[3] Myrick *v.* Hasey, 27 Me. 9, [46 Am. D. 583;] Ruckmaboye *v.* Mottichund, *supra;* Mansell *v.* Reg., 8 Ellis & B. 54, 73; Bank of Mobile *v.* Meagher, 33 Ala. 622; La Selle *v.* Whitfield, 12 La. An. 81; *Ex parte* Matthews, 52 Ala. 51; Tuxbury's Appeal, 67 Me. 267; O'Byrnes *v.* S., 51 Ala. 25; Cota *v.* Ross, 66 Me. 161. Said Woodbury, J., in the supreme court of the United States: "With the knowledge of our construction, like words being again repeated by congress, it may be considered that a like construction was intended, and was expected to be given to those words." Mason *v.* Fearson, 9 How. (U. S.) 248, 258; [Sanders *v.* Bridges, 67 Tex. 93, 2 S. W. R. 663; Handlin *v.* Morgan Co., 57 Mo. 114; Northcutt *v.* Eager, 132 Mo. 265, 33 S. W. R. 1125; Hilliker *v.* R. R. Co., 152 Ind. 86, 52 N. E. R. 607; Calhoun *v.* Little, 106 Ga. 336, 32 S. E. R. 86, 43 L. R. A. 630.]

[4] Bishop, Mar., Div. & S., §§ 1105, 1106, 1109.

[5] Id., §§ 414–417, 422, 423–425.

so absolutely in others. In the adjudications on this question, no nice distinctions have been drawn; but, in a general way, it is held that a word, phrase or statutory provision, adopted from the laws of another state,[1] or from England,[2] or even from the civil law,[3] will ordinarily receive the construction it had in the law whence it was taken.[4] Yet it is deemed also that the foreign exposition is not conclusive,[5] or in so high a degree controlling as the domestic.[6] Thus, for example, a prior interpretation from another state will not be followed when antagonistic to,[7] or further than harmonious with,[8] our own laws and judicial usages. In like manner,—

[1] Rigg *v.* Wilton, 13 Ill. 15, [54 Am. D. 419;] S. *v.* Rowley, 13 Conn. 101; McKenzie *v.* S., 6 Eng. 594; Campbell *v.* Quinlin, 3 Scam. 288; Draper *v.* Emerson, 22 Wis. 147; Drennan *v.* P., 10 Mich. 169; Bemis *v.* Becker, 1 Kan. 226; S. *v.* Swope, 7 Ind. 91; S. *v.* Macon County Court, 41 Mo. 453; Westcott *v.* Miller, 42 Wis. 454; Kilkelly *v.* S., 43 Wis. 604; [Adams *v.* R. R. Co., 10 S. Dak. 239, 72 N. W. R. 577; Stutsman Co. *v.* Wallace, 142 U. S. 293, 35 L. ed. 1018; Nicollet Bank *v.* Bank, 38 Minn. 85, 35 N. W. R. 577; Pomeroy *v.* Pomeroy, 93 Wis. 262, 67 N. W. R. 430; Coulter *v.* Stafford, 48 Fed. R. 266; Stadler *v.* Bank, 22 Mont. 190, 56 Pac. R. 111; Henrietta Co. *v.* Gardiner, 178 U. S. 123, 43 L. ed. 637; Kendall *v.* Garneau, 55 Neb. 403, 75 N. W. R. 852. The rule is not applicable to constructions made after the adoption. Olin *v.* R. R. Co., 25 Colo. 177, 53 Pac. R. 454. The same rule holds good where congress extends the laws of a state over a territory. Kohn *v.* McKinnon, 90 Fed. R. 623; Zufall *v.* U. S. (I. T.), 43 S. W. R. 760. See also Trabant *v.* Rummell, 14 Oreg. 17, 12 Pac. R. 56; Lindley *v.* Davis, 6 Mont. 453, 13 Pac. R. 118; Pratt *v.* Tel. Co., 141 Mass. 225, 5 N. E. R. 307. Also when congress adopts the statutes of a state. Metropolitan R. R. Co. *v.* Moore, 121 U. S. 558, 30 L. ed. 1022; Willis *v.* Eastern Co., 169 U. S. 295, 42 L. ed. 752.]

[2] McCartee *v.* Orphan Asylum Society, 9 Cow. 437, [18 Am. D. 516;] Kennedy *v.* Kennedy, 2 Ala. 571; McKenzie *v.* S., 6 Eng. 594; Com. *v.* Hartnett, 3 Gray, 450; Pennock *v.* Dialogue, 2 Pet. 1; Tyler *v.* Tyler, 19 Ill. 151; Adams *v.* Field, 21 Vt. 256; Marqueze *v.* Caldwell, 48 Miss. 23; McCool *v.* Smith, 1 Black, 459.

[3] U. S. *v.* Jones, 3 Wash. C. C. 209, 215.

[4] Fisher *v.* Deering, 60 Ill. 114; Clark *v.* Jeffersonville, etc. R. R. Co., 44 Ind. 248; Fall *v.* Hazelrigg, 45 Ind. 576, [15 Am. R. 278;] Pangborn *v.* Westlake, 36 Iowa, 546; Harrison *v.* Sager, 27 Mich. 476; Greiner *v.* Klein, 28 Mich. 12, 22; Daniels *v.* Clegg, 28 Mich. 32; Poertner *v.* Russel, 33 Wis. 193; Hobbs *v.* Memphis, etc. R. R. Co., 9 Heisk. 873; Anderson *v.* May, 10 Heisk. 84. [A statute passed by a state to carry into effect the duty imposed by a federal statute will be presumed to have the same meaning. Wilson *v.* Bradley (Ky.), 48 S. W. R. 1088.]

[5] Snoddy *v.* Cage, 5 Tex. 106.

[6] Rigg *v.* Wilton, 13 Ill. 15; Ingraham *v.* Regan, 23 Miss. 213.

[7] Cole *v.* P., 84 Ill. 216.

[8] Jamison *v.* Burton, 43 Iowa, 282; Freese *v.* Tripp, 70 Ill. 496; Gage *v.* Smith, 79 Ill. 219; [Florida R. R. Co.

Constitution.— In pursuance of the presumed intent of the makers, a constitutional provision, adopted from another state after it had been judicially interpreted, will, in the absence of any contrary indication, retain the meaning thus previously ascertained.[1]

§ 98. Revisions and codifications.— Where statutes are "revised," as is common in our states, to render them more convenient and plain, the revision is to receive the interpretation which had been given to the old laws, except where the contrary intention affirmatively appears. One of the objects having been to improve and make uniform the phraseology, slight changes of language will not work changes of meaning.[2] Still, where the language in its new forms is distinct, it will be given its due effect. The old, which it supersedes, cannot vary it; though, in a doubtful case, it may help in opening its import.[3]

v. Money, 40 Fla. 17, 24 S. R. 148; Smith *v.* Bell, 70 Ill. Ap. 490.]

[1] P. *v.* Coleman, 4 Cal. 46, [60 Am. D. 581;] Atty. Gen. *v.* Brunst, 3 Wis. 787; Hess *v.* Pegg, 7 Nev. 23; Leavenworth *v.* Miller, 7 Kan. 479, [12 Am. R. 425;] Walker *v.* Cincinnati, 21 Ohio St. 14, [8 Am. R. 24;] Daily *v.* Swope, 47 Miss. 367; [Sanders *v.* Anchor Line, 91 Mo. 26, 10 S. W. R. 595.]

[2] Hughes *v.* Farrar, 45 Me. 72; Parramore *v.* Taylor, 11 Grat. 220, 242; Duramus *v.* Harrison, 26 Ala. 326; Mooers *v.* Bunker, 9 Fost. (N. H.) 420; Conger *v.* Barker, 11 Ohio St. 1; P. *v.* Deming, 1 Hilton, 271; Overfield *v.* Sutton, 1 Met. (Ky.) 621; Allen *v.* Ramsey, 1 Met. (Ky.) 635; Theriat *v.* Hart, 2 Hill (N. Y.), 380; *In re* Brown, 21 Wend. 316; Lee *v.* Forman, 3 Met. (Ky.) 114; Anthony *v.* S., 29 Ala. 27; Glass *v.* S., 30 Ala. 529, 531; Fosdick *v.* Perrysburg, 14 Ohio St. 472; Croswell *v.* Crane, 7 Barb. 191; Dominick *v.* Michael, 4 Sandf. 374; Smith *v.* Smith, 19 Wis. 522; Douglas *v.* Douglas, 5 Hun, 140; [Landford *v.* Dunklin, 71 Ala. 594; Bradley *v.* S., 60 Ala. 318; Brown *v.* County (W. Va.), 32 S. E. R. 165; Ghighlione *v.* Marsh, 48 N. Y. Supp. 604; Comer *v.* S. (Ga.), 29 S. E. R. 501; Braun *v.* S. (Tex.), 49 S. W. R. 620; Montville R. R. Co. *v.* R. R. Co., 68 Conn. 418, 36 Atl. R. 811; Inhabitants *v.* Rockland, 89 Me. 43, 35 Atl. R. 1033; Cummings *v.* Everett, 82 Me. 260, 19 Atl. R. 456; Duffield *v.* Pike (Conn.), 42 Atl. R. 641. The grouping of provisions in a code or revision of laws is in general intended for convenient reference only, and cannot affect construction. Weindel *v.* Weindel, 126 Mo. 640, 29 S. W. R. 715; Hooper *v.* Creager, 84 Md. 195, 35 Atl. R. 967, 35 L. R. A. 202. A change of language in a statute does not necessarily indicate a *change in its prior construction.* McGrath *v.* R. R. Co., 128 Mo. 1, 30 S. W. R. 329. Where the legislature enjoins the addition of marginal notes indicating contents of statutes, the notes are not the construction sanctioned by legislature. Com. Co. *v.* Place (R. I.), 43 Atl. R. 68. Where a law has been codified to accord with a decision of the supreme court, it will ordinarily be construed in the light of such decision. Calhoun *v.* Little (Ga.), 32 S. E. R. 86.]

[3] *Ante*, § 82; U. S. *v.* Bowen, 100 U.

So likewise a passage in the revision will alter the law if otherwise it would be inoperative.[1] And where for any other reason this consequence was plainly meant, the courts will depart from the old interpretation.[2]

§ 98a. **The subject.**— In the course of the foregoing illustrations, the leading rule whence chiefly proceed the results is stated; namely, that the meanings will vary with the subject.[3] This is a canon also in the interpretation of contracts: the subject of which they speak must be taken into the account.[4] It applies likewise to treaties,[5] and to all other forms of written and spoken language. Those who in any way use words mean one thing or another according to the subject in contemplation. Now,—

§ 99. **Technical, but not legal.**— Looking to the subject for the meaning,[6] if a statute employs a word which, though not legal, is technical to its subject, we give it the technical sense,— not the general sense, not one technical to another subject,— unless something appears indicating a different intent of the legislature.[7] Thus,—

S. 508; Coffin *v.* Rich, 45 Me. 507, [71 Am. D. 559.]

[1] Burnham *v.* Stevens, 33 N. H. 247. And see The Magellan Pirates, 18 Jur. 13, 25 Eng. L. & Eq. 595.

[2] Rich *v.* Keyser, 54 Pa. St. 86; Douglas *v.* Douglas, 5 Hun, 140; Lehman *v.* Robinson, 59 Ala. 219; S. *v.* Clark, 57 Mo. 25.

Particular revisions.— For decisions on particular revisions and codes and their construction, see U. S. *v.* Bowen, 100 U. S. 508; *In re* Oregon Bulletin Printing, etc. Co., 14 Bankr. Reg. 405, 3 Saw. 614; *Ex parte* Ray, 45 Ala. 15; O'Neal *v.* Robinson, 45 Ala. 526; Barker *v.* Bell, 46 Ala. 216; Mobile, etc. R. R. Co. *v.* Malone, 46 Ala. 391; Vinsant *v.* Knox, 27 Ark. 266; Whitehead *v.* Wells, 29 Ark. 99; Battle *v.* Shivers, 39 Ga. 405; Inman *v.* S., 54 Ga. 219; Ballin *v.* Ferst, 55 Ga. 546; Gray *v.* Mount, 45 Iowa, 591; Burgess *v.* Memphis, etc. R. R. Co., 18 Kan. 53; Broaddus *v.* Broaddus, 10 Bush, 299; Sellers *v.* Com., 13 Bush, 331; S. *v.* Popp, 45 Md. 432; St. Louis *v.* Foster, 52 Mo. 513; Middleton *v.* New Jersey West Line R. R. Co., 11 C. E. Green, 269; Scheftels *v.* Tabert, 46 Wis. 439. And see *post*, § 160, note.

[3] *Ante*, §§ 93, 95*a*; Rex *v.* Hall, 1 B. & C. 123, 136; The Lion, Law Rep. 2 P. C. 525, 530.

[4] Bishop, Con., § 397.

[5] Vattel, Law of Nations, b. 2, c. 17, §§ 280, 295.

[6] *Ante*, § 98*a*.

[7] S. *v.* Smith, 5 Humph. 394; Burton *v.* Reevell, 16 M. & W. 307, 309. And see Caldwell's Case, 19 Wall. 264. [The court judicially knows the *ordinary* meaning of words; when, therefore, it is claimed that a word has acquired a technical, commercial sense, it must be shown that the latter usage is established, uniform and general. Sonn *v.* Magone, 159 U. S. 417, 40 L. ed. 203.]

Commercial meaning — Revenue laws, etc. — An act relating to commerce is interpreted by the vocabulary of merchants, not of mechanics.[1] And words in revenue laws are construed according to the usages of trade;[2] as, if "bohea tea" is mentioned, it means the article known in trade as such, not in science;[3] and "loaf sugar" in these laws signifies sugar in loaves, not crushed sugar; such being the the use of the words in trade and commerce.[4] But —

§ 100. Exceptions. — The technical sense will not be applied to defeat the purpose of a statute, or violate its obvious signification. Thus,—

Credit to student. — A statute in Connecticut forbade the giving of credit, except on certain conditions, to "any student of Yale College, being a minor." And the word "student" was held to include one not matriculated, or admitted to regular membership; matriculation taking place only after a residence of six months, and evidence of unblemished moral character.[5] Whether this had occurred in a particular instance could not ordinarily be known to persons asked for credit, making it plain that the popular meaning, which takes cognizance simply of the apparent relation of the student to the college, was intended. Moreover, this statute was penal; yet —

In penal statute. — It has been deemed that, where technical words are sought to be expanded into the larger popular signification in a penal statute, such intent of the legislature must plainly appear.[6]

§ 101. Not technical — Popular meanings. — The language of our statutes is, in the greater part, not technical in either

[1] U. S. *v.* Sarchet, Gilpin, 278.

[2] Elliott *v.* Swartwout, 20 Pet. 137, 151; Lee *v.* Lincoln, 1 Story, 610; U. S. *v.* One Hundred and Twelve Casks of Sugar, 8 Pet. 277; Bacon *v.* Bancroft, 1 Story, 341; Lawrence *v.* Allen, 7 How. (U. S.) 785; Curtis *v.* Martin, 3 How. (U. S.) 106.

[3] Two Hundred Chests of Tea, 9 Wheat. 430.

[4] U. S. *v.* Breed, 1 Sumner, 159.

"Tenpins." — And see, as to the word "tenpins," S. *v.* Gupton, 8 Ire. 271.

[5] Morse *v.* S., 6 Conn. 9. See also U. S. *v.* Gooding, 12 Wheat. 460, 467; U. S. *v.* Twenty-Four Coils of Cordage, Bald. 502, 505; Jesson *v.* Wright, 2 Bligh, 1, 57; Winter *v.* Perratt, 6 Man. & G. 314, 379; Com. *v.* Buzzell, 16 Pick. 153, 161; Waring *v.* Clark, 5 How. (U. S.) 441; *post*, § 242*a*.

"Purporting." — As to the word "purporting," see S. *v.* Harris, 5 Ire. 287; S. *v.* Page, 19 Mo. 213.

[6] Stephenson *v.* Higginson, 3 H. L. Cas. 638, 18 Eng. L. & Eq. 50.

sense above explained, but popular; to be understood, therefore, in its common, popular meanings.[1] In the absence of any other legislative purpose appearing,[2] it should be read as written,[3] and all its words should be contemplated together with reference to the connection in which they stand, and the subject to which they relate.[4] Yet,—

Local meaning.— As a general statute speaks the language of the entire people, it cannot have a local meaning, or vary in particular places with the special usages there prevailing.[5]

§ 102. Larger or restricted meanings.— Within the differing limits recognized by common usage, the words of statutes may be extended or contracted in their meanings, like those of any other writings, according as the various expanding and compressing forces of the particular rules of interpretation applicable to the individual instance, and its special reasons and circumstances, indicate. Thus,—

Language general, reason special.— Kent mentions that, "when the expression in a statute is special or particular, but the reason is general, the expression should be deemed general."[6] On the other hand,—

"*All.*"— The word "all" is often restrained in meaning by its context, or by the general object of the provision.[7] And —

[1] Dwar. Stat. (2d ed.) 573; S. *v.* Blythe, 3 McCord, 363; Macy *v.* Raymond, 9 Pick. 285; Allen *v.* Hartford Ins. Co., 2 Md. 111; Rex *v.* Wooldridge, 1 Leach, 307; Barker *v.* S., 12 Tex. 273; S. *v.* Clarksville & R. T. P. Co., 2 Sneed, 88; Favers *v.* Glass, 23 Ala. 621, [58 Am. D. 272;] Gross *v.* Fowler, 21 Cal. 392; Green *v.* Weller, 32 Miss. 650; Quigley *v.* Gorham, 5 Cal. 418, [63 Am. D. 139;] Wetumpka *v.* Winter, 29 Ala. 651; Schriefer *v.* Wood, 5 Blatch. 215; Philadelphia & Erie R. R. Co. *v.* Catawissa R. R. Co., 53 Pa. St. 20; Enckeling *v.* Von Wamel, 26 Tex. 469; McGregor *v.* S., 4 Tex. Ap. 599; Philpott *v.* St. George's Hospital, 6 H. L. Cas. 338; [S. *v.* Johnson, 132 Mo. 105, 33 S. W. R. 781; S. *v.* Jones, 102 Mo. 305, 14 S. W. R. 946; So. Tel. Co. *v.* D'Alembert (Fla.), 21 S. R. 570; Lake *v.* Ocean City (N. J.), 41 Atl. R. 427; Richmond *v.* Moore, 107 Ill. 429; Stuart *v.* Hamilton, 66 Ill. 253; P. *v.* May, 3 Mich. 598; Turman *v.* S., 4 Tex. Ap. 586; Weill *v.* Kenfield, 54 Cal. 111; Peeler *v.* Peeler, 68 Miss. 141, 8 S. R. 392; McLoriman *v.* Overseers, 49 N. J. L. 614, 10 Atl. R. 187.]

[2] *Ante*, §§ 70, 82.

[3] *Ante*, § 80.

[4] *Ex parte* Hall, 1 Pick. 261; Opinion of the Justices, 7 Mass. 523.

[5] Rex *v.* Hogg, 1 T. R. 721, 728. See *post*, § 104.

[6] 1 Kent Com. 462, referring to Beawfage's Case, 10 Co. 99*b*, 101*b*. See also Williams *v.* McDonald, 4 Chand. 65.

[7] Phillips *v.* S., 15 Ga. 518; P. *v.* Gies, 25 Mich. 83; Dano *v.* M. O. & R. R. R. Co., 27 Ark. 564.

"*Property.*"—The word "property" may extend to real estate the same as to personal.[1] Yet in various connections it does not.[2] But—

Common meaning.—Ordinarily the language is to be understood in its common signification; as, for instance, general terms are to receive their general, not restricted, sense.[3]

§ 103. Including or excluding state.—A government, making laws for its subjects, will not be presumed to be binding itself by them unless this intent affirmatively appears. Therefore, in England, while an act of parliament may by express words or even by distinct implication include the crown, general terms in it, such as bind the subject, will not alone have this effect, except in special cases, wherein the reason and policy of the law extend equally to both. Such is believed to be the exact English rule, yet it is not in every particular quite palpable on the mere face of the adjudications.[4] So, with us, the state is not bound by general statutory provisions whereby any of its prerogatives, rights, titles or interests would be impaired, unless by express words.[5] For example,—

[1] De Witt *v.* San Francisco, 2 Cal. 289; 2 Bishop, Mar. Women, § 75.

[2] P. *v.* New York, etc. Ry. Co., 84 N. Y. 565. And see 2 Bishop, Mar. Women, §§ 75–77; Palfrey *v.* Boston, 101 Mass. 329, [3 Am. R. 364.]

[3] Jones *v.* Jones, 18 Me. 308, [36 Am. D. 723.] And see Alexander *v.* Worthington, 5 Md. 471; Bartlett *v.* Morris, 9 Port. 266; [Jones *v.* Drewry, 72 Ala. 311. General terms must, however, receive such reasonable interpretation as will leave the rest of the act practical operation. Electro Co. *v.* Van Auken, 11 Pac. R. 80, 9 Colo. 204. When the language of an act granting powers is sufficient to include a particular power it will be held to have passed under the grant. Saunders *v.* Pensacola, 24 Fla. 226, 4 S. R. 801.]

[4] Attorney-General *v.* Donaldson, 10 M. & W. 117, 123, 124; *Ex parte* Exeter, 10 C. B. 102; Willion *v.* Berkley, 1 Plow. 223, 235–238, 240, 248; Magdalen College Case, 11 Co. 66*b*, 73*a*, 74*b*, 75*a*; Case of Non Obstante, 12 Co. 18; Case of Fine, 7 Co. 32*a*; Reg. *v.* Tuchin, 2 Ld. Raym. 1061; Cooke's Case, 1 Show. 208; Rex *v.* Wright, 1 A. & E. 434, 437, 447; De Bode *v.* Reg., 13 Q. B. 364, 378; Moore *v.* Smith, 5 Jur. (N. S.) 892; Mersey Docks *v.* Cameron, 11 H. L. Cas. 443; Reg. *v.* York, 14 Q. B. 81; Reg. *v.* St. Martins, Law R. 2 Q. B. 493; Reg. *v.* McCann, Law R. 3 Q. B. 141, 677; Greig *v.* University of Edinburgh, Law R. 1 H. L. Sc. 348, 350; Rex *v.* Cook, 3 T. R. 519, 521; Com. *v.* Boston & Maine R. R. Co., 3 Cush. 25; U. S. *v.* Weise, 2 Wall. Jr. 72; Public Schools *v.* Trenton, 3 Stew. Ch. 667, 683.

[5] S. *v.* Kinne, 41 N. H. 238; Bennett *v.* McWhorter, 2 W. Va. 441; Cole *v.* White, 32 Ark. 45; Gilman *v.* Sheboygan, 2 Black, 510; Alexander *v.* S., 56 Ga. 478; [*Ex parte* MacDonald, 76 Ala. 603.]

Discharge in bankruptcy.— A discharge in bankruptcy under a statute which authorizes the government to prove its demands against the bankrupt, and declares the discharge to be a release "from all debts, claims, liabilities and demands which were or might have been proved," and "a full and complete bar to all suits brought on any such debts, claims, liabilities or demands," is of no avail against a suit by the government.[1] Again,—

Statutes of limitations—do not run against the state or United States, unless by express words.[2] And—

Presumption of payment.— Lapse of time does not create the presumption of the payment of a debt due to the government.[3] On the other hand,—

Government bound.— Statutes establishing general rules of procedure in civil actions,[4] or providing for the promotion of learning, the advancement of religion, and the support of the poor,[5] bind the state though not named.

Suing state.— A state cannot be sued in its own courts except by its consent.[6] Statutes giving consent, being in derogation of a sovereign right, are to be strictly construed.[7] And,—

[1] U. S. *v.* Herron, 20 Wall. 251; S. P., Public Schools *v.* Trenton, 3 Stew. Ch. 667, 685, referring to Anonymous, 1 Atk. 262; U. S. *v.* Wilson, 8 Wheat. 253; Glenn *v.* Humphreys, 4 Wash. C. C. 424; P. *v.* Rossiter, 4 Cow. 143.

[2] Lambert *v.* Taylor, 4 B. & C. 138, 152; Lindsey *v.* Miller, 6 Pet. 666, 673; P. *v.* Gilbert, 18 Johns. 227; S. *v.* Kinne, 41 N. H. 238; S. *v.* Garland, 7 Ire. 48; U. S. *v.* Williams, 5 McLean, 133; S. *v.* Fleming, 19 Mo. 607; Brinsfield *v.* Carter, 2 Kelly, 143; McKeehan *v.* Com., 3 Pa. St. 151; U. S. *v.* Davis, 3 McLean, 488; U. S. *v.* Hoar, 2 Mason, 311; Ware *v.* Greene, 37 Ala. 494; Walls *v.* McGee, 4 Harr. (Del.) 108; U. S. *v.* White, 2 Hill (N. Y.), 59; *post*, § 142, note. [The United States government cannot be prejudiced by the negligence of its officers, or bound by the statute of limitations, although it goes into court claiming rights under a deed between private parties. U. S. *v.* Devereux, 90 Fed. R. 182. Statute does not run against suit to correct error in patent while legal title is in United States. Godkin *v.* Kohn, 80 Fed. R. 458.]

[3] U. S. *v.* Williams, 5 McLean, 133.

Laches of agent.—The rights of a state are not lost by the laches of its agents. Haehnlen *v.* Com., 13 Pa. St. 617, [53 Am. D. 502.]

[4] Green *v.* U. S., 9 Wall. 655.

[5] Gladney *v.* Deavors, 11 Ga. 79. And see Com. *v.* Boston, etc. R. R. Co., 3 Cush. 25.

[6] Troy, etc. R. R. Co. *v.* Com., 127 Mass. 43.

[7] Rose *v.* The Governor, 24 Tex. 496. But see S. *v.* Curran, 7 Eng. 321. As to Nebraska, see S. *v.* Stout, 7 Neb. 89.

Limitations.— In a suit of this sort the state may plead the statute of limitations.[1]

§ 103a. Municipal corporations.— The reasons of the rule of construction, that statutes in general words do not bind the state, would seem not in general to extend it to municipal corporations. And commonly with us it is not so extended,[2] but in some states it is.[3] There are various considerations connected with different aspects of this question not best to be entered into here.[4]

§ 104. Contemporaneous interpretation.— An interpretation given by the sages of the law, when a statute was passed, or soon after, is much regarded by the courts.[5] They are specially inclined to follow it where rights of property have been acquired in reliance thereon.[6] Even, under limitations explained in previous discussions,[7] a contemporaneous exposition by the legislature has weight, and it is sometimes high evidence of the sense intended.[8] Nothing of the sort just recited has, like a decision from the highest court authorized to construe the statute, the force which is technically termed authority.[9] Again,—

[1] Baxter *v.* S., 10 Wis. 454.

[2] Wheeling *v.* Campbell, 12 W. Va. 36; Cincinnati *v.* First Presbyterian Church, 8 Ohio, 298, [32 Am. D. 718;] Lane *v.* Kennedy, 13 Ohio St. 42; Cincinnati *v.* Evans, 5 Ohio St. 494; St. Charles *v.* Powell, 22 Mo. 525, [66 Am. D. 637. The statute of limitations runs against a county. Shelby Co. *v.* Bickford, 102 Tenn. 395, 52 S. W. R. 772.]

[3] Cole *v.* White, 32 Ark. 45.

[4] And see Kellogg *v.* Decatur, 38 Iowa, 524; Brown *v.* Painter, 44 Iowa, 368.

[5] Sedgw. Stat. Law, 251; Reg. *v.* Cutbush, Law R. 2 Q. B. 379; Fall *v.* Hazelrigg, 45 Ind. 576, [15 Am. R. 278.] But compare with *ante*, §§ 74–77. [The construction put on a statute by members of the bar has great significance. Tompkins *v.* Horton, 10 Green (N. J. Eq.), 294. See also Russell *v.* Rumsey, 35 Ill. 362; Matz *v.* Chicago Co., 85 Fed. R. 180.]

[6] *In re* Warfield, 22 Cal. 51. Where an old statute has received an early practical construction, which, if the question were *res integra*, it might be difficult to maintain, it will be adhered to, particularly when great mischief would follow a contrary interpretation. Rogers *v.* Goodwin, 2 Mass. 475; Packard *v.* Richardson, 17 Mass. 122, 144, [9 Am. D. 123;] Opinion of the Justices, 3 Pick. 517. If the true construction is doubtful, one long acted upon by the inferior courts will be regarded by the superior. Plummer *v.* Plummer, 37 Miss. 185. But where it is not doubtful, it cannot be aided in this way. Bailey *v.* Rolfe, 16 N. H. 247.

[7] *Ante*, §§ 75–77.

[8] Philadelphia & Erie R. R. Co. *v.* Catawissa R. R. Co., 53 Pa. St. 20. See U. S. *v.* Gilmore, 8 Wall. 330; Byrd *v.* S., 57 Miss. 243, [34 Am. R. 440;] U. S. *v.* Freeman, 3 How. (U. S.) 556.

[9] Aikin *v.* Western R. R. Co., 20 N. Y. 370; Dunbar *v.* Roxburghe, 3 Cl. & F. 335; *ante*, § 76.

Extrajudicial usage.—The usage of the departments and officers of the government under a statute within their special cognizance, especially when long and uniformly acquiesced in, has almost controlling force with the courts.[1] So,—

Judicial usage — (*Constitutionality of statute*).—In the absence of express adjudication, the usage of the courts will have weight.[2] For "though," said Lord Kenyon, C. J., "where the words of an act of parliament are plain, it cannot be repealed by non user, yet, where there has been a series of practice, without any exception, it goes a great way to explain them where there is any ambiguity."[3] Therefore, also, if for a long time a statute has been acted on by the courts, a strong presumption of its constitutionality arises,[4]— not conclusive, for still they may adjudge it void.[5]

[1] *Ante*, § 35, note; U. S. *v.* Gilmore, *supra;* Scanlan *v.* Childs, 33 Wis. 663; Hahn *v.* U. S., 14 Ct. of Cl. 305: Swift Courtney, etc. Co. *v.* U. S., 14 Ct. of Cl. 481; Union Ins. Co. *v.* Hoge, 21 How. (U. S.) 35; U. S. *v.* Lytle, 5 McLean, 9; Chesnut *v.* Shane, 16 Ohio, 599, 607, [47 Am. D. 387.] And see S. *v.* Severance, 49 Mo. 401. [The construction by a company of a public nature of its own charter, acted upon and acquiesced in for thirty years, will be adopted, though the legislative meaning is doubtful. Louisville *v.* Water Co. (Ky.), 49 S. W. R. 766. See also Harrison *v.* Com., 88 Ky. 162; Frost *v.* Pfeiffer, 26 Colo. 338, 58 Pac. R. 147; P. *v.* Le Fevre, 21 Colo. 218; Cooper *v.* Ferguson, 113 U. S. 727, 28 L. ed. 1137; S. *v.* Compton, 51 La. An. 1272, 26 S. R. 91; S. *v.* Kelsey, 15 Vroom (N. J.), 1; Wetmore *v.* S., 55 Ala. 198; Matthews *v.* Shores, 24 Ill. 27; U. S. *v.* Bliss, 12 D. C. Ap. 485; U. S. *v.* Johnston, 124 U. S. 236, 31 L. ed. 389; Heath *v.* Wallace, 138 U. S. 573, 34 L. ed. 1063; U. S. *v.* R. R. Co., 142 U. S. 615, 35 L. ed. 1134; Pennoyer *v.* McConnaughy, 140 U. S. 1, 35 L. ed. 363; U. S. *v.* R. R. Co., 148 U. S. 562, 37 L. ed. 560; Robertson *v.* Downing, 127 U. S. 607, 32 L. ed. 269. Such construction will not be followed if plainly wrong. S. *v.* Cornell, 54 Neb. 647, 75 N. W. R. 25. To same effect, U. S. *v.* Dickson, 15 Pet. 141, 10 L. ed. 689; Merritt *v.* Cameron, 137 U. S. 542, 34 L. ed. 772; Travelers' Ins. Co. *v.* Fricke, 94 Wis. 258; S. *v.* Fricke (Wis.), 78 N. W. R. 455; U. S. *v.* Moore, 95 U. S. 763, 24 L. ed. 588.]

[2] McKeen *v.* Delancy, 5 Cranch, 22; Morrison *v.* Barksdale, Harper, 101; Rogers *v.* Goodwin, 2 Mass. 475; Packard *v.* Richardson, 17 Mass. 122, 144; Atty. Gen. *v.* Bank of Cape Fear, 5 Ire. Eq. 71; Bailey *v.* Rolfe, 16 N. H. 247; Kernion *v.* Hills, 1 La. An. 419; Plummer *v.* Plummer, 37 Miss. 185; Wetmore *v.* S., 55 Ala. 198.

[3] Leigh *v.* Kent, 3 T. R. 362, 364. See *ante*, § 91.

Proving professional usage.—One is not entitled to examine, before the judge, lawyers to prove what has been the professional usage under a statute. "The judge might, had he chosen," said Carpenter, J., "have called to his aid the wisdom and experience of eminent counsel, but he was not bound to do it, and his refusal to do so is not erroneous." Gaylor's Appeal, 43 Conn. 82, 84.

[4] S. *v.* Bosworth, 13 Vt. 402.

[5] Baltimore *v.* S., 15 Md. 376.

Expounding by usage.—Though the words in a general statute cannot have a local meaning,[1] they may, when doubtful, be expounded with reference to a general usage; and words in a statute applicable to a particular place only, may be construed by the usage there.[2]

§ 104a. Stare decisis.— The doctrine of *stare decisis* prevails in the interpretation of statutes[3] as in the other departments of the law.[4] A single decision should be followed unless clearly wrong. And a series of decisions not just in themselves may bind where one would not.[5] The courts will be particularly disinclined to reverse a construction which has established a rule of property, thus endangering vested rights.[6] And a practice which has grown out of the construction of a statute will be somewhat tenaciously adhered to.[7] But, where no reasons like those which control these cases interpose, former adjudications will be more readily overruled.[8]

[1] *Ante*, § 101.

[2] Love *v.* Hinckley, 1 Abb. Adm. 436. See Delaplane *v.* Crenshaw, 15 Grat. 457. [A custom or usage, if ever admissible to affect the construction of an act of congress, by altering the ordinary meanings of terms, must be shown to be so generally prevalent in all sections where the law is operative as to leave no doubt that its terms were used with reference thereto. U. S. *v.* Pine Riv. Co., 89 Fed. R. 907. Custom cannot be resorted to to explain the plain words of a statute. Sub. C. *v.* Elizabeth, 30 Vroom (N. J.), 134; Frazier *v.* Warfield, 13 Md. 279; McCurtain *v.* Grady (I. T.), 38 S. W. R. 65.]

[3] Reg. *v.* Chantrell, Law R. 10 Q. B. 587, 589. 590; Kentucky *v.* Ohio, 24 How. (U. S.) 66, 98; S. *v.* Thompson, 10 La. An. 122; New Orleans *v.* Poutz, 14 La. An. 853; Waldo *v.* Bell, 13 La. An. 329.

[4] Crim. Law, I, §§ 93–98. [When a statute requiring judicial construction has received it by the highest court having jurisdiction, and such interpretation has become firmly established, it is as much a part of the statute as if written into it. Bank *v.* Benson (Wis.), 82 N. W. R. 604.]

[5] Com. *v.* Miller, 5 Dana, 320; Reg. *v.* Chantrell, *supra;* P. *v.* Albertson, 55 N. Y. 50, 64. And see Van Loon *v.* Lyon, 4 Daly, 149; Kentucky *v.* Ohio, 24 How. (U. S.) 66.

[6] *In re* Warfield, 22 Cal. 51; Day *v.* Munson, 14 Ohio St. 488; Aicard *v.* Daly, 7 La. An. 612; Farmer *v.* Fletcher, 11 La. An. 142.

[7] Succession of Lauve, 6 La. An. 529. And see Wolf *v.* Lowry, 10 La. An. 272.

[8] Crim. Law, *ut sup.* And see Greencastle Southern Turnpike, 28 Ind. 382; Miller *v.* Marigny, 10 La. An. 838. [If the court should, upon fuller consideration, decide that their former decision was wrong. they are not precluded from asserting the correct doctrine, unless vested interests of great moment should be thereby disturbed. P. *v.* Lynch, 51 Cal. 15.]

CHAPTER XIV.

THE COMPUTATION OF TIME IN STATUTES.

§ 104b. Compared with other writings.— As in other respects,[1] so in the computation of time, statutes and other writings are expounded by similar rules. The universal rule, requiring all utterances, whether written or oral, to be interpreted by the subject which the speaker was contemplating,[2] produces some apparent differences, and not impossibly there may be others more nearly real. But in the main and in essence, time is computed alike in the several departments of the law.

§ 105. Month.— A calendar month is reckoned by the calendar, and differs in the number of days according to the particular month in question.[3] A lunar month in the law is, not the scientific, but the popular one, of twenty-eight days;[4] the fractions of a day not being taken into the account.[5] In a statute, the word "month" will be interpreted either as the one or the other, according to the circumstances, or the opinions of the particular tribunal. In the old English law, established when the calendar was not as well settled as now, and computations by lunar months were not unknown in actual affairs,[6] it became established that ordinarily, and *prima facie*, the word "month" in a statute signified the lunar one of twenty-eight days.[7] And this rule remained unchanged[8] down to 1850, when for future cases it was provided that "in all acts" this word should "mean calendar month unless words be added showing lunar

[1] *Ante*, § 4.

[2] *Ante*, § 98*a*.

[3] Bishop, Con., § 748.

[4] Id.; Co. Lit. 135; Peterborough *v.* Catesby, Cro. Jac. 166; Barksdale *v.* Morgan, 4 Mod. 185, 186; Tomlin's Law Dict., tit. Month; Chit. Con. 730; Bouv. Law Dict., tit. Month.

[5] *Ante*, §§ 29, 30; *post*, § 108.

[6] As to which, see Jocelyn *v.* Hawkins, 1 Stra. 446; Titus *v.* Preston, 1 Stra. 652.

[7] Such was the general rule in the common law, but the ecclesiastical month was reckoned by the calendar. Tullet *v.* Linfield, 3 Bur. 1455. And see Simpson *v.* Margitson, 11 Q. B. 23; Hart *v.* Middleton, 2 Car. & K. 9; Hipwell *v.* Knight, 1 Y. & Col. Ex. 401; Turner *v.* Barlow, 3 Fost. & F. 946.

[8] Lacon *v.* Hooper, *infra*.

month to be intended." Even before this statute, "a twelve month"[1] meant twelve calendar months, and the term "six months" was sometimes — always in ecclesiastical affairs — construed to signify a half year.[2] "I confess," said Lord Kenyon, C. J., in 1795, "I wish that, when the rule was first established, it had been decided that 'months' should be understood to mean calendar and not lunar months; but the contrary has been determined so long and so frequently that it ought not again to be brought in question. In the instance, indeed, of *quare impedit*, the computation of time is by calendar months, but that depends on the words of an act of parliament, *tempus semestre*. But for all other purposes, and in all acts of parliament where 'months' are spoken of without the word 'calendar,' and nothing is added from which a clear inference can be drawn that the legislature intended calendar months, it is understood to mean lunar months."[3] Some of the American courts have adopted this rule of the English common law,[4] but always with the inclination to depart from it and hold the month to be calendar whenever special circumstances would permit.[5] Largely, in our states, statutes, like

[1] "Twelve months" signified twelve lunar months severally of twenty-eight days. Dormer *v.* Smith, Cro. Eliz. 835.

[2] Catesby's Case, 6 Co. 61; s. c. *nom.* Peterborough *v.* Catesby, Cro. Jac. 166; Reg. *v.* Chawton, 1 Q. B. 247; Sharp *v.* Hubbard, 2 Mod. 58; Barksdale *v.* Morgan, 4 Mod. 185, 186; Burton *v.* Woodward, 4 Mod. 95; Woodward *v.* Hamersly, Skin. 313. And see *In re* Swinford, 6 M. & S. 226.

[3] Lacon *v.* Hooper, 6 T. R. 224, 226. And see Ryalls *v.* Reg., 13 Jur. 259, 18 Law J. (N. S.) M. C. 69.

[4] Stackhouse *v.* Halsey, 3 Johns. Ch. 74; S. *v.* Jacobs, 2 Harring. (Del.) 548; Rives *v.* Guthrie, 1 Jones (N. C.), 84; Loring *v.* Halling, 15 Johns. 119; Redmond *v.* Glover, Dudley (Ga.), 107.

[5] In Parsons *v.* Chamberlin, 4 Wend. 512, the words "six months," employed in a statute, were under the particular circumstances held to be calendar months. And Savage, C. J., observed: "The general rule as to the computation of time is that, when months are mentioned in a statute, lunar months are intended. Loring *v.* Halling, 15 Johns. 119, 120. It was there held that the six months mentioned in relation to the foreclosure of mortgages are lunar months; but months in relation to promissory notes or bills of exchange are calendar and not lunar." p. 513. And see Vanderwall *v.* Com., 2 Va. Cas. 275. The term "month," in bills and notes, uniformly means a calendar month. Thomas *v.* Shoemaker, 6 Watts & S. 179. So the law has always been; while, in contracts and deeds, the old rule was that the month should be presumed to be lunar unless the contrary intent appeared (Chit. Con., *ut sup.*), but, on the whole, the question was to be decided much upon the instrument itself. Lang *v.* Gale, 1 M. & S. 111. Yet it may be deemed to be the

the modern English ones, have interfered and made the month calendar. And, without statutory aid, it has been said that the "current of authority" with us presumes the month to be calendar, contrary to the old English rule.[1] So that, in one way and another, such has become the almost universal doctrine in our states at the present day.[2] It is believed there never was a time in this country when, in common speech, the word "month," unqualified, ordinarily meant a lunar month; therefore, in reason, there is no propriety in our adhering to the old rule of the English common law.

§ 106. Year.— A year, mentioned in a legislative or judicial proceeding, is presumptively to be computed by the Christian calendar.[3] It embraces three hundred and sixty-five days, or three hundred and sixty-six, according as the particular year in question happens to be leap year or not.[4] Still the meaning of this term may vary with the subject and the evident intent.[5]

§ 107. Rule for computing number of days, weeks, etc. In reason, when a statute specifies a particular number of days, weeks or years, the computation should be made by adding, for instance, to the ascertained number of the day in the month,

American doctrine, that, in the absence of a statutory provision governing the question, and of all intimation in the contract or deed, the word "month" shall in such an instrument be taken to mean a calendar month. Sheets *v.* Selden, 2 Wall. 177; Bishop, Con., § 1339; Hardin *v.* Major, 4 Bibb, 104; Shapley *v.* Garey, 6 S. & R. 539.

[1] Bartol *v.* Calvert, 21 Ala. 42, 47.

[2] Hunt *v.* Holden, 2 Mass. 168, 170; Avery *v.* Pixley, 4 Mass. 460; Williamson *v.* Farrow, 1 Bailey, 611, [21 Am. D. 492;] Com. *v.* Chambre, 4 Dall. 143; Pyle *v.* Maulding, 7 J. J. Mar. 202; Kimball *v.* Lamson, 2 Vt. 138; Com. *v.* Shortridge, 8 J. J. Mar. 638; Strong *v.* Birchard, 5 Conn. 357; Alston *v.* Alston, 3 Brev. 469; Churchill *v.* Merchants' Bank, 19 Pick. 532, 535; Gross *v.* Fowler, 21 Cal. 392; Sprague *v.* Norway, 31 Cal. 173; Glenn *v.* Hebb, 17 Md. 260; [Snyder *v.* Warren, 2 Cow. 518; P. *v.* New York, 10 Wend. 393; Brown *v.* Williams, 34 Neb. 376, 51 N. W. R. 851; Guaranty Co. *v.* R. R. Co., 139 U. S. 137; 35 L. ed. 116; White *v.* Lapp, 4 Ohio (N. P.), 31; Daley *v.* Anderson (Wyo.), 48 Pac. R. 839; Balto. Co. *v.* Pumphrey, 74 Md. 86, 21 Atl. R. 559.]

[3] Engleman *v.* S., 2 Ind. 91, [52 Am. D. 494; Com. *v.* R. R. Co., 129 Pa. St. 429, 18 Atl. R. 406; King *v.* Johnson, 96 Ga. 497, 23 S. E. R. 500; Ross *v.* Morrow, 85 Tex. 172, 19 S. W. R. 1090.]

[4] Dwar. Stat. (2d ed.) 693; Rex *v.* Wormingall, 6 M. & S. 350; Gibson *v.* Barton, Law R. 10 Q. B. 329; Hopkins *v.* Chambers, 7 T. B. Mon. 257.

[5] Paris *v.* Hiram, 12 Mass. 262; Thornton *v.* Boyd, 25 Miss. 598; Bartlett *v.* Kirkwood, 2 Ellis & B. 771.

the statutory number. Thus, an enactment passed on the fifth day of the month, to take effect in ten days, will go into operation on the fifteenth day of the month; because the sum of five and ten is fifteen. The rule of reason, therefore, may be stated to be, that, of the two extreme days, the one shall be included and the other excluded in the reckoning. And in a sort of general way the authorities are so;[1] as, for example, where the statutory words are "ten days' notice."[2] But —

§ 108. Limits and modifications.— This rule is variously limited and modified; as,—

No fractions of day.— It is sometimes seriously broken in upon by the doctrine that, *prima facie*, the law recognizes no fractions of a day.[3] It commonly counts the fraction as an

[1] This may be deemed the *prima facie* method, applicable alike to statutes, to contracts, to rules of court, and to all other legal things. Bishop, Con., § 1341; Thomas *v.* Affleck, 16 Pa. St. 14; Iron Mountain Co. *v.* Haight, 39 Cal. 540; Corwin *v.* Comptroller-General, 6 S. C. 390; Cann *v.* Warren, 1 Houst. 188; Bird *v.* Baker, 1 Ellis & E. 12; Webb *v.* Fairmaner, 3 M. & W. 473; Watson *v.* Pears, 2 Camp. 294; Judd *v.* Fulton, 10 Barb. 117; Garner *v.* Johnson, 22 Ala. 494; [Stewart *v.* Myer, 54 Md. 454; Walsh *v.* Boyle, 30 Md. 262; Gillespie *v.* White, 16 John. 117; *Re* Senate Resolution, 9 Colo. 630, 21 Pac. R. 475; Stroud *v.* Water Co., 56 N. J. L. 422, 28 Atl. R. 578; Hill *v.* Kerr, 78 Tex. 213, 14 S. W. R. 566; Leavenworth *v.* Barber, 47 Kan. 29, 27 Pac. R. 114.]

[2] Rex *v.* West Riding of Yorkshire, 4 B. & Ad. 685, 689. And see Reg. *v.* Shropshire, 8 A. & E. 173; Hyer *v.* Van Valkenburgh, 8 Cow. 260; Homan *v.* Liswell, 6 Cow. 659; *Ex parte* Dean, 2 Cow. 605, [14 Am. D. 521;] Bigelow *v.* Willson, 1 Pick. 485; Portland Bank *v.* Maine Bank, 11 Mass. 204; Fresbrey *v.* Williams, 15 Mass. 193; Rex *v.* Moore, Jefferson, 8; White *v.* Crutcher, 1 Bush, 472; Bowman *v.* Wood, 41 Ill. 203; S. *v.* Upchurch, 72 N. C. 146.

[3] *Ante*, § 29. [Whether or not fractions of a day will be taken into account seems to depend upon circumstances. Ordinarily they will not. In case of conflicting claims they are taken into account, as in attachment and assignment. Malvin *v.* Sweitzer, 1 Kulp (Pa.), 5; Angell *v.* Pickard, 61 Mich. 561, 28 N. W. R. 680; Worth *v.* Piedmont Bank, 121 N. C. 343, 28 S. E. R. 488. Where a judgment was rendered by a court of competent jurisdiction, the legal representative cannot show his intestate died an hour before judgment on same day. Mitchell *v.* Schoonover, 16 Oreg. 211, 17 Pac. R. 867, 8 Am. St. R. 282. Fractions of a day will not be recognized to defeat the manifest intentions of the parties. Pearce *v.* Denver, 13 Colo. 383, 22 Pac. R. 774, 6 L. R. A. 541. When, for any reason, time becomes important, courts will inquire into fractional parts of a day. P. *v.* Beatty, 14 Cal. 566. So, in general, when essential to justice. . S. *v.* Asbury, 26 Tex. 82; Goetzinger *v.* Rosenfield, 16 Wash. 392, 47 Pac. R. 882; Louisville *v.* Bank, 104 U. S. 469, 26 L. ed. 775; Taylor *v.* Brown, 147 U. S. 640, 37 L. ed. 313; Leavenworth

entire day, yet it may be compelled to reject it altogether.[1] Uniting this common mode of estimating the fractions to the rule stated in the last section, we may have a result almost nullifying the statute. Thus, reducing the "ten days' notice," just mentioned, to its constituent elements, we may have the following. Suppose the statutory requirement to be "one day's" notice, then, if given on the last moment of the fifth day of the month, it is out on the first moment of the sixth, consequently the party has only two moments' notice, equivalent to none, while the statute says "one day." Next, we may suppose the required notice to be for two days, still the interpretation cuts it down practically to one day; and the "ten days' notice" becomes, by force of the interpretation, in practical effect only nine. And, if the reader will look through the reports of cases under this head, he will see that, in various instances[2] in which this result of the general doctrine has been pressed upon the tribunals, they have sought substantial justice by excluding from the computation both the first and the last day; as though, to continue the illustrative case before mentioned, if ten days' notice were required, and it has been given on the fifth day of the month, the court should hold it not to be out till the sixteenth day of the month. And, uniting with this view of the justice of the case, we have —

Particular words of statutes.— The special language of a statute will sometimes, and particularly when considered in re-

Co. *v.* Barber, 47 Kan. 29, 27 Pac. R. 114; Maine *v.* Gillman, 11 Fed. R. 214. Where an assessment was levied the same day stock was purchased, the court will hold the purchaser, and disregard fractional computation. San Gabriel *v.* Dennis (Cal.), 34 Pac. R. 441. The almost universal rule for computation of days, etc., is to exclude the first and include the last. Vogel *v.* S., 107 Ind. 374, 8 N. E. R. 164; S. *v.* Weld, 39 Minn. 426; 40 N. W. R. 561; Penn. Co. *v.* Ins. Co., 189 Pa. St. 255, 42 Atl. R. 138; Smith *v.* Dickey, 74 Tex. 64, 11 S. W. R. 1049; Blitch *v.* Brewer, 83 Ga. 333, 9 S. E. R. 837; Seward *v.* Hayden, 150 Mass. 158, 22 N. E. R. 629, 5 L. R. A. 844; Walker *v.* Ins. Co., 167 Mass. 188, 45 N. E. R. 89; Doyle *v.* Mizner, 41 Mich. 549, 50 N. W. R. 392; Scruton *v.* Hall, 50 Pac. R. 964, 6 Kan. Ap. 714.]

[1] Reg. *v.* St. Mary, Warwick, 1 Ellis & B. 816; Portland Bank *v.* Maine Bank, 11 Mass. 204; Edwards *v.* Reg., 9 Exch. 628; Jones *v.* Planters' Bank, 5 Humph. 619, [42 Am. D. 471;] *In re* Welman, 20 Vt. 653; Phelan *v.* Douglass, 11 How. Pr. 193.

[2] As, see Young *v.* Higgon, 6 M. & W. 49, 54; Lester *v.* Garland, 15 Ves. 248; Webb *v.* Fairmaner, 3 M. & W. 473; Speer *v.* S., 2 Tex. Ap. 246; Bemis *v.* Leonard, 118 Mass. 502, [19 Am. R. 470.]

lation to its subject, work a result different from the general one above stated. Thus —

§ **108a. "Entire day" — "Day."** — The words "entire day,"[1] or even "day" alone, in some connections and as applied to some subjects,[2] may include the whole twenty-four hours, from midnight to midnight. Again,—

§ **109. "One day previous."** — The Texas constitution having required that bills, to become laws, should be presented to the governor "one day previous to the adjournment of the legislature," this was held to mean not less than twenty-four hours.[3]

§ **110. "Clear."** — If the statute requires a given number of "*clear days*," — as, "ten clear days," — neither the first nor the last is counted in the computation.[4] Such is the settled English rule, and there is believed to be nothing adverse to it in this country. So —

"*At least.*" — The English courts hold, to regret, and still to adhere to the holding, that the words "at least" have equal effect with "clear;" as, where the expression was "fourteen days at least," "the court was of opinion that fourteen days at least must mean fourteen clear days."[5] The contrary was adjudged in Missouri, in a case where a forfeiture was thus avoided, otherwise the English doctrine would have been followed.[6] And —

[1] Haines *v.* S., 7 Tex. Ap. 30; Lawrence *v.* S., 7 Tex. Ap. 192.

[2] Kane *v.* Com., 89 Pa. St. 522, [33 Am. R. 787]. See S. *v.* Holliday, 61 Mo. 229; S. *v.* Holliday, 61 Mo. 400. [Day ordinarily intended is twenty-four hours from midnight to midnight. Zimmerman *v.* Cowan, 107 Ill. 631; Penn. Co. *v.* Ins. Co., 189 Pa. St. 255, 42 Atl. R. 138.]

[3] Hyde *v.* White, 24 Tex. 127, Roberts, J., observing: "Whether it be held that the word 'day' is twenty-four hours from the moment of adjournment, and used as a *measure of time*, allowed the governor to consider of and act on the bill, or is an entire day regarded as an intervening point of time between the day of presentation and the day of the adjournment, this case does not require us to decide. One or the other construction must be adopted." p. 145.

[4] Rex *v.* Herefordshire, 3 B. & Ald. 581; Rex *v.* West Riding of Yorkshire, 4 B. & Ad. 685, 690; [Walsh *v.* Boyle, 30 Md. 262.]

[5] Zouch *v.* Empsey, 4 B. & Ald. 522; Reg. *v.* Shropshire, 8 A. & E. 173; Mitchell *v.* Foster, 12 A. & E. 472; Reg. *v.* Aberdare Canal, 14 Q. B. 854, 867, 868. In Young *v.* Higgon, 6 M. & W. 49, the statutory expression was "at least one calendar month," and the like construction was put upon it, the court not even mentioning the words "at least," though they may have been in the judicial mind. See also Reg. *v.* St. Mary, Warwick, 1 Ellis & B. 816; Freeman *v.* Read, 4 B. & S. 174.

[6] S. *v.* Gasconade, 33 Mo. 102. ["Not

"*Before*."— In Texas the expression "five days before the return-day" was held to mean five "clear" days.[1]

"*From and after*."— The effect of these words has already been considered.[2]

§ 110a. Months unequal in length.— In computing time by calendar months, which are of unequal length, the month in which it begins rather than that in which it ends, or any intermediate one, ordinarily furnishes the rule; as, for example, from the fifteenth day of March to the fifteenth day of April, a period of thirty-one days, is one calendar month, and from the fifteenth of April to the fifteenth of May, a period of thirty days, is one calendar month.[3] But while so much is reasonably plain, embarrassing questions, not in all particulars adjudicated, arise. Assuming, as established, that a month beginning on the fifteenth of January ends on the fifteenth of February, when does one end which begins on the thirtieth of January? Where twenty-eight days in February alone constitute a full calendar month, plainly, in reason, the thirty-first of January and the first and second of March need not all be added. Though this absurdity cannot be involved in the true answer to the question, there is no possible answer which does not present something not apparently quite right. It is submitted, therefore, as the best solution attainable, that, when February has twenty-eight days, a calendar month beginning the twenty-

less than" does not mean *clear* days. S. *v.* Winter Park, 25 Fla. 371, 5 S. R. 618.]

[1] O'Connor *v.* Towns, 1 Tex. 107. [If an act is to be done a certain number of days before a given day, that day must not be counted. Salee *v.* Ireland, 9 Mich. 154.]

[2] *Ante*, § 31*a*; Goode *v.* Webb, 52 Ala. 452; Wood *v.* Com., 11 Bush, 220; Bemis *v.* Leonard, 118 Mass. 502, [19 Am. R. 470;] Menges *v.* Frick, 73 Pa. St. 187, [13 Am. R. 731. "Until:" Time until a certain day may be either inclusive or exclusive of the day mentioned, according to intention. Conway *v.* Mercantile Co., 44 Pac. R. 940 (Wyo.). "To" a specified day includes that day. Penn. Co. *v.* Schreiner, 14 Mont. 141, 35 Pac. R. 878. "At once" means reasonable time. Cohen *v.* Silverman, 40 N. Y. Sup. 8. See also Warren *v.* Slade, 23 Mich. 1; Everts *v.* Fisk, 44 Mich. 515, 7 N. W. R. 81. Where a statute makes a certain act punishable, if committed in the "night-time," it is not night so long as there is light enough to discern a person's features. Klieferth *v.* S., 88 Wis. 163, 59 N. W. R. 507. "On or before" includes that day. Disney *v.* Furness, 79 Fed. R. 810.]

[3] Freeman *v.* Read, 4 B. & S. 174; P. *v.* Ulrich, 2 Abb. Pr. 28; Webb *v.* Fairmaner, 3 M. & W. 473; Migotti *v.* Colvill, 4 C. P. D. 233, 235; s. c. *nom.* Nigotti *v.* Colville, 14 Cox, C. C. 305.

ninth, the thirtieth or the thirty-first of January ends equally in each instance on the twenty-eighth, or last day, of February.[1]

§ 110b. Hours.— Sometimes a statute employs the term "hour" or "hours," but there is nothing in its meaning requiring special consideration.[2]

§ 110c. Sunday.— Whether or not Sunday is to be excluded from a computation will depend largely on the nature of the subject, and in some degree on the statutory terms. As it is not a day for judicial business,[3] it is excluded from computations relating thereto, when consistent with the words. Where, in a case of this sort, the law gives a certain number of *hours* for the performance of an act, those even of an intervening Sunday are to be left out from the count; the person being allowed hours wherein it is lawful to do the act.[4] And to some extent, and by some opinions, this is so also where the time is given in days, especially when the number is less than seven.[5]

[1] Indeed, this may be deemed established by analogy. "In the case of bills of exchange, in which the word 'month' is held to mean 'calendar month,' it is laid down by all the text writers that bills at one month drawn on the 28th, 29th, 30th or 31st of January will fall due (excluding the days of grace) all on the same day, namely, the 28th of February, or, in leap-year, on the 29th. . . . It is no doubt true that the law applicable to bills of exchange depends upon the usage of merchants and is not necessarily applicable to other cases; but, where the question is, what is the true meaning of 'one calendar month?' it is useful to consider how such an expression is regarded in any case in which it is constantly used in familiar legal instruments." Denman, J., in Migotti *v.* Colvill, *supra*, at p. 236. In this case it was held that a sentence on the 31st of October to one month's imprisonment expires on the last moment of the last day, being the 30th of November.

[2] Franklin *v.* Holden, 7 R. I. 215; Com. *v.* Intoxicating Liquors, 97 Mass. 601; Ridgley *v.* S., 7 Wis. 661; Meng *v.* Winkleman, 43 Wis. 41.

[3] Crim. Pro., I, § 1001; Chapman *v.* S., 5 Blackf. 111; Langabier *v.* Fairbury, etc. R. R. Co., 64 Ill. 243, [16 Am. R. 550;] True *v.* Plumley, 36 Me. 466; Harris *v.* Morse, 49 Me. 432, [77 Am. D. 269;] Watts *v.* Com., 5 Bush, 309; [Qualter *v.* S., 120 Ind. 92, 22 N. E. R. 100; Porter *v.* Pierce, 120 N. Y. 217, 24 N. E. R. 281, 7 L. R. A. 847; S. *v.* Harris, 121 Mo. 445, 26 S. W. R. 558; St. Joseph *v.* Landis, 54 Mo. Ap. 315; First Nat. Bank *v.* Williams, 110 Mich. 15, 67 N. W. R. 976; S. *v.* May, 142 Mo. 135, 43 S. W. R. 637; Robinson *v.* Templar, 114 Cal. 41, 45 Pac. R. 998; P. *v.* Rose (Ill.), 47 N. E. R. 547; Johnson *v.* Merritt, 50 Minn. 303, 52 N. W. R. 863.]

[4] Meng *v.* Winkleman, 43 Wis. 41; Com. *v.* Intoxicating Liquors, 97 Mass. 601; Ridgley *v.* S., 7 Wis. 661. But see Franklin *v.* Holden, 7 R. I. 215. And see S. *v.* Green, 66 Mo. 631.

[5] Chicago *v.* Vulcan Iron Works, 93 Ill. 222; S. *v.* Howard, 82 N. C. 623; National Bank *v.* Williams, 46 Mo. 17; Ridgley *v.* S., 7 Wis. 661. But see Peacock *v.* Reg., 4 C. B. (N. S.) 264.

Nor is Sunday counted among the days of a term of court.[1] But the rule governing most classes of cases is, that it is counted the same as any other day.[2] The cases cited in the notes show some diversities of views, not necessary to be entered into here.

§ 111. Differing words — Subject.— We have already seen that the differing words of statutes enter largely into the questions discussed in this chapter, as do likewise their differing subjects. And, when all is done, the unreconciled conflicts of judicial opinion are numerous. It would be a happy thing if an author could so present this topic as to render doubts or differences impossible hereafter. Since this cannot be, let us here close the chapter with some further references to authorities, chiefly pertinent to the matter of this section, as showing the combined effect of the particular subject and the special words.[3]

[1] Michie *v.* Michie, 17 Grat. 109; Read *v.* Com., 22 Grat. 924. And see National Bank *v.* Williams, 46 Mo. 17; Burton *v.* Chicago, 53 Ill. 87; Clerks' Sav. Bank *v.* Thomas, 2 Mo. Ap. 367.

[2] Commissioners of Pilots *v.* Erie Ry. Co., 5 Rob. (N. Y.) 366; Peacock *v.* Reg., 4 C. B. (N. S.) 264; Taylor *v.* Palmer, 31 Cal. 240; Miles *v.* McDermott, 31 Cal. 271; Broome *v.* Wellington, 1 Sandf. 664; *Ex parte* Dodge, 7 Cow. 147; *Ex parte* Simpkin, 2 Ellis & E. 392. And see Hughes *v.* Griffiths, 13 C. B. (N. S.) 824; [Wood *v.* Galveston, 76 Tex. 126, 13 S. W. R. 227; Merritt *v.* Bank, 100 Ga. 147, 27 S. E. R. 979, 38 L. R. A. 749; Heard *v.* Phillips, 101 Ga. 691, 31 S. E. R. 216; Yocum *v.* Bank, 144 Ind. 272, 43 N. E. R. 231; Martin *v.* Tel. Co., 18 Wash. 260, 51 Pac. R. 376.]

[3] Sanborn *v.* Fireman's Ins. Co., 16 Gray, 448, [77 Am. D. 419] ("within"); Levert *v.* Read, 54 Ala. 529 ("within"); P. *v.* Wayne Circuit Judge, 37 Mich. 287 ("heretofore"); P. *v.* Walker, 17 N. Y. 502 ("until"); Annan *v.* Baker, 49 N. H. 161 ("at the end of the year"); Simpson *v.* Sutton, Phillips (N. C.), 112 ("year and day"); Alger *v.* Curry, 40 Vt. 437; Swainson *v.* Bishop, 53 Mo. 227; Northrop *v.* Cooper, 23 Kan. 432; S. *v.* McLendon, 1 Stew. 195; Garner *v.* Johnson, 22 Ala. 494; Boyd *v.* Com., 1 Rob. (Va.) 691; Owen *v.* Slatter, 26 Ala. 547, [62 Am. D. 745;] S. *v.* Schnierle, 5 Rich. 299; Burr *v.* Lewis, 6 Tex. 76; Com. *v.* Jones, 12 Pa. St. 365; Abrahams *v.* Com., 1 Rob. (Va.) 675; Kimm *v.* Osgood, 19 Mo. 60; Peables *v.* Hannaford, 18 Me. 106; S. *v.* Godfrey, 3 Fairf. 361; Pulling *v.* P., 8 Barb. 384. [Most of the states have statutes regulating the computation of time.]

CHAPTER XV.

HOW THE SPECIAL MATTER OF A STATUTE INFLUENCES ITS INTERPRETATION.

§ 111a. Doctrine defined.— The doctrine of this chapter is, that the interpretation of a statute is influenced by the special matter comprehended in its terms.

Distinctions.— This doctrine is similar to, yet diverse from, various others prominent in these discussions; such as, that all laws are to be interpreted together as modifying one another,[1] and that every writing is to be construed with reference to its subject.[2]

Illustrations — of the doctrine are such as the following: —

§ 112. "May" and "shall."— The words "may" and "shall"— the one permissive and the other imperative, therefore in their primary meanings quite different — are interpreted by the matter of the provision in which they occur; so that practically "may" is almost as often imperative as permissive, and the two admit of being used, to a considerable extent, interchangeably.[3] Still the cases are not numerous in which "shall" alone is held to be permissive like "may" in its primary sense, but they do occur.[4] And the phrase "it shall be lawful," or "it shall and may be lawful," is an equivalent for the latter word, both primarily, and as admitting of either a permissive or an imperative rendering, to accord with the matter of the statute.[5] The rules to determine when the permissive form is

[1] *Ante*, § 86.

[2] *Ante*, § 98*a*.

[3] Fowler *v.* Pirkins, 77 Ill. 271; Kane *v.* Footh, 70 Ill. 587; Steines *v.* Franklin, 48 Mo. 167, [8 Am. R. 87;] Estate of Ballentine, 45 Cal. 696; P. *v.* Buffalo, 4 Neb. 150; P. *v.* Otsego, 51 N. Y. 401; Rockwell *v.* Clark, 44 Conn. 534; S. *v.* Buffalo, 6 Neb. 454; [Pueblo Co. *v.* Smith, 22 Colo. 534, 45 Pac. R. 357, 33 L. R. A. 465; Smith *v.* King, 14 Oreg. 10, 12 Pac. R. 8; Johnston *v.* Pate, 95 N. C. 68; Crawford *v.* Greenleaf, 48 Mo. Ap. 590.]

[4] R. R. Co. *v.* Hecht, 95 U. S. 168; Wheeler *v.* Chicago, 24 Ill. 105, [76 Am. D. 736.] And see Rex *v.* Flookwold Inclosure, 2 Chit. 251; Hudd *v.* Ravenor, 2 Brod. & B. 662, 665.

[5] Castelli *v.* Groom, 18 Q. B. 490, 495; Cook *v.* Tower, 1 Taunt. 372, 377; Rex *v.* Eye, 1 B. & C. 85, 86; Reg. *v.* Oxford, 4 Q. B. D. 245, 525; s. c. in H. of L. *nom.* Julius *v.* Oxford, 5 Ap.

to be construed as imperative are not in all particulars made distinct by the decisions; but, in general, whenever a private party or the public claims a right or interest under such a provision, the claim constitutes a sort of election which makes the permissive terms imperative, and they will be held to be so even without the formal claim.[1] Consequently, for example, a permission to a court is a command, if it relates to the rights of suitors,[2] but otherwise if it concerns something in its nature discretionary.[3] So far the doctrine is plain, and is abundantly

Cas. 214; Rex *v.* Norfolk, 4 B. & Ad. Ill. 471; Rumsey *v.* Lake, 55 How. 238; *In re* Neath, etc. Ry. Co., Law R. Pr. 339; Estate of Walley, 11 Nev. 260; S. *v.* Buffalo, 6 Neb. 454; Rockwell *v.* Clark, 44 Conn. 534; St. Louis, etc. R. R. Co. *v.* Teters, 68 Ill. 144. [When public interests are concerned, or the rights of third persons are involved, "may" and "shall" are both imperative. Smith *v.* King, 14 Oreg. 10, 12 Pac. R. 8; Johnston *v.* Pate, 95 N. C. 68. Statutory directions which are of the essence of the thing to be done are mandatory. Jackson Co. *v.* Dorick, 117 Ala. 348, 23 S. R. 193. See also U. S. *v.* Eaton, 169 U. S. 331, 42 L. ed. 767; S. *v.* Laughlin, 73 Mo. 443; S. *v.* King, 136 Mo. 309, 36 S. W. R. 681; Kohn *v.* Hinshaw, 17 Oreg. 308, 20 Pac. R. 629; Hayes *v.* Los Angeles, 99 Cal. 74, 33 Pac. R. 766. "Is authorized" construed as mandatory. P. *v.* Buffalo, 140 N. Y. 300, 35 N. E. R. 485. See also Swenson *v.* McLaren, 2 Tex. Civ. Ap. 331, 21 S. W. R. 300; Adams *v.* Sleeper, 64 Vt. 544, 24 Atl. R. 990; S. *v.* Farley, 36 Neb. 537, 54 N. W. R. 862.]

[1] Rex *v.* Tithe Commissioners, 14 Q. B. 459, 474; New York *v.* Furze, 3 Hill (N. Y.), 612; Seiple *v.* Elizabeth, 3 Dutcher, 407; Mitchell *v.* Duncan, 7 Fla. 13; Schuyler *v.* Mercer, 4 Gilman, 20; Cutler *v.* Howard, 9 Wis. 389; Blake *v.* Portsmouth & Concord R. R. Co., 39 N. H. 435; Nave *v.* Nave, 7 Ind. 122; Bansemer *v.* Mace, 18 Ind. 27, [81 Am. D. 344;] Supervisors *v.* U. S., 4 Wall. 435; Galena *v.* Amy, 5 Wall. 705; P. *v.* Otsego, 51 N. Y. 401; P. *v.* Buffalo, 4 Neb. 150; Phelps *v.* Hawley, 52 N. Y. 23; Low *v.* Dunham, 61 Me. 566; Phillips *v.* Fadden, 125 Mass. 198; Steines *v.* Franklin, 48 Mo. 167; S. *v.* Saline County Court, 48 Mo. 390, [8 Am. R. 108;] Kane *v.* Footh, 70 Ill. 587; S. *v.* Board of State Canvassers, 36 Wis. 498.

[2] Reg. *v.* Adamson, 1 Q. B. D. 201; Macdougall *v.* Paterson, 11 C. B. 755; Crake *v.* Powell, 2 Ellis & B. 210; Asplin *v.* Blackman, 7 Exch. 386; Backwell's Case, 1 Vern. 152; Bowes *v.* Hope Life Ins. etc. Co., 11 H. L. Cas. 389, 402; Marson *v.* Lund, 13 Q. B. 664; Morisse *v.* Royal British Bank, 1 C. B. (N. S.) 67; Reg. *v.* Harwich, 8 A. & E. 919; Roles *v.* Roswell, 5 T. R. 538; Hardy *v.* Bern, 5 T. R. 636; Drage *v.* Brand, 2 Wils. 377; Reg. *v.* Boteler, 4 B. & S. 959; Phelps *v.* Hawley, 3 Lans. 160; Appleton *v.* Warner, 51 Barb. 270; Ticknor *v.* McClelland, 84

[3] Estate of Ballentine, 45 Cal. 696; Barber *v.* Gamson, 4 B. & Ald. 281; Cook *v.* Tower, 1 Taunt. 372; Girdleston *v.* Allan, 1 B. & C. 61; *In re* Newport Bridge, 2 Ellis & E. 377; Bell *v.* Crane, Law R. 8 Q. B. 481; Castelli *v.* Groom, 18 Q. B. 490.

Costs.—In Jones *v.* Harrison, 6 Exch. 328, 3 Eng. L. & Eq. 579, and Palmer *v.* Richards, 6 Exch. 335, it was held that costs to a party, in the

established by the decisions. It was once observed that "may" is imperative "in all cases where the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject, further than that that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the legislature."[1] And, by all opinions, it is the meaning of the legislature at which interpretation in these cases, as in all others,[2] should aim.[3] Said Woodbury, J., in the supreme court of the United States: "Whenever it is provided that a corporation or officer 'may' act in a certain way, or it 'shall be lawful' for them to act in a certain way, it may be insisted on as a duty for them to act so if the matter, as here, is devolved on a public officer, and relates to the public or third persons."[4] Another judicial observation from the books is that "may" is imperative only for sustaining or enforcing a right, not for creating one;[5] but quite likely the latter clause of this *dictum* requires qualification. Certainly this permissive word is often to have its primary meaning;[6] and probably it should receive it in cases generally where nothing affirmatively appears in the matter of the statute indicating the other construction.[7] Thus,—

Jurisdiction — (Polygamy). — A mere permissive jurisdictional statute will not take away the common-law jurisdiction. For example, in Maine the act against polygamy provides that the indictment "*may* be found and tried in the county where the offender resides;" yet, in the words of Dickerson, J., "this

circumstances contemplated in the text, are discretionary with the court. But in Asplin *v.* Blackman, *supra*, the same court, following Crake *v.* Powell and Macdougall *v.* Paterson, *supra*, overruled these decisions. And see Wood *v.* Brown, 6 Daly, 428.

[1] Minor *v.* Mechanics' Bank, 1 Pet. 46, 64. And see *Ex parte* Simonton, 9 Port. 390, [33 Am. D. 320;] Newburgh, etc. Turnpike *v.* Miller, 5 Johns. Ch. 101; Com. *v.* Gable, 7 S. & R. 423; Rex *v.* Flockwold Inclosure, 2 Chit. 251.

[2] *Ante*, § 70.

[3] Kelly *v.* Morse, 3 Neb. 224.

[4] Mason *v.* Fearson, 9 How. (U. S.) 248, 259.

[5] S. *v.* Holt County Court, 39 Mo. 521; *Ex parte* Banks, 28 Ala. 28. And see York, etc. Ry. Co. *v.* Reg., 1 Ellis & B. 858; Stead *v.* Carey, 1 C. B. 496.

[6] *Ex parte* Yeager, 11 Grat. 655; Com. *v.* Haynes, 107 Mass. 194, 197. And see Leigh *v.* Westervelt, 2 Duer, 618; Bowers *v.* Sonoma, 32 Cal. 66; P. *v.* Brooks, 1 Denio, 457, [43 Am. D. 704.]

[7] Fowler *v.* Pirkins, 77 Ill. 271.

provision of the statute is *permissive* and not *mandatory*. It is not in derogation of the common-law right of indictment and trial in the county where the offense is committed, but rather an enlargement of the jurisdiction of the court."[1]

§ 112a. Particular and general.— Out of the special matter of the statute grows also a doctrine, spoken of likewise in other connections, whereby apparently conflicting provisions are reconciled and made harmonious. It is applicable equally to the different clauses of the same enactment, to different statutes at whatever different times passed, and to the common and statutory laws when viewed in combination. It is, that the general and specific in legal doctrine may mingle without antagonism, the specific being construed simply to impose restrictions and limitations on the general; so that general and specific provisions in the laws, both written and unwritten, may stand together, the latter qualifying and limiting the former.[2] This doctrine commonly extends also to —

§ 112b. Acts local and special.— Ordinarily, if there are a general statute and one local or special, on the same subject, in conflicting terms, neither abrogates the other, but both stand together; the latter furnishing the rule for the particular locality or case, the former for the unexcepted places and instances. And it is immaterial which is the later in date.[3] But where from anything cognizable by the judges they are satisfied that

[1] S. *v.* Sweetser, 53 Me. 438, 440. And see Barnawell *v.* Threadgill, 5 Ire. Eq. 86; Crawford *v.* Childress, 1 Ala. 482; *post*, § 164.

[2] *Ante*, § 64; *post*, §§ 126, 131, 152, 156; S. *v.* Goetze, 22 Wis. 363; Taylor *v.* Oldham, 4 Ch. D. 395, 410; Lyn *v.* Wyn, O. Bridg. 122, 127; Atty. Gen. *v.* Moore, 3 Ex. D. 276; S. *v.* Kelley, 5 Vroom, 75; McGavisk *v.* S., 5 Vroom, 509; Gloversville *v.* Howell, 70 N. Y. 287; Hedges *v.* Titus, 47 Ind. 145; Rounds *v.* Waymart, 81 Pa. St. 395; S. *v.* Trenton, 9 Vroom, 64; Thorpe *v.* Adams, Law Rep. 6 C. P. 125, 135; Pretty *v.* Solly, 26 Beav. 606; De Winton *v.* Brecon, 26 Beav. 533; Denton *v.* Manners, 4 Jur. (N. S.) 151, 714; [Talcott *v.* Com., 53 Cal. 199; Dewey *v.* Central Co., 42 Mich. 399, 4 N. W. R. 179; S. *v.* Green, 24 Mo. Ap. 227; Wilson *v.* Knox Co., 132 Mo. 387; S. *v.* Hobe (Wis.), 82 N. W. R. 336.]

[3] *Post*, § 156; P. *v.* Quigg, 59 N. Y. 83; Rex *v.* St. Pancras, 6 A. & E. 1; London, etc. Ry. Co. *v.* Limehouse, 3 Kay & J. 123, 128; Crane *v.* Reeder, 22 Mich. 322; S. *v.* Mills, 5 Vroom, 177; Fitzgerald *v.* Champneys, 2 Johns. & H. 31; Purnell *v.* Wolverhampton New Water Works, 10 C. B. (N. S.) 576; Gloversville *v.* Howell, 70 N. Y. 287; S. *v.* Kelley, 5 Vroom, 75; McGavisk *v.* S., 5 Vroom, 509; S. *v.* Brady, 41 Conn. 588; Burke *v.* Jeffries, 20 Iowa, 145; Liverpool Library *v.* Liverpool, 5 H. & N. 526; [Dawson Co. *v.* Clark (Neb.), 79 N. W. R. 822; Seifried *v.* Com., 101 Pa. St. 202; Mallory *v.* Com., 115 Pa. St. 25, 7 Atl. R.

the general law was meant by the legislature to supersede the local or special, they will give it such effect.[1]

§ 113. Private statutes,— "made for the accommodation of particular citizens or corporations, ought not," it has been said, "to be construed to affect the rights or privileges of others, unless such construction results from express words, or from necessary implication."[2] To a considerable extent they are regarded as contracts, or *quasi*-contracts, between the public and the individual.[3] But, especially, being limited to the one individual or corporation, they will not control the general laws in their applications to other persons and things; neither, on the other hand, will the general laws, or another private act,[4] abrogate their express terms as to the individual or corporation named.[5] This proposition is subject to exceptions, as indicated in the last section.

§ 113a. In conclusion,— a statute must be construed equally by itself and by the rest of the law. The mind of the interpreter, if narrow, will stumble. There are no questions, in the entire range of the law, on which views alike broad and minute are more emphatically required of the expounder, than those relating to statutory interpretation.

790; Building Ass'n *v.* Lea, 100 Pa. St. 212; Negrotto *v.* Monett, 49 Mo. Ap. 286.]

[1] Bramston *v.* Colchester, 6 Ellis & B. 246; Daw *v.* Metropolitan Board, 12 C. B. (N. S.) 161; Great Central Gas Consumers' Co. *v.* Clarke, 13 C. B. (N. S.) 838, 840; S. *v.* Pearcy, 44 Mo. 159; P. *v.* Miner, 47 Ill. 33. Possibly there may be cases not quite in accord with the doctrine of this section, but it is abundantly sustained in general authority. See and compare Com. *v.* Pointer, 5 Bush, 301; S. *v.* Douglass, 4 Vroom, 363; Talcott *v.* Harbor Com'rs, 53 Cal. 199; Howell *v.* Cassopolis, 35 Mich. 471; [Adleman *v.* Steele, 13 Phila. 529; Borough *v.* Hawthorne, 123 Pa. St. 106, 16 Atl. R. 835; Kennedy *v.* Board, 82 Cal. 483, 22 Pac. R. 1042.]

[2] Parsons, C. J., in Coolidge *v.* Williams, 4 Mass. 140, 145; Wales *v.* Stetson, 2 Mass. 143, [3 Am. D. 39;] Hood *v.* Dighton Bridge, 3 Mass. 263; Perry *v.* Wilson, 7 Mass. 393; Sprague *v.* Birdsall, 2 Cow. 419.

[3] Dwar. Stat. (2d ed.) 650, 651; Lee *v.* Shankle, 6 Jones (N. C.), 313; Thomas *v.* Mahan, 4 Greenl. 513.

[4] Birkenhead Docks *v.* Laird, 4 De G., M. & G. 732.

[5] Broadbent *v.* Tuskaloosa Scientific, etc. Ass'n, 45 Ala. 170; Lee *v.* Shankle, *supra;* Campbell's Case, 2 Bland, 209, [20 Am. D. 360;] Williams *v.* Pritchard, 4 T. R. 2; Eddington *v.* Borman, 4 T. R. 4; Abergavenny *v.* Brace, Law Rep. 7 Ex. 145, 160.

CHAPTER XVI.

HOW THE DOCTRINE THAT ALL THE LAWS ARE TO BE INTERPRETED INTO ONE SYSTEM IS PRACTICALLY APPLIED TO THE STATUTES.

§ 113b. Elsewhere — we saw what this doctrine is.[1]

Here — we are to consider something of its practical forms and methods.

§ 114. Ordinary modes of procedure.— A statute being, as we have seen,[2] a fresh drop added to the yielding mass of the prior law, to be mingled by interpretation with it, "where," said Kent, C. J., it "admits of two constructions, it is advisable to give it that which is consonant to the ordinary mode of proceeding." Therefore, in the case of an enactment defectively worded, one part of it apparently providing a summary process for the recovery of a penalty, and another indicating the ordinary method, the court pronounced for the latter.[3] Again,—

§ 115. Foreign statutes.— In those circumstances in which the tribunal acts for the occasion on foreign laws as its own,[4] and generally where laws are adopted from a foreign country, no distinction is made between the written and the unwritten. Both are looked upon as mingled into one mass.[5] And,—

Interpreting statutes of another jurisdiction.— In thus acting on or adopting foreign statutes[6] or those of a sister state,[7]

[1] *Ante*, § 86 *et seq.*

[2] *Ante*, §§ 4–7, 86.

[3] Bennett *v.* Ward, 3 Caines, 259. And see Minet *v.* Leman, 20 Beav. 269.

[4] 1 Bishop, Mar., Div. & S., §§ 855, 1089; Caldwell *v.* Vanvlissengen, 9 Hare, 415.

[5] Huber *v.* Steiner, 2 Scott, 304, 2 Bing. N. C. 202; Smith *v.* Bartram, 11 Ohio St. 690; Ruckmaboye *v.* Mottichund, 8 Moore P. C. 4; Alves *v.* Hodgson, 7 T. R. 237, 241; Bristow *v.* Sequeville, 5 Exch. 275; Pemble *v.* Clifford, 2 McCord, 31; Drew *v.* Wakefield, 54 Me. 291; Scott *v.* Lunt, 7 Pet. 596; Plumleigh *v.* Cook, 13 Ill. 669.

[6] Hoyt *v.* Thompson, 3 Sandf. 416; Bloodgood *v.* Grasey, 31 Ala. 575; [Int. Com. *v.* R. R. Co., 43 Fed. R. 37.]

[7] Carlton *v.* Felder, 6 Rich. Eq. 58; Hale *v.* Lawrence, 3 Zab. 590, [57 Am. D. 420;] Davis *v.* Robertson, 11 La. An. 752; Johnston *v.* South Western R. Bank, 3 Strob. Eq. 263; [Hamilton *v.* R. R. Co., 39 Kan. 56, 18 Pac. R. 57; Nicollet *v.* Bank, 38 Minn. 85, 35 N.

the court receives with them the foreign interpretation, which is unwritten law, not distinguishing the written from the unwritten. So our national tribunals follow, with the statutes of the several states, the meanings given them by the state courts, when either furnishes the rule for their decision.[1] And, as a broad proposition,—

§ 116. Origin of law immaterial in interpretation.—In the interpretation of the laws their origin is immaterial. The unwritten, in all their forms, and from whatever sources arising, and all forms of the written, at whatever different dates ordained, are by interpretation blended into one mass, as rounded and perfect as the several natures of the less flexible will permit. And, as observed in part in a previous chapter,[2]—

All laws require interpretation.—There is no law, written or unwritten, which does not require to be interpreted in its administration.[3] A statute, recent and in general terms, presents greater difficulties than an old and often-adjudicated doctrine of the common law; but neither the one nor the other can be

W. R. 577; Savings Co. *v.* O'Brien, 51 Hun, 45, 3 N. Y. Sup. 764; Stutsman *v.* Wallace, 142 U. S. 293, 35 L. ed. 1018; Coulter *v.* Stafford, 48 Fed. R. 266; Sanger *v.* Flow, 48 Fed. R. 152; Barnes *v.* Lynch (Okl.), 59 Pac. R. 995; Requa *v.* Graham, 86 Ill. Ap. 566; Blaine *v.* Curtis, 69 Vt. 120, 7 Atl. R. 798. Where a statute is adopted, omitting an amendment lately added, it takes the construction it had before amendment. Lindley *v.* Davis, 6 Mont. 453, 13 Pac. R. 118. This rule does not hold where the policy of the two states is entirely different. Frankel *v.* Creditors, 20 Nev. 49, 14 Pac. R. 775.]

[1] *Ante*, § 35b; De Wolf *v.* Rabaud, 1 Pet. 476; Bell *v.* Morrison, 1 Pet. 351; Gardner *v.* Collins, 2 Pet. 58; Elmendorf *v.* Taylor, 10 Wheat. 152; Harpending *v.* Dutch Church, 16 Pet. 455; Porterfield *v.* Clark, 2 How. (U. S.) 76; [McElwaine *v.* Brush, 142 U. S. 155, 35 L. ed. 971; So. Branch Co. *v.* Ott, 142 U. S. 622, 35 L. ed. 1136; Gormly *v.* Clark, 134 U. S. 338, 33 L. ed. 909; Louisville R. R. Co. *v.* Miss., 133 U. S. 587, 33 L. ed. 784; Peters *v.* Bain, 133 U. S. 670, 33 L. ed. 696; Amy *v.* Watertown, 130 U. S. 301, 32 L. ed. 946; McFadden *v.* Blocker, 54 S. W. R. (I. T.) 873. The rules established by the highest courts of a state for determining the validity of a state statute under the state constitution are binding on the federal courts. New York Co. *v.* Board, 99 Fed. R. 846.]

[2] *Ante*, § 71.

[3] This proposition, properly understood, is not in conflict with another, which is, that, in the words of Vattel, "It is not allowable to interpret what has no need of interpretation." Vattel, Law of Nations, b. 17, § 263. And see *ante*, § 72. The meaning of which is, that a passage should not be bent from its obvious sense. But however plain a writing may be, its application to facts in controversy is always a question of interpretation, equally permissible and commendable.

practically available in litigation except as it is interpreted for the particular instance. For no case can proceed to judgment without compelling from the bench so much interpretation of the law, whether written, unwritten, or both, as will determine whether or not the proven or admitted facts are within its terms or operation. And no more than this is ever done in the interpretation of any statute. Hence —

§ 117. Written and unwritten follow like rules.— The written law and the unwritten are interpreted by substantially the same rules. For example,—

Minority.— The common law, for the protection of minors, disables them in general to bind themselves by contract, yet permits it in exceptional circumstances, and with cautiously-devised limitations.[1] Now, whatever their power of contract may be in a particular class of circumstances, it is precisely the same whether the contract in question is under a statute or at the common law.[2] Again,—

Infantile incapacity for crime.— At the common law, a child under seven years of age is incapable of crime.[3] Therefore, when a statute creates a crime, its terms, however general, are no more applied to such a child than are similar terms of the common law.[4] And —

§ 117*a*. In general.— This sort of interpretation extends through all our laws, the written and the unwritten alike. The books contain cases in which counsel and the courts forget it; but none in which judicial persons, with their eyes open and duly warned, deliberately reject it. We sometimes read, in judicial opinions, that those pronouncing them deem it due to the legislature to follow its directions, and not to make exceptions where it has made none; but this sort of language should not be taken as a denial of what every person familiar with our reports knows; namely, that no judge ever deliberately undertook to administer a statute without admitting those exceptions to it which are recognized in the other parts of the legal system. Nor did any legislative body ever proceed on the idea that its enactments are to be put in force by courts so ignorant of legal affairs as to deem them meant for independent rules, to be limited by no others, and to override all laws

[1] Bishop, Con., §§ 892–946.
[2] Id., § 273.
[3] Crim. Law, I, § 368.
[4] *Ante*, § 7; *post*, § 131.

antagonistic to their general words. For legislatures and courts alike recognize the fact, which common sense teaches to every thoughtful person, that it is neither possible nor desirable, in any system of laws, to attach to each particular law every qualification embraced in every other. So voluminous would the laws thus become, and so often would conflicts be found in them in spite of every legislative caution, and so difficult would it be to explore their immense masses, that their usefulness would be indefinitely diminished.[1]

§ 118. Ancient and modern interpretations compared.— In ancient times, in England, the statutes were commonly brief and general in their terms. Afterward they became more minute and complicated. And the American statutes follow more nearly the later English models than the earlier. When, in England, they were very brief and general, a good deal of bending, restraining and enlarging of meanings was indispensable to their having any just effect, therefore was permissible. But sometimes interpretation was carried to the practical undoing of what was plainly meant by the enacting power. This, of course, was never justifiable.[2] Modern courts in neither country do it. But the fact of its having been done has created some modern prejudice against what is justifiable and necessary. So that in later days the courts oftener interpret the statutes too little than too much.

§ 118a. Two methods — (Effect — Meaning).— The methods by which interpretation brings the several statutes into harmony with one another and with the rest of the law, and the rest of the law into harmony with them, producing one jurisprudence, are chiefly two. In appearance they are similar, and they are often spoken of without distinction; but, in their natures, the manner of their operating, and their consequences, they are among the most absolutely distinct things in our legal system. The one method consists of curtailing or extending — in other words, cutting short or adding to — the *effect* of the particular provision of statutory or common law in question, by bringing another law of either sort into combination with it, so that the two together will produce a result not within the terms of either one alone; as two diverse propelling forces, applied to an inert

[1] And see *post*, § 128.

[2] *Ante*, § 70.

body, will send it to a point which neither one of itself would do. The other method consists of expanding or contracting the *meaning* of the law in question, by applying to it the various and differing rules of interpretation; such as, that the legislative intent shall be carried out,[1] or that the statute is of a sort requiring a strict construction,[2] or a liberal,[3] or some other.

§ 118b. The effect — of combining, as just said, diverse written and unwritten laws, so as to produce results not competent to any of them acting severally, will be fully explained in the next chapter. And,—

The meaning.— Further on, it will be shown in detail how, under the influence of differing rules of interpretation, variously called into action by the dissimilar natures of the provisions and their objects and circumstances, statutes are enlarged and contracted in their meanings. But, before we proceed to those fuller explanations, something further seems desirable to be said concerning the —

§ 119. Expansion and contraction of meanings: —

Keeping within words.— There are classes of statutes the meanings of which the courts restrict to their express terms, allowing nothing by implication. Thus,—

Derogation of common right — (Private property to public use).— The taking away of rights is not favored by the law. Therefore statutes in derogation of common right are in the construction kept within their express provisions.[4] Of this sort, for example, is a statute permitting the condemnation of private land to public use.[5] So,—

Derogation of common law.— A statute which on its face does not profess to repeal anything, being *prima facie* an *addition* to the prior body of the law, will not be construed to change such law further than its direct terms require. This rule is variously expressed: a common form of the expression, covering the doctrine in part, is, that statutes in derogation of the common law are to be construed strictly, as extending

[1] *Ante*, § 70.
[2] *Post*, §§ 119, 191.
[3] *Post*, §§ 120, 191, 227.
[4] Indianapolis & Cincinnati R. R. Co. *v.* Kinney, 8 Ind. 402.
[5] Gilmer *v.* Lime Point, 19 Cal. 47; *In re* Powers, 29 Mich. 504. And see *In re* Washington Park, 52 N. Y. 131.

only to cases fairly within the scope of their language.[1] Again,—

Penal statutes,— which deprive men of property and liberty, and bring them into disgrace, are construed thus strictly.[2] So also —

New powers to magistrate.— A justice of the peace, given new statutory powers, "must proceed in the mode prescribed by the statute."[3] But this is simply a branch of the general doctrine that —

Statutory authority or right.— A purely statutory authority or right must be pursued in strict compliance with the terms of the statute.[4] So —

Proceeding by motion — Restraint of trade — Evidence — Constructive notice — Special privileges.— A statute authorizing an aggrieved party to proceed against a public officer by motion, on his official bond;[5] or in restraint of trade, or of the alienation of property;[6] or excluding one from giving evidence;[7]

[1] Dwelly *v.* Dwelly, 46 Me. 377; Burnside *v.* Whitney, 21 N. Y. 148; Gibson *v.* Com., 87 Pa. St. 253; The Waverly, 7 Biss. 465; Indiana North and South Ry. Co. *v.* Attica, 56 Ind. 476; Harrison *v.* Leach, 4 W. Va. 383; Harrison *v.* Smith, 4 W. Va. 97; Pendleton *v.* Barton, 4 W. Va. 496; Brown *v.* Fifield, 4 Mich. 322; Barrett *v.* Long, 3 H. L. Cas. 395. And see *post*, §§ 155, 189*a*; [Beal *v.* Posey, 72 Ala. 323; Esterly's Appeal, 54 Pa. St. 192; Cook *v.* Meyer, 73 Ala. 580; Lanier *v.* Youngblood, 73 Ala. 587; Commissioner *v.* Newby, 81 Ill. Ap. 378; Heard *v.* S., 81 Ala. 55, 1 S. R. 640.]

[2] *Post*, § 193; Atlanta *v.* White, 33 Ga. 229; Steele *v.* S., 26 Ind. 82; S. *v.* Lovell, 23 Iowa, 304. [Penal laws in the international sense are only those punishing offenses against the state, which the executive has power to pardon. Huntington *v.* Attrill, 146 U. S. 657, 36 L. ed. 1123. Yet even penal laws must be so construed as to give effect to the legislative intent. Reese *v.* S., 73 Ala. 18; U. S. *v.* Lacher, 134 U. S. 624, 33 L. ed. 1080; *In re* Coy, 31 Fed. R. 794; *In re* McDonogh, 49 Fed. R. 360; Sewell *v.* State, 82 Ala. 56, 2 S. R. 622. A statute conferring a penalty requires a strict compliance with all its terms to set the statute in motion. Ferch *v.* Victoria Co. (Minn.), 32 N. W. R. 678.]

[3] O'Brian *v.* S., 12 Ind. 369.

[4] Morris Aqueduct *v.* Jones, 7 Vroom, 206; Com. *v.* Howes, 15 Pick. 231; Best *v.* Gholson, 89 Ill. 465; Lang *v.* Scott, 1 Blackf. 405, [12 Am. D. 257;] Chicago & Alton R. R. Co. *v.* Smith, 78 Ill. 96; Garrigus *v.* Parke, 39 Ind. 66; Banks *v.* Darden, 18 Ga. 318; Moody *v.* Nelson, 60 Ill. 229; Matthews *v.* Skinker, 62 Mo. 329, [21 Am. R. 425;] Erlinger *v.* Boneau, 51 Ill. 94; Ryan *v.* S., 33 Tex. 280; Hastings *v.* Cunningham, 39 Cal. 137. [All statutory powers are to be construed strictly. Falk *v.* Hecht, 75 Ala. 293; Coosaw Co. *v.* S., 144 U. S. 550, 36 L. ed. 537.]

[5] Hearn *v.* Ewin, 3 Coldw. 399.

[6] Richardson *v.* Emswiler, 14 La. An. 658.

[7] Pelham *v.* Messenger, 16 La. An. 99; Esterley's Appeal, 54 Pa. St. 192;

or authorizing constructive, instead of personal, service of process;[1] or giving to corporations or individuals special privileges,[2]—is, for the reasons already explained, to be kept by construction within its express terms. But,—

§ 120. Expanding the meaning.— In cases governed by reasons of a different sort, interpretation may expand the meaning beyond the mere literal significance of the words. The degree of the expansion will vary with the individual instance, and with the particular rule of construction requiring it. No uniform standard can be defined. This is called a liberal interpretation.

When — (Appeal — Redemption of land — Arbitration).— It is applied, for illustration, to a statute extending the right of appeal,[3] allowing redemption of real estate after a tax sale,[4] or providing for the settlement of disputes by arbitration.[5] And —

Remedial — Public convenience.— All other remedial statutes,[6] and statutes to promote the public convenience,[7] are to be thus liberally construed.

§ 121. In conclusion,— while, as said by Perkins, J., "the application of the words of a single statute may be enlarged or restrained to bring the operation of the act within the intention of the legislature, when violence will not be done by such interpretation to the language of the statute,"[8] this doctrine can have its just effect only in combination with all the other rules of statutory interpretation, and such skill in the interpreter as comes alone from a thoughtful and intelligent study of the entire subject.

Sullivan *v.* La Crosse, etc. Steam Packet Co., 10 Minn. 386.

[1] Stewart *v.* Stringer, 41 Mo. 400, [97 Am. D. 278.]

[2] Moran *v.* Miami, 2 Black, 722; [Hannibal R. R. Co. *v.* Ins. Co., 125 U. S. 260, 31 L. ed. 731.]

[3] Pearson *v.* Lovejoy, 53 Barb. 407; Converse *v.* Burrows, 2 Minn. 229; [U. S. *v.* Burchard, 125 U. S. 176, 31 L. ed. 662.]

[4] Jones *v.* Collins, 16 Wis. 594.

[5] Tuskaloosa Bridge *v.* Jennison, 33 Ala. 476.

[6] Hudler *v.* Golden, 36 N. Y. 446; White *v.* Steam-Tug Mary Ann, 6 Cal. 462; Jackson *v.* Warren, 33 Ill. 331; Cullerton *v.* Mead, 22 Cal. 95.

[7] Marshall *v.* Vultee, 1 E. D. Smith, 294.

[8] Maxwell *v.* Collins, 8 Ind. 38, 40.

CHAPTER XVII.

HOW THE EFFECT OF STATUTORY AND COMMON-LAW PROVISIONS IS CURTAILED AND EXTENDED BY INTERPRETING EACH IN COMBINATION WITH THE OTHERS.

§ 122. Introduction.
123–125. The general doctrine.
126, 127. One statute cutting short another.
128–130. One statute extending another.
131–133. Common law shortening statute.
134–137. Common law extending statute.
138, 138*a*. Statutes abridging and enlarging the common law.
139, 140. Taking qualities and incidents from common law.
141–144. Otherwise construed by common law.
145, 146. Adhering to terms of statute.

§ 122. How chapter divided.—We shall consider, I. The general doctrine; II. One statute cutting short another; III. One statute extending another; IV. The common law shortening a statute; V. The common law extending a statute; VI. Statutes abridging and enlarging the common law; VII. Statutes taking their qualities and incidents from the common law; VIII. The statutes to be otherwise construed harmoniously with the common law; IX. Adhering in the construction to the terms of the statutes.

I. The General Doctrine.

§ 123. Elsewhere and here.— We have already seen that, in interpreting any statute, we are to lay beside it the other relevant statutes and provisions of the common law, and give it the meaning and effect derived from a consideration of the combined whole.[1] We are here to carry into detail the applications of this doctrine, not as to the meaning, but as to the effect.

Doctrine defined.— The doctrine of this chapter is that, having ascertained the meaning of a statute, we are to lay beside it all the other relevant provisions of statutory and common law, at whatever several dates established, and lengthen out

[1] *Ante*, §§ 82, 86, 113*a*–113*b*.

and shorten it by them and them by it in their respective effects, until the whole system thus constructed becomes as harmonious in itself and with the rest of the law as the particular terms of the interpreted provisions will permit.

§ 124. Necessity of this doctrine.—We have already seen, in some measure, why this sort of doctrine is a necessity in the law.[1] Without it, no legislature could give to any court directions which it would understand. A new law is made to control future events. They cannot be foreseen in detail. The law is the *rule* for whatever may occur. But no event stands alone; each particular one is connected with, is influenced by, and influences other events. And the others are governed by their rules. So that rule comes in conflict with rule. If, then, the rules were not interpreted together, as limiting and extending one another, where all, viewed in their full terms, are in conflict, a court could not enforce any one; because, finding another rule commanding otherwise, it would not know which to obey. The legislature could not foresee the particular case, and by the form of its enactment make a way through the difficulty. Even if this were not strictly so, and, endowed with superhuman foresight, it could lay for the tribunal paths no one of which should cross another, and each should be unconnected with the rest, the folly of doing it would be so steep as to constitute a practical impossibility.

§ 125. How doctrine made to appear.—Necessity is one of the elements of the law. Whatever, in jurisprudence, must be, is.[2] Therefore, as practically the laws cannot be administered without this doctrine, it is parcel of them. In matter of judicial authority, legal doctrine is not, in general, established by direct adjudication. In large part, silently controlling the decisions, it is learned from a comparison of decision with decision; just as the laws of nature are discerned in its operations, and from a comparison of instance with instance. To establish the doctrine of this chapter, we are required to examine it, as we shall do in successive sub-titles, in its several parts; and, when each part is shown to pertain to the adjudged law, the conclusion that so does the whole will follow as of course.

[1] *Ante*, § 117*a*.

[2] Crim. Law, I, §§ 54, 346–355, 824; Crim. Pro., I, §§ 7, 264*i*, 493 *et seq.*

II. One Statute Cutting Short Another.

§ 126. Doctrine defined.— The doctrine of this sub-title is, that, where the harmony of the law requires, one statute will be construed as cutting short — that is, curtailing the effect of — another. Thus,—

Provisions partly antagonistic.— There are not unfrequently clauses in the same act or in different acts which may well stand together to a certain point; but, arrived there, one must give way. To determine which one is often a nice question. It does not depend solely on the priority of the acts, though this consideration is sometimes important. One rule is that,—

Specific and general — (Repeal).— As already mentioned,[1] the more specific provision controls the general, without regard to their comparative dates; the two acts operating together, and neither one working a repeal of the other.[2] An old form of the

[1] *Ante*, §§ 64, 112*a*, 112*b*.

[2] Dwar. Stat. (2d ed.) 513, 668; McVey *v.* McVey, 51 Mo. 406; Brown *v.* Com'rs, 21 Pa. St. 37, 43; Haywood *v.* Savannah, 12 Ga. 404; Conley *v.* Calhoun, 2 W. Va. 416; Beridon *v.* Barbin, 13 La. An. 458; Mobile & Ohio R. R. Co. *v.* S., 29 Ala. 573; McFarland *v.* State Bank, 4 Pike, 410; Ellis *v.* Batts, 26 Tex. 703; S. *v.* Macon County Court, 41 Mo. 453. In a Florida case, which affirms this doctrine, Thompson, J., observed: "As a general rule, it is true that every affirmative statute is a repeal, by implication, of a precedent affirmative statute, so far as it is contrary thereto; *leges posteriores priores contrarias abrogant* — but to apply this maxim of the law, it is necessary that the two acts be in conflict with each other, which is not the case here. The last act is general; and, though it may inflict a milder punishment than the preceding statute for the same offense, yet the act which is claimed to be repealed by this implication is special and particular." Luke *v.* S., 5 Fla. 185, 194. Yet an act prescribing the mode of punishing an offense in a single county was, in Pennsylvania, held to be repealed by a later one regulating the mode for the entire state. Nusser *v.* Com., 25 Pa. St. 126. See also Blevings *v.* P., 1 Scam. 172. So, where a statute permitted an appeal from the judgment of a justice of the peace, then another was passed allowing an appeal whenever the judgment exceeded $5, the former was held to be by implication repealed. Curtis *v.* Gill, 34 Conn. 49. But in Maine it was held that the act of 1823, saving the right of appeal from the sentence of the common pleas in criminal cases, not mentioning any condition, did not repeal the prior statute, which required a recognizance with sureties to be given to prosecute such an appeal. Dennison's Case, 4 Greenl. 541. A general law does not repeal a special one passed at the same session. Ottawa *v.* La Salle, 12 Ill. 339. Again, a special statute giving a bank a summary process against its creditors is not affected by a subsequent general one, unless such intention is clear on the face of the latter Pearce *v.*

expression is, that "a thing given in particular shall not be taken away by general words."[1] Thus,—

Limitation of time — Place.— A statute prescribing the time within which a class of offenses must be prosecuted, or the place of the trial, controls a general one, even subsequent in date, creating an offense within the class, and providing for its punishment.[2] And —

Selling liquor in town.— A local act, making finable the unlicensed selling of spirituous liquors in a designated town, is not affected by a subsequent general one regulating the sale of such liquors in the state.[3] So —

Bank of Mobile, 33 Ala. 693. See also Zachary *v.* Chambers, 1 Oreg. 321; S. *v.* Bilansky, 3 Minn. 246; St. Martin *v.* New Orleans, 14 La. An. 118; Pease *v.* Whitney, 5 Mass. 380; Nichols *v.* Bertram, 3 Pick. 342; S. *v.* Perrysburg, 14 Ohio St. 472; Isham *v.* Bennington Iron Co., 19 Vt. 230; London, etc. Ry. Co. *v.* Wandsworth Board of Works, Law R. 8 C. P. 185, 189; *post*, § 156; [Harrisburg *v.* Sheck, 104 Pa. St. 53; Dick's Appeal, 106 Pa. St. 589; Coats *v.* Hill, 41 Ark. 149; Wood *v.* Election Com., 58 Cal. 561; McKenna *v.* Edmundstone, 91 N. Y. 231; S. *v.* Stevenson, 44 N. J. L. 371; *Ex parte* Schmidt, 24 S. C. 363; S. *v.* Green, 24 Mo. Ap. 227; P. *v.* Westchester, 40 Hun, 353; S. *v.* Fitzporter, 17 Mo. Ap. 271; Cascades R. R. Co. *v.* Sohns, 1 Wash. T. 557; S. *v.* Young, 30 S. C. 399, 9 S. E. R. 355; President *v.* Rushville, 32 Ill. Ap. 320; Musick *v.* K. C. R. R. Co., 114 Mo. 309, 21 S. W. R. 491; S. *v.* Womble, 112 N. C. 862, 19 L. R. A. 827, 17 S. E. R. 491; S. *v.* Callac, 45 La. An. 27, 12 S. R. 119; Cook Co. *v.* Gilbert, 146 Ill. 268, 33 N. E. R. 761; Aldinger *v.* Pugh, 57 Hun, 181, 10 N. Y. Sup. 684; *Re* Goddard, 94 N. Y. 544; Buffalo Cemetery *v.* Buffalo, 118 N. Y. 61, 22 N. E. R. 962; Com. *v.* Cain, 14 Bush, 525; Com. *v.* Boone Co., 82 Ky. 632. A special earlier law is repealed by a later general law only when such a legislative intention clearly appears. Essex Co. *v.* Essex Com., 62 N. J. L. 376, 41 Atl. R. 957; P. *v.* Keller, 158 N. Y. 187, 52 N. E. R. 1107; S. *v.* Stoll, 17 Wall. 436; P. *v.* Hanrahan, 75 Mich. 611, 42 N. W. R. 1124. 4 L. R. A. 751; Mallory *v.* Com., 115 Pa. St. 25, 7 Atl. R. 790; Keyes *v.* N. Y., 57 N. Y. Sup. 1047. Where the repeal by general law of a special law would render the general law unconstitutional, there is a doubly strong presumption against repeal. S. *v.* Collector, 54 N. J. L. 274, 23 Atl. R. 666. A presumption against repeal may arise also from the fact that no corresponding remedy is given by the new statute. Newman *v.* Ecton, 100 Ky. 653, 21 S. W. R. 526.]

[1] Hutton, J., in Standen *v.* University of Oxford. W. Jones, 17, 26; McFarland *v.* State Bank, 4 Pike, 410; Felt *v.* Felt, 19 Wis. 193.

[2] Johnson *v.* U. S., 3 McLean, 89; U. S. *v.* Ballard, 3 McLean, 469; Rex *v.* Wyndham, Russ. & Ry. 197; s. c. *nom.* Rex *v.* Window, 3 Camp. 78; Churchill *v.* Crease, 5 Bing. 177, 180; Gregory's Case, 6 Co. 19*b*; Dwar. Stat. (2d ed.) 514; Ottawa *v.* La Salle, 12 Ill. 339.

[3] McRae *v.* Wessell, 6 Ire. 153.

Jurisdiction to magistrate.— A statute conferring on justices of the peace jurisdiction over offenses punishable by fine not exceeding $7, and another giving a like jurisdiction over enumerated offenses the fine for which is more than $7, may, the former being general and the latter specific, stand together; what is said in general, in the one, being qualified by what is enunciated in particular, in the other.[1]

§ 126a. Different provisions in one statute.— As this doctrine applies to different statutes, *a fortiori* it does to different provisions in the same statute.[2]

§ 127. Other classes of cases.— There are other classes of cases to which the doctrine of this sub-title applies.[3] For example,—

Provisions as to punishment — (*Larceny*).— After a statute had provided a punishment for the larceny of goods exceeding $50 in value, another was enacted ordaining a heavier punishment for larceny where the goods are of value above $2,000, and repealing inconsistent acts. Thereupon the later statute was held to apply only to the heavier larcenies, while the earlier stood as to those of value between $50 and $2,000.[4]

III. One Statute Extending Another.

§ 128. Doctrine defined.— The doctrine of this sub-title is that, where the harmony of the law requires, one statute will be construed as lengthening out — that is, extending the effect of — another. Thus,—

Forbidding clergy.— When clergy was allowed, if a statute took it away from offenses of a designated class, all subsequently-enacted offenses within such class were held to be excluded;[5] the earlier statute by construction enlarging the later into the forbidding of clergy to the offender. For —

[1] Barnes *v.* S., 19 Conn. 398. As to the principle of this case, compare it with Hill *v.* Hall, 1 Ex. D. 411.

[2] 3 Inst. 117; Rex *v.* Armagh, 8 Mod. 6, 8; Clarence Ry. Co. *v.* Great North of England, etc. Ry. Co., 4 Q. B. 46; Brown *v.* Clegg, 16 Q. B. 681.

[3] And see Cincinnati *v.* Rice, 15 Ohio, 225; Tuttle *v.* Hills, 6 Wend. 213; Anderson *v.* Anderson, 4 Wend. 474; Reg. *v.* Thompson, 4 Eng. L. & Eq. 287.

[4] S. *v.* Grady, 34 Conn. 118.

[5] 1 East, P. C. 136; Foster, 190. And see 1 East, P. C. 129; Anonymous, T. Jones, 233.

Earlier qualifying later.— An earlier enactment may qualify a later,[1] nor are express words required to give it this effect.[2] Again,—

§ 129. Perjury.— The act of congress of March 3, 1825, defining the crime of perjury against the United States, was held to apply to false swearing under the statute of bankruptcy, subsequently passed;[3] the two enactments operating upon and enlarging each other. On the same principle,—

Deputy collector — (Administering oath).— The act of congress of March 3, 1817, having conferred on every collector of customs "authority, with the approbation of the secretary of the treasury, to employ within his district such number of proper persons as deputy collectors of the customs as he shall judge necessary, who are hereby declared to be officers of the customs," the construction was that, wherever in subsequent enactments any authority — as, to administer an oath — was given the collector, the same extended by exposition to his deputy.[4]

§ 130. Salaries under successive statutes.— A statute in Tennessee, after enlarging the duties and jurisdiction of a certain county court, added that "the judge of said court . . . shall have the same salary as the circuit judges of the state." Afterward another statute increased the salaries of the circuit judges, whereupon the county judge was held entitled to the increased salary also.[5] In Alabama, the pay of the quartermaster-general having been fixed by a statute at $200 a year, another, repealing this one, placed it at $4 a day while he should be on duty. But the general appropriation act, passed later during the same session, yet approved by the governor the same day, set apart for this officer $200 a year for two years; and this was held to postpone the operation of the act making his compensation $4 a day until the two years should expire.[6]

[1] Holmes *v.* Tutton, 5 Ellis & B. 65; Atty. Gen. *v.* Moore, 3 Ex. D. 276; Barber *v.* Tilson, 3 M. & S. 429.

[2] Reg. *v.* Smith, Law Rep. 1 C. C. 266, 270; *In re* Perrin, 2 Drury & Warren, 147, 1 Con. & L. 567; Williams *v.* Drewe, Willes, 392; Louisville *v.* Com., 9 Dana, 70; S. *v.* Becton, 7 Bax. 138.

[3] U. S. *v.* Nihols, 4 McLean, 23.

[4] U. S. *v.* Barton, Gilpin, 439. See also S. *v.* Raines, 3 McCord, 533; Doebler *v.* S., 1 Swan (Tenn.), 473; Campbell *v.* P., 8 Wend. 636.

[5] Crozier *v.* S., 2 Sneed, 410.

[6] Riggs *v.* Pfister, 21 Ala. 469. Compare with Kinsey *v.* Sherman, 46 Iowa, 463. And see further, concern-

IV. The Common Law Shortening a Statute.

§ 131. Doctrine defined.— The doctrine of this sub-title is that a provision of the common law, like a statutory one,[1] may, when the harmony of the legal system requires, cut short the effect of a statute. For,—

Modify, not repeal.— When the unwritten and the written law, the same as when two statutes, may stand together without conflict up to a given point, there is not properly a repeal; but, at this point, the one or the other simply gives way. For example,—

Specific common law and general statute.— The rule as to general and specific in statutes[2] prevails also in this case. A statute general in its terms is construed as subject to any exceptions which the common law requires.[3] Thus,—

Infants.— Though, as already seen, infants may be bound by a statute in general terms, they are not always so. The particular instance will be governed by its own reasons.[4] Since the unwritten law restricts or takes away the capacity for crime of those who are below certain ages, the same limitation extends to and qualifies statutes in general terms creating offenses.[5] So,—

Insanity.— While insane persons may enforce rights under statutes as well as at the common law, and may be bound by statutes,[6] they are not responsible to the common law for crime,

ing the doctrine of this section, Griswold *v.* Atlantic Dock, 21 Barb. 225. [The appropriations made by the legislature, where there is no provision limiting particular cases to a shorter period, extend to the end of the first fiscal quarter after the adjournment of the next regular session. S. *v.* Babcock, 33 N. W. R. 709, 22 Neb. 33.]

[1] *Ante*, § 126. [The presumption that a statute is to be construed strictly in derogation of the common law perhaps amounts to no more than a presumption against the further change than shown expressly, of either common or statute existing law. Many states have adopted statutes changing the old rule; and the tendency now is as indicated, though many states still declare the old rule. Civ. Code Cal., § 4; Code Civ. Proc. N. Y., § 3345; McClain, Ann. Iowa Code, § 3733.]

[2] *Ante*, §§ 112*a*, 112*b*, 126.

[3] See Wilbur *v.* Crane, 13 Pick. 284; U. S. *v.* Hart, Pet. C. C. 390; C. *v.* Knox, 6 Mass. 76; S. *v.* Martindale, 1 Bailey, 163.

[4] *Ante*, § 117; Beckford *v.* Wade, 17 Ves. 87; Warfield *v.* Fox, 53 Pa. St. 382; Bailey *v.* Whaley, 14 Rich. Eq. 81.

[5] Crim. Law, I, §§ 367–373; *ante*, § 117; Rex *v.* Groombridge, 7 Car. & P. 582. And see Sydney *v.* S., 3 Humph. 478.

[6] 2 Bishop, Mar., Div. & S., §§ 518–522; Jones *v.* Green, Law R. 5 Eq. 555.

therefore they are also excepted by interpretation out of statutes creating crimes. The common law thus limits and cuts short their effects.[1] Also,—

Coverture.— The common-law exemption of the wife from responsibility for criminal acts committed in the presence of the husband is, by construction, carried equally into statutory offenses, thus cutting short the effect of the statutes.[2] And a statute in general terms creating a forfeiture is, in like manner, restrained by the common law. It does not include women under coverture.[3] Again,—

§ 132. Evil intent.— A statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurred with his act,[4] because the common law does not.[5] Hence —

Necessity.— What is done from overwhelming necessity is construed as not violating a statute, however contrary to its general terms.[6] And —

Mistake of facts.— One who, while careful and circumspect, is led into a mistake of facts, and, doing what would be in no way reprehensible were they what he supposes them to be, commits what under the real facts is a violation of a criminal

[1] Crim. Law, I, §§ 303*a*, note, 374 *et seq.*

[2] Crim. Law, I, § 356 *et seq.* And see Com. *v.* Hadley, 11 Met. 66.

[3] Martin *v.* Com., 1 Mass. 347. See also Cornwall *v.* Hoyt, 7 Conn. 420. But a *feme covert* may be proceeded against under a penal statute without joining her husband. Rex *v.* Crofts, 7 Mod. 397.

[4] The William Gray, 1 Paine, 16; Reg. *v.* Allday, 8 Car. & P. 136, 139; Anonymous, 2 East, P. C. 765; Price *v.* Thornton, 10 Mo. 135; Com. *v.* Stout, 7 B. Mon. 247; Duncan *v.* S., 7 Humph. 148; Com. *v.* Slack, 19 Pick. 304; Reg. *v.* Page, 8 Car. & P. 122; Reg. *v.* Langford, Car. & M. 602; Reg. *v.* Caruthers, 3 Crawf. & Dix. C. C. 391; Com. *v.* Fourteen Hogs, 10 S. & R. 393; Campbell *v.* Com., 2 Rob. (Va.) 791; Reg. *v.* Philpotts, 1 Car. & K. 112; Rex *v.* Speed, 1 Ld. Raym. 583, 584. But see Reg. *v.* Armstrong, 1 Crawf. & Dix. C. C. 110; Reg. *v.* Woodrow, 2 New Sess. Cas. 346. And see Reg. *v.* Tivey, 1 Den. C. C. 63; S. *v.* Nicholas, 2 Strob. 278; Hooper *v.* S., 56 Ind. 153; Taylor *v.* Newman, 4 B. & S. 89, 9 Cox C. C. 314. [Where a statute makes criminal an act not *malum in se*, or infamous without requiring the act to be knowingly done, a criminal intent need not be proved. U. S. *v.* Leathers, 6 Sawy. 17; Gardiner *v.* P., 62 N. Y. 299; Com. *v.* Wentworth, 118 Mass. 441; Halsted *v.* S., 41 N. J. L. 552, 32 Am. R. 247; P. *v.* Adams, 16 Hun, 549; S. *v.* White Co., 111 N. C. 661, 16 S. E. R. 331.]

[5] Crim. Law, I, a series of chapters extending from § 204 to § 429.

[6] The Gertrude, 3 Story, 68; The Josefa Segunda, 5 Wheat. 338; Stratton *v.* Hague, 4 Call, 564.

statute, is guilty of no crime; because such is the rule of the common law, and in construction it restricts the statute. Yet in some instances of this sort he incurs a civil liability.[1] So,—

Outlawed plaintiff.— Where the old English doctrine of outlawry prevails, disqualifying the outlawed person to maintain an action, one may defend an information *qui tam* by showing that the plaintiff is outlawed, though the statute sued upon allows "any person" to inform.[2] And,—

§ 133. In general,— all statutes, and more particularly criminal ones, are liable to be cut short in this way. Thus,—

False pretenses. — However unqualified the enactments against cheating by false pretenses may be in their terms, numerous limitations, drawn from the reasons of the common law, as well as from considerations of their objects and purposes, incumber their practical application.[3]

V. The Common Law Extending a Statute.

§ 134. Doctrine defined.— The doctrine of this sub-title is that, when the harmony of the legal system requires, statutes will be construed as extended in their effects by the common law beyond their terms. The prior common law operates in the same way as a prior statute, explained in the sub-title before the last. For,—

New interest and old law.— As once observed: "When an act of parliament creates a new interest, it shall be governed by the same law that like interests have been governed [by] before."[4] And —

New right or duty.— Rights and duties newly created by statute are, in the same way, construed as extended by the common law. Thus,—

[1] Crim. Law, I, §§ 301–310, and particularly the note to § 303*a*; Myers *v.* S., 1 Conn. 502; Reg. *v.* Grasseley, 2 Dy. 210*b*, pl. 25; Preston *v.* Hunt, 7 Wend. 53; The Marianna Flora, 11 Wheat. 1; Etheridge *v.* Cromwell, 8 Wend. 629; U. S. *v.* Package of Wood, Gilpin, 349. But see Reg. *v.* Woodrow, 15 M. & W. 404; Attorney-General *v.* Lockwood, 9 M. & W. 378; Rex *v.* Marsh, 4 D. & R. 260.

[2] Atkins *v.* Bayles, 2 Mod. 267.

[3] See P. *v.* Clough, 17 Wend. 351, [31 Am. D. 303;] Reg. *v.* Johnston, 2 Moody, 254; Com. *v.* Drew, 19 Pick. 179. [Every false pretense is not within such statutes. Sumner *v.* S., 10 Vt. 587, 33 Am. Dec. 219; Chapman *v.* S., 2 Head, 42; Wallace *v.* S., 11 Lea (Tenn.), 542; S. *v.* Delay, 93 Md. 98; Rothschild *v.* S., 13 Lea (Tenn.), 296.

[4] Lane *v.* Cotton, 12 Mod. 472, 486.

Acting by agent.— The act of a duly authorized agent being, by the common law, the principal's act,[1] if a statute commands or forbids one to do a thing, and his agent, authorized thereto, does or declines it, the case is within the statute, which, by construction, receives for the occasion the appendage of this common-law rule.[2] And the like doctrine prevails in all analogous cases. For example,—

Trading with slave.— Under the law of slavery, now abolished, if a statute made it criminal to trade with a slave without a permit from his master, a permit from the overseer, being the master's agent, was sufficient. But the rule was limited where the common law limits the powers of agents, who cannot act for themselves and their principals in the same transaction; therefore the overseer could not trade with the slave on a permit given by himself.[3] And,—

False pretenses.— Under the statutes against cheating by false pretenses, such pretense made to a clerk or salesman, and by him communicated to the employer, is a false pretense to the employer;[4] interpretation, it is perceived, adding the common-law rule to the statutory terms. Again,—

§ 135. Principals of second degree.— By the common law, all persons present giving aid and comfort to another committing an offense, even a felony, are regarded as principals; that is, as in legal contemplation doing the deed. Therefore, if a statute makes the doing of a thing criminal, it includes, with the actual doer, persons who are present lending their countenance and aid.[5] Thus,—

[1] Bishop, Con., § 1112; Crim. Pro., I, § 332.

[2] Hathaway *v.* Johnson, 55 N. Y. 93, [14 Am. R. 186;] Dorrity *v.* Rapp, 72 N. Y. 307; Armstrong *v.* Cooley, 5 Gilman, 509; U. S. *v.* Voss, 1 Cranch, C. C. 101; U. S. *v.* Conner, 1 Cranch, C. C. 102. [A corporation may be criminally responsible for the acts of its agents. Com. *v.* New Bedford, 68 Mass. 339; Ill. Cent. R. R. Co. *v.* P., 95 Ill. 313; Com. *v.* Ass'n, 92 Ky. 197, 17 S. W. R. 442; S. *v.* Morris, 23 N. J. L. 360; Norris *v.* S., 25 Ohio St. 217, 18 Am. R. 291; L. & N. R. R. Co. *v.* S., 40 Tenn. 523, 75 Am. D. 778. But a corporation cannot be held criminally responsible when in the hands of a receiver. S. *v.* Wabash, 115 Ind. 466, 17 N. E. R. 909, 1 L. R. A. 179; S. *v.* R. R. Co., 30 Vt. 108. A corporation is indictable for keeping a disorderly house. S. *v.* Passaic, 54 N. J. L. 260, 23 Atl. R. 680.]

[3] S. *v.* Chandler, 2 Strob. 266. See Reg. *v.* Nickless, 8 Car. & P. 757.

[4] Com. *v.* Harley, 7 Met. 462; Com. *v.* Call, 21 Pick. 515.

[5] U. S. *v.* Wilson, Bald. 78, 103; Rex *v.* Tattersal, 1 Russ. Crimes (3d Eng. ed.), 27; Rex *v.* Manning, 2 Comyns, 616; Reg. *v.* Simpson, Car. & M. 669;

Malicious shooting.— The English statute of 9 Geo. 1, ch. 22, § 1, having made it felony for one to "wilfully and maliciously shoot at any person," one who, using no fire-arms himself, stood by encouraging his companion who shot, was held to be a principal offender.[1] Likewise,—

Felonious gaming.— Under the Tennessee act of 1820, not only the person who deals the cards at faro is guilty as a principal felon, but the owner of the funds and house, who receives the profits, and is present assisting, incurs the same degree of guilt.[2] The like doctrine, of extending the statute by the common law, is applied also to —

§ 136. Misdemeanors.— Where a statute makes the doing of a thing misdemeanor, persons who procure it to be done, though not present, are by construction treated as actually doing it, such being the rule in common-law misdemeanors.[3] So,—

Treason — (Rescue — Escape).— In statutory treasons, says East, writing of the English law, "he who rescues the traitor from prison, or suffers him voluntarily to escape from his lawful custody, though not expressly named in the statute, is yet a traitor by necessary construction of law upon the act itself,"[4]— a result which, as seen in another connection,[5] is probably different under the special terms of our American constitutions and statutes.

§ 137. Right carrying remedy.— By the common law, *Ubi jus, ibi remedium*, there is for every right a remedy.[6] Or, as Coke expresses it: "In every case where a man is wronged, or endamaged, he shall have remedy."[7] Or, in the words of Holt,

Rex *v.* Bear, 2 Salk. 417, 418; [Com. *v.* Ahearn, 160 Mass. 300, 35 N. E. R. 853.]

[1] Granger's Case, 1 East, P. C. 413; Rex *v.* Gibson, 1 East, P. C. 413; Rex *v.* Wells, 1 East, P. C. 414. And see Reg. *v.* Whittaker, 1 Den. C. C. 310; Rex *v.* Franklyn, 1 Leach, 255. And see Reg. *v.* Davis, 8 Car. & P. 759; Reg. *v.* Williams, Car. & M. 259.

[2] McGowan *v.* S., 9 Yerg. 184.

[3] U. S. *v.* Morrow, 4 Wash. C. C. 733; S. *v.* Berman, 3 Hill (S. C.), 90; Com. *v.* Nichols, 10 Met. 259, [43 Am. D. 432]; Schmidt *v.* S., 14 Mo. 137; S. *v.* Dow, 21 Vt. 484; [U. S. *v.* White, 5 Cranch C. C. 73; Kinnebrew *v.* S., 80 Ga. 232, 5 S. E. R. 56; S. *v.* De Boy, 117 N. C. 702, 23 S. E. R. 167; P. *v.* Lyon, 99 N. Y. 210, 1 N. E. R. 673; Engeman *v.* S., 54 N. J. L. 247, 23 Atl. R. 676; Atkins *v.* S., 95 Tenn. 474, 32 S. W. R. 391.]

[4] 1 East, P. C. 96.

[5] Crim. Law, I, §§ 701–704.

[6] Broom, Leg. Max. (2d ed.) 146. "There is no wrong without a remedy." Johnstone *v.* Sutton, 1 T. R. 511, 512.

[7] Co. Lit. 197b.

C. J.: "It is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."[1] Hence,—

Statute effectual—(Collateral right and remedy).—When the harmony of the law requires, the courts expand the statutes in construction by adding to them this common-law principle; resulting in the doctrine that every enactment carries with it so much of collateral right and remedy as will make its provisions effectual.[2] This doctrine is equally traceable to necessity, the power whereof in our jurisprudence has already been explained in this chapter.[3] In the words of Fletcher, J., following the maxim *Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud*,[4] "when a general power is given, or duty enjoined, every particular power, necessary for the exercise of the one or the performance of the other, is given by implication.[5] Thus,—

Contempt.— The authority to punish for contempt is necessarily implied in the establishment of a judicial tribunal.[6] So,—

[1] Ashby *v.* White, 2 Ld. Raym. 938, 953.

[2] Bac. Abr., Statute, B.; Oath before Justices, 12 Co. 130, 131; Cookson *v.* Lee, 23 Eng. L. & Eq. 400; The Protector *v.* Ashfield, Hardr. 62; 2 Inst. 306; 1 Kent, Com. 464; S. *v.* Hawthorn, 9 Mo. 389; Stief *v.* Hart, 1 Comst. 20; Lockwood *v.* S., 1 Ind. 161; P. *v.* Hicks, 15 Barb. 153; Dewitt *v.* San Francisco, 2 Cal. 289; Green *v.* New York, 2 Hilton, 203; Stearns *v.* Atlantic, etc. R. R. Co., 46 Me. 95; S. *v.* Rover, 13 Nev. 17; Wilbraham *v.* Hampden, 11 Pick. 322; Chase *v.* Rutland, 47 Vt. 393, 401; Sturtevants *v.* Alton, 3 McLean, 393; P. *v.* Knapp, 42 Mich. 267, [36 Am. R. 438.]

[3] *Ante*, §§ 124, 125.

[4] Broom, Leg. Max. (2d ed.) 366; Foliamb's Case, 5 Co. 115*b*.

[5] Heard *v.* Pierce, 8 Cush. 338, 345, [54 Am. D. 757,] referring also to Miller *v.* Knox, 4 Bing. N. C. 574, 583; Pittstown *v.* Plattsburgh, 18 Johns. 407, 418; Field *v.* P., 2 Scam. 79; Witherspoon *v.* Dunlap, 1 McCord, 546; [S. *v.* Burbridge, 24 Fla. 112, 3 S. R. 869. Whenever a statute prohibits any matter of public grievance or commands a matter of public convenience, without enacting any penalty, those who violate its provisions may be prosecuted by indictment and punished by fine. Keller *v.* S., 11 Md. 525, 69 Am. D. 226; S. *v.* Fletcher, 5 N. H. 257.]

[6] U. S. *v.* New Bedford Bridge, 1 Woodb. & M. 401; S. *v.* Johnson, 1 Brev. 155; Crim. Law, II. § 243. [The power to punish for contempt is inherent in superior courts of record whether created by statute or otherwise; but the power is usually held not to extend to inferior courts. Their powers to punish for contempt are conferred by statute, not to be extended beyond this limit, and are usually confined to punishing for contempts in disobedience of process, or to those committed *in facie curiæ*. *Ex parte* Robinson, 19 Wall. 505; Cartwright's Case, 114 Mass.

Court taking oaths.— Where a statute gave the king's justices power "to take the oaths" of persons, it carried with it, by intendment, authority to issue their precept, and bring the persons before them to be sworn.[1] And —

Witness before grand jury.— A grand jury, authorized by statute to make inquiry and presentment of offenses, may require the officer in attendance to conduct before the court a witness who is disrespectful and refuses to be sworn, that he may be punished for the contempt; because this is essential to the exercise of the power expressly conferred.[2]

Limit of doctrine.— The terms of this doctrine indicate its limit. If an adequate remedy for the statutory right is provided in the statute itself, there is no need for implication, and none will be made;[3] if an inadequate, the deficiency will be supplied by implication.[4] What violates existing rights, or interferes with established relations, will not be adopted as implied.[5] Nor will implication be carried beyond what is fairly required; as,—

238; S. *v.* Galloway, 5 Coldw. 326, 98 Am. D. 404; Rutherford *v.* Holmes, 66 N. Y. 368. Supervisors cannot commit witnesses for contempt. Blue's Case, 46 Mich. 268, 9 N. E. R. 41. The legislative power to punish for contempt is limited to the grant by statute; it does not possess the common-law power of the English parliament. P. *v.* Webb, 5 N. Y. Sup. 853. The grand jury has no power to punish for contempt in disobedience of process, but should report such matter to the court. Wyatt *v.* P., 17 Colo. 252, 28 Pac. R. 961. A referee, in the absence of statute, should report the contempt to the court. *In re* Haldorn, 10 Mont. 222, 25 Pac. R. 101; Lafontaine *v.* Ass'n, 83 N. C. 132. A special judge having jurisdiction and power to grant a restraining order has as incident thereto the power to punish as for contempt the disobedience thereof. Mowrer *v.* S., 107 Ind. 539, 8 N. E. R. 561.]

[1] Oath before Justices, 12 Co. 130, 131; Dwar. Stat. (2d ed.) 671.

[2] Heard *v.* Pierce, 8 Cush. 338. And see S. *v.* Blocker, 14 Ala. 450; Crim. Proc., I, §§ 868, 869.

[3] *Post*, §§ 249–253; Payne *v.* Baldwin, 8 Sm. & M. 661; Butler *v.* S., 6 Ind. 165; Com. *v.* Howes, 15 Pick. 231; Weller *v.* Weyand, 2 Grant (Pa.), 10; Morris Aqueduct *v.* Jones, 7 Vroom, 206; Sudbury Meadows *v.* Middlesex Canal, 23 Pick. 36; Dodge *v.* Essex, 3 Met. 380; Wiley *v.* Yale, 1 Met. 553, 554; Elder *v.* Bemis, 2 Met. 599, 604; Lang *v.* Scott, 1 Blackf. 405, [12 Am. D. 257;] Andover, etc. Turnpike *v.* Gould, 6 Mass. 40, [4 Am. D. 80;] Franklin Glass Co. *v.* White, 14 Mass. 286; Sturgeon *v.* S., 1 Blackf. 39; Journey *v.* S., 1 Mo. 428; Riddick *v.* Governor, 1 Mo. 147; S. *v.* Cole, 2 McCord, 117; Rising *v.* Dodge, 2 Duer, 42; Bosworth *v.* Brand, 1 Dana, 377; James *v.* Atlantic Delaine Co., 11 Bankr. Reg. 390; *In re* O'Connor, 48 Barb. 258.

[4] Johnston *v.* Louisville, 11 Bush, 527.

[5] Com. *v.* Downes, 24 Pick. 227.

Arbitrators administering oath.— A power conferred on a court by statute to submit a case to arbitration has been held not so to descend to the arbitrators as to qualify them to administer an oath.[1]

Constitution.— This doctrine is not limited to statutes: it is applied equally to the interpretation of our written constitutions.[2]

VI. Statutes Abridging and Enlarging the Common Law.

§ 138. Doctrine defined.— The doctrine of this sub-title is that, as by construction a statute will abridge or enlarge another statute in its effect, when the harmony of the legal system requires, so also it will the common law. Thus,—

Breach of statutory duty.— As explained in another connection,[3] since the common law punishes every breach of public duty, sufficient in magnitude for its notice, if a statute newly creates a duty of this sort, yet prescribes no punishment for its violation, the violator, while not indictable strictly under the statute, is so at the common law.[4] And, where the duty is private and not public, the private party injured by a breach of it will have his common-law action.[5] So,—

Attempt.— A mere unsuccessful attempt to commit a substantive crime being ordinarily indictable at the common law,[6]

[1] Reg. *v.* Hallett, 2 Den. C. C. 237, 4 Eng. L. & Eq. 570.

[2] Field *v.* P., 2 Scam. 79.

[3] Crim. Law, I, §§ 237, 238.

[4] Gearhart *v.* Dixon, 1 Pa. St. 224; Rex *v.* Wiggot, Comb. 205, 372; Rex *v.* Robinson, 2 Bur. 799, 803; U. S. *v.* Coolidge, 1 Gallis. 488; S. *v.* Fletcher, 5 N. H. 257; Rex *v.* Smith, 2 Doug. 441; Com. *v.* Chapman, 13 Met. 68, 69; Rex *v.* De Beauvoir, 7 Car. & P. 17; Com. *v.* Silsbee, 9 Mass. 417; S. *v.* Patton, 4 Ire. 16; Com. *v.* Piper, 9 Leigh, 657; Reg. *v.* Price, 3 Per. & D. 421, 11 A. & E. 727, 4 Jur. 291; S. *v.* Morris Canal & Banking Co., 2 Zab. 537; Reg. *v.* Wyat, 1 Salk. 380; s. c. *nom.* Reg. *v.* Wyatt, 2 Ld. Raym. 1189; Anonymous, 6 Mod. 96; Rex *v.* Sheffield Canal, 4 New Sess. Cas. 25, 14 Jur. 170; Crouther's Case, Cro. Eliz. 654; S. *v.* Adams, Walk. (Miss.) 368; Baker *v.* S., 57 Ind. 255. [Where a statute makes an act "unlawful," and specifies no mode of proceeding, its violation is punishable according to the course of the common law. S. *v.* Parker, 91 N. C. 650; Keller *v.* S., 11 Md. 525, 69 Am. D. 226.

[5] Crim. Law, I, §§ 237, 238; Com. Dig., Action upon Statute, A.; 2 Inst. 118; Tripp *v.* Grouner, 60 Ill. 174; Case of the Marshalsea, 10 Co. 63*b*, 75*b*.

[6] Crim. Law, I, §§ 435, 540, 604, 723 *et seq.*

such punishable attempts increase with the statutes creating new crimes.[1] Again,—

§ 138a. Agreements contrary to law.— By the common law, a promise to do what the law forbids, or what is contrary to its policy, cannot be enforced as a contract.[2] Consequently, when a statute creates a new offense, or renders violative of the legislative policy something which was not so before, it curtails, to the extent of its provision, the power of contract at common law. A contract made contrary thereto is void.[3]

VII. Statutes Taking their Qualities and Incidents from the Common Law.

§ 139. Doctrine defined.— The doctrine of this sub-title is a sort of condensation of foregoing propositions. It is that whatever is newly created by statute draws to itself the same qualities and incidents as if it had existed at the common law.[4] In other words, the statute is to be interpreted after the rules and incidents of the common law.[5] For example,—

[1] Rex *v.* Roderick, 7 Car. & P. 795; Rex *v.* Butler, 6 Car. & P. 368; Reg. *v.* Meredith, 8 Car. & P. 589; Rex *v.* Cartwright, Russ. & Ry. 106; *post*, § 139. And see Reg. *v.* Williams, 1 Den. C. C. 39; S. *v.* Maner, 2 Hill (S. C.), 453. [An attempt to commit a misdemeanor, whether so by common law or by statute, is a misdemeanor. Com. *v.* Smith, 54 Pa. St. 209, 93 Am. D. 686. *Contra*, Whitesides *v.* S., 79 Tenn. 474. There can be no attempt on an attempt; as where the offense itself is a bare attempt. P. *v.* Thomas, 63 Cal. 482; S. *v.* Sales, 2 Nev. 268; Wilson *v.* S., 53 Ga. 205.]

[2] Bishop, Con., §§ 467–548.

[3] Id., §§ 458, 464; *post*, § 1030; Rex *v.* Hipswell, 8 B. & C. 466; Law *v.* Hodson, 11 East, 300; Hopkins *v.* Prescott, 4 C. B. 578, 595; Bartlett *v.* Vinor, Carth. 251, 252; Pangborn *v.* Westlake, 36 Iowa, 546; Ritchie *v.* Smith, 6 C. B. 462; Ferguson *v.* Norman, 5 Bing. N. C. 76; Græme *v.* Wroughton, 11 Exch. 146; Tyson *v.* Thomas, McClel. & Y. 119; Cundell *v.* Dawson, 4 C. B. 376; Little *v.* Poole, 9 B. & C. 192; Rex *v.* Gravesend, 3 B. & Ad. 240; Solomon *v.* Dreschler, 4 Minn. 278. [An employee cannot waive the legislative protection created for him by the police power of the state, limiting hours of labor. Short *v.* Bullion Co., 20 Utah, 20, 57 Pac. R. 720, 45 L. R. A. 603. See, however, Com. *v.* Hamilton Co., 120 Mass. 383. A penalty implies a prohibition. Harrison *v.* Jones, 80 Ala. 412.]

[4] S. *v.* Murdock, 9 Mo. 730; Rex *v.* Wyer, 1 Leach, 480, 2 East, P. C. 753, 2 T. R. 77; S. *v.* Smith, 32 Me. 369, [54 Am. D. 578;] S. *v.* Wright, 4 McCord, 358; Com. *v.* Macomber, 3 Mass. 254; Com. *v.* Barlow, 4 Mass. 439; Rex *v.* Potts, Russ. & Ry. 358; Troy's Case, 1 Mod. 5, 6; Rex *v.* Gray, 7 Car. & P. 164; S. *v.* Bosse, 8 Rich. 276.

[5] 2 Inst. 301; Harbert's Case, 3 Co. 11, 13*b*; The William Gray, 1 Paine, 16.

Principals and accessories in felony.—When a statute creates a new felony, whether out of what was before innocent, or was a misdemeanor, those who are present aiding one who personally commits it are principals, as already said;[1] and the absent who counseled it, and those who afterward assist the felon to elude justice, are accessories before or after the fact;[2] because such are the relations of the like parties in felonies at the common law. So,—

Like parties in treason — (Misprision of treason).— If what was felony is by statute made treason, a crime having no accessories at common law, those who would have been such to the felony will be principals in the treason.[3] And a statute creating a new treason makes by implication the concealing of it misprision of treason,[4] and the consenting to it treason,[5]— the rules of the common law being in these several instances engrafted by construction on the statutory crime. Again,—

§ 140. Incidents of misdemeanor.— All the incidents of a common-law misdemeanor attach to a misdemeanor by statute.[6] And —

Larceny and carrying into county.— The rule that a thief who, stealing goods in one county, carries them into another, may be indicted in either,[7] applies as well in statutory as in common-law larceny.[8]

VIII. The Statutes to be Otherwise Construed Harmoniously with the Common Law.

§ 141. Doctrine defined.— The doctrine of this sub-title is that, in all other respects, statutes should be construed as far as possible in harmony with their policy and with the common law.[9] For example.—

[1] *Ante*, §§ 135, 136.

[2] 1 East, P. C. 161, 176, 446; 2 East, P. C. 511; Rex *v.* Soares, 2 East, P. C. 974; Reg. *v.* Tracy, 6 Mod. 30, 32; Rex *v.* Whistler, 2 Salk. 542, 11 Mod. 25, 29; Hughes *v.* S., 12 Ala. 458; Rex *v.* Sadi, 1 Leach, 468, 2 East, P. C. 748; Rex *v.* Gaze, Russ. & Ry. 384; Rex *v.* Bear, 2 Salk. 417, 418; Reg. *v.* Smith, Law Rep. 1 C. C. 266, 269.

[3] Reg. *v.* Tracy, 6 Mod. 30, 32; Reg. *v.* Whistler, 11 Mod. 25, 29; 1 East, P. C. 93, 94, 96.

[4] 1 East, P. C. 140.

[5] Eden, Penal Law (3d ed.), 125; *ante*, § 136.

[6] Reg. *v.* Button, 11 Q. B. 929, 947, 12 Jur. 1017, 1021; Hull *v.* S., 3 Kelly, 18; P. *v.* Brown, 16 Wend. 561.

[7] Crim. Proc., I, §§ 59, 60.

[8] Com. *v.* Simpson, 9 Met. 138.

[9] See 1 Kent, Com. 464; Rex *v.* Peel,

Notice of proceedings.— The common law, the just spirit of all laws, and "the plainest principles of reason and justice,"[1] forbid the taking of judicial steps against a person without notice to him, and the opportunity to be present and be heard.[2] Therefore a statute will not be interpreted, unless its words are specific requiring it, to authorize judicial proceedings without notice to the party to be affected by them.[3] So,—

Russ. & Ry. 407; *ante*, § 123; P. *v.* Goshen, etc. Turnpike, 11 Wend. 597; Rex *v.* John. 7 Car. & P. 324; Rex *v.* Ellis, 8 D. & R. 173; Palmer *v.* Cuyahoga, 3 McLean, 226; Richardson *v.* Broughton, 3 Strob. 1; Wood *v.* Smith, 23 Vt. 706; P. *v.* Mather, 4 Wend. 229, 255, [21 Am. D. 122;] S. *v.* Doon, R. M. Charl. 1; Rex *v.* Shukard, Russ. & Ry. 200; U. S. *v.* Pearce, 2 McLean, 14; Bump *v.* Com., 8 Met. 533; Hanway *v.* Boultbee, 4 Car. & P. 350, 1 Moody & R. 15; Reg. *v.* Hamilton, 1 Car. & K. 212; S. *v.* Cheatwood, 2 Hill (S. C.), 459; Murphy *v.* S., 1 Ind. 366. [The general words of a statute are not to be so construed as to alter or change the previous policy of the law, unless there is no sense or meaning which will leave that policy untouched. Brooke *v.* Turner, 95 Va. 696, 30 S. E. R. 55. Courts will not construe a statute in such a way as to repeal by mere implication a rule of the common law, unless the implication is absolutely imperative. Smith *v.* Loetsch, 114 Ill. 271, 2 N. E. R. 59. It does not follow that because a statute declaratory of the common law is repealed, the common law is thereby repealed. Robins *v.* McClure, 100 N. Y. 328, 3 N. E. R. 663. When the common law and a statute differ, the common law gives way to the statute, but only where absolute repugnance exists. S. *v.* Norton, 23 N. J. L. 33.]

[1] Swayne, J., in Lasere *v.* Rochereau, 17 Wall. 437, 438, referring to McVeigh *v.* U. S., 11 Wall. 259, 267.

[2] Bishop, First Book, § 24; 2 Bishop, Mar., Div. & S., §§ 140–143 *et seq.*, 153–158, 547; Haywood *v.* Collins, 60 Ill. 328; Robinson *v.* Reid, 50 Ala. 69; Garrott *v.* Jaffray, 10 Bush, 413.

[3] *Ante*, § 25; Meade *v.* Deputy Marshal, 1 Brock. 324; Reg. *v.* Simpson, 10 Mod. 378, 380; S. *v.* Savannah, T. U. P. Charl. 235, [4 Am. D. 708;] Chase *v.* Hathaway, 14 Mass. 222, 224; Arthur *v.* S., 22 Ala. 61; Harper *v.* Carr, 7 T. R. 270, 275; Painter *v.* Liverpool Gas Light Co., 3 A. & E. 433. And see Innes *v.* Wylie, 1 Car. & K. 257, 263; Bigelow *v.* Stearns, 19 Johns. 39, 41, [10 Am. D. 189;] S. *v.* Stokes, Coxe, 392; Souter *v.* The Sea Witch, 1 Cal. 162; Selden *v.* Preston, 11 Bush, 191; Wagner *v.* Tice, 36 Iowa, 599; Hyslop *v.* Hoppock, 6 Bankr. Reg. 557; Kelly *v.* Morse, 8 Neb. 224; Burnside *v.* Ennis, 43 Ind. 411; Mitchell *v.* Mitchell, 67 N. C. 307; Atkins *v.* Disintegrating Co., 18 Wall. 272; Campbell *v.* Campbell, 63 Ill. 462; Lang *v.* Cox, 40 Ind. 142; Church *v.* Fisher, 40 Ind. 195; Hiner *v.* Pavy, 40 Ind. 341; Heaton *v.* Butler, 41 Ind. 143; Bash *v.* Evans, 41 Ind. 144; Keller *v.* Boatman, 41 Ind. 277; Huston *v.* Roosa, 42 Ind. 386; Keiser *v.* Yandes, 42 Ind. 399; Barnhart *v.* Cissna, 42 Ind. 477; Price *v.* Pollock, 42 Ind. 497; Rabb *v.* Graham, 43 Ind. 1; Barger *v.* Manning, 43 Ind. 472.

How long.—The notice meant by a statute requiring it in express terms, yet not saying how long, is a reasonable notice. Burden *v.* Stein, 25 Ala. 455.

Extra-territorial force.— As, under the unwritten rule,[1] and in the absence of special circumstances, the laws of a state are for the government only of persons and things within it, statutes in mere general terms will be construed as not intended to create offenses, or otherwise regulate the conduct of persons, beyond its territorial limits.[2] Even where legislation in one country may properly bind its citizens in another,[3] express words are required, or distinct implication, to give it this effect.[4] And —

Express words — (Law of nations).— Statutes in terms binding persons beyond the territorial jurisdiction are, in the construction, restricted where the law of nations limits the right,[5] as extending only to the subjects of the government legislating.[6] But,—

Bind and protect all within local limits.— On the other hand, statutes in mere general words are, in the absence of special circumstances, applied as well to foreigners and transient persons as to citizens and permanent residents; binding and protecting all.[7] Again,—

[1] Crim. Law, I, §§ 109, 110.

[2] Com. *v.* Green, 17 Mass. 515, 540; U. S. *v.* Bevans, 3 Wheat. 336; P. *v.* Cæsar, 1 Par. Cr. 645, 647. See Rex *v.* Sawyer, 2 Car. & K. 181; U. S. *v.* Wiltberger, 5 Wheat. 76; U. S. *v.* Holmes, 5 Wheat. 412; Mitchell *v.* Tibbets, 17 Pick. 298; Vandeventer *v.* New York & New Haven R. R. Co., 27 Barb. 244; Com. *v.* Harris, 13 Allen, 534; Madrazo *v.* Willes, 3 B. & Ald. 353; Bishop *v.* Barton, 5 Thomp. & C. 6, 2 Hun, 436; Hover *v.* Pennsylvania Co., 25 Ohio St. 667; Rosseter *v.* Cahlmann, 8 Exch. 361; *Ex parte* Blain, 12 Ch. D. 522; Bulkeley *v.* Schutz, Law Rep. 3 P. C. 764; McCarthy *v.* Chicago, etc. R. R. Co., 18 Kan. 46, [26 Am. R. 742;] Hildreth *v.* Heath, 1 Bradw. 82.

By-law.— For the doctrine applied to a municipal by-law, see St. Louis Gas Light Co. *v.* St. Louis, 46 Mo. 121. [If a state legislature has no power to regulate an administrative branch of the general government, its statutes will not be construed to have that effect. Ohio *v.* Thomas, 58 U. S. Ap. 431, 87 Fed. R. 453. A penal statute will not be given an extra-territorial effect because the legislature, after getting the opinion of the attorney-general, rejected an amendment limiting the operation of the law to the state. S. *v.* Ins. Co., 66 Ark. 466, 51 S. W. R. 633, 45 L. R. A. 348.]

[3] Crim. Law, I, § 121.

[4] Jefferys *v.* Boosey, 4 H. L. Cas. 815, 939, 955; Clementi *v.* Walker, 2 B. & C. 861, 868.

[5] Crim. Law, I, §§ 115 and note, 124.

[6] The Apollon, 9 Wheat. 362; Crim. Law, I, § 121.

[7] Crim. Law, I, § 124; Wooten *v.* Miller, 7 Sm. & M. 380; Jefferys *v.* Boosey, 4 H. L. Cas. 815; Low *v.* Routledge, Law R. 1 Ch. Ap. 42, Law R. 3 H. L. 100.

§ 142. Judicial jurisdiction — (State and United States). Following the rules of the common law, a statute will not be construed, unless express words require, to confer jurisdiction on courts established under another power; as, if it is a statute of the United States, to give authority to state tribunals.[1] Likewise,—

Binding state.— Prima facie, as we have seen,[2] it will be interpreted not to bind the sovereign,[3] or the sovereign state.[4] And —

Common-law distinctions — (Principal and accessory).— It will not be taken, by implication, to abrogate the common-law distinction between principal and accessory,[5] or any other distinction already known in the law.[6] Again,—

§ 143. Provisions overlying one another — (Distinct inhibitions of one thing).— At common law, a particular act with its evil intent may constitute a part of several distinct offenses.[7]

[1] Houston *v.* Moore, 5 Wheat. 1, 42, 66; *In re* Bruni, 1 Barb. 187, 208.

[2] *Ante*, § 103.

[3] *Ante*, § 103; Vin. Abr., Statutes, E., 10; U. S. *v.* Hewes, Crabbe, 307; Broom, Leg. Max. (2d ed.) 50.

[4] S. *v.* Garland, 7 Ire. 48; S. *v.* Milburn, 9 Gill, 105.

Hence, **limitations.**— A statute of limitations does not run against a state unless it is expressly named. *Ante*, § 103; Broom, Leg. Max. (2d ed.) 46; Lindsey *v.* Miller, 6 Pet. 666; S. *v.* Arledge, 2 Bailey, 401; Weatherhead *v.* Bledsoe, 2 Tenn. 352; P. *v.* Gilbert, 18 Johns. 227; State Treasurer *v.* Weeks, 4 Vt. 215; Stoughton *v.* Baker, 4 Mass. 522, 528, [3 Am. D. 236;] Nimmo *v.* Com., 4 Hen. & Munf. 57, [4 Am. D. 488;] Bagley *v.* Wallace, 16 S. & R. 245; Munshower *v.* Patton, 10 S. & R. 334, [13 Am. D. 678;] Com. *v.* Baldwin, 1 Watts, 54, [26 Am. D. 33;] Wallace *v.* Miner, 6 Ohio, 366, 369; Wallace *v.* Minor, 7 Ohio, part I, 249, 252. As to the construction of statutes adverse to the state, see *ante*, § 103; S. *v.* Curran, 7 Eng. 321, 346. [A state cannot be sued except with its consent. Melvin *v.* S., 121 Cal. 16, 53 Pac. R. 416; Memphis R. R. Co. *v.* Tenn., 101 U. S. 337, 25 L. ed. 960; South, etc. R. R. Co. *v.* Ala., 101 U. S. 832, 25 L. ed. 973. A state has a right to sue in its own courts, both by reason of its sovereign quality and its corporate rights. S. *v.* Oil Co., 150 Ind. 21, 49 N. E. R. 809. Where a suit against a state officer amounts in effect to one against the state, it cannot be maintained. Taylor *v.* Hall, 71 Tex. 206, 9 S. W. R. 148. Where a state is a stockholder in a private corporation, it is liable like everybody else. R. R. Co. *v.* R. R. Co., 81 Fed. R. 595.]

[5] S. *v.* Ricker, 29 Me. 84; Com. *v.* Knapp, 9 Pick. 496, [20 Am. D. 491;] Com. *v.* Macomber, 8 Mass. 254; Com. *v.* Barlow, 4 Mass. 439; *ante*, § 139.

[6] Drew *v.* Com., 1 Whart. 279; U. S. *v.* Wilson, Bald. 78; Rex *v.* Carlile, 3 B. & Ald. 161; Com. *v.* Simpson, 9 Met. 138, 2 East, P. C. 804; S. *v.* Absence, 4 Port. 397; Com. *v.* Barlow, 4 Mass. 439; Com. *v.* Newell, 7 Mass. 245; S. *v.* Butler, 3 McCord, 383; Rex *v.* Breeme, 1 Leach, 220, 2 East, P. C. 1026; Rex *v.* Pearce, 2 Leach, 1046.

[7] Crim. Law, I, §§ 775–784.

Hence, when a court construes a statute, it does not so arrange and bend the several sections and clauses, or so combine it with the prior law, that a particular transaction shall be included under only one inhibition. It is no objection that it is included under numerous separate inhibitions or statutes, each having a separate penalty of its own.[1] Thus,—

Liquor selling and Lord's day.— A sale of intoxicating liquor may violate both a statute prohibiting labor on the Lord's day, and one against the unlicensed selling of the liquor, and the prosecuting officer may proceed for the one or the other offense, at his election.[2] So,—

Liquor selling and peddling.— A statute against peddling, and another against liquor selling, may be equally violated by one sale. Nor is it material whether the inhibitions are in separate acts or separate clauses of the same act.[3]

Proceedings barring one another.— Whether, in these cases, one proceeding can be pleaded in bar of another is a question not within the scope of these discussions.[4] Again,—

§ 144. Declaratory statutes.— An enactment in its nature declaratory of the common law will be construed, as far as may be, according to the common law.[5] In like manner,—

Common-law remedy.— Said a learned judge: "Without any statutory provision giving any specific remedy where a purely statutory right or remedy is asserted, the courts would adopt analogous common-law remedies to forward the ends of justice.

[1] Monck *v.* Hilton, 2 Ex. D. 268, 277, 280; S. *v.* Williams, 11 S. C. 288; *post*, § 247. [Where a statute imposes several duties, and a failure to comply with the "conditions" of the section, a disobedience of any one subjects to the penalty. S. *v.* R. R. Co., 32 Fed. R. 722; Clifton *v.* S., 73 Ala. 473. Where there is a civil liabillty by statute, and a criminal one is superadded, the civil proceeding cannot be affected or destroyed by the fact that the criminal law imposes other and further liabilities. Waite *v.* Bartlett, 53 Mo. Ap. 378.]

[2] Com. *v.* Harrison, 11 Gray, 310; Com. *v.* Trickey, 13 Allen, 559.

[3] Com. *v.* McConnell, 11 Gray, 204. Compare with U. S. *v.* Morin, 4 Bis. 93.

[4] Crim. Law, I, § 978 *et seq.*; S. *v.* Williams, *supra;* Com. *v.* Churchill, 5 Mass. 174; Com. *v.* Cheney, 6 Mass. 347.

[5] Freeman *v.* P., 4 Denio, 9, 29, [47 Am. D. 216;] Com. *v.* Humphries, 7 Mass. 242; P. *v.* Butler, 16 Johns. 203; Baker *v.* Baker, 13 Cal. 87; Hewey *v.* Nourse, 54 Me. 256. [Statutes in affirmance of the common law will be construed as to their consequences in accordance with the common law. Peterson *v.* Gittings, 107 Iowa, 306, 77 N. W. R. 1056.]

And this has been too long the practice of the courts to be now brought in question.[1] On a like principle,—

Revisions — of statutes are to be interpreted as were the statutes revised.[2] So —

Local jurisdiction of crime.— As, at the common law, crimes are punishable only in the county where they occurred, if a county is divided, those before committed will, equally with the subsequent ones, be prosecuted each in its particular part of the old county.[3]

IX. Adhering in the Construction to the Terms of the Statutes.

§ 145. Doctrine defined.— The doctrine of this sub-title is simply an expansion of what was laid down in a previous chapter.[4] It is that interpretation cannot, without a sufficient indication in the words employed,[5] aided by such surroundings as the law permits the courts to look into,[6] import words into the statute. The judge is only to expound what he finds written. And there is a degree beyond which the meanings of the written words cannot be bent, or the foregoing rules applied.[7] Thus,—

[1] Byrd, J., in Hightower *v.* Fitzpatrick, 42 Ala. 597, 600. See *ante*, § 114.

[2] Com. *v.* Messenger, 4 Mass. 462; Ennis *v.* Crump, 6 Tex. 34; *ante*, § 98. [As a general rule, revisions are not construed to alter the law. The intention of the legislature to this effect must be clearly apparent. Clark *v.* Powell, 62 Vt. 442, 20 Atl. R. 597; Spencer *v.* Haug, 45 Minn. 231, 47 N. W. R. 794. Where the act providing for a revision of the code declares acts passed in a certain time should be and remain the law, and directs their incorporation into the code, it does not ratify changes made in the excepted acts by the codifiers. McDaniel *v.* Campbell, 78 Ga. 188. A mere change of phraseology will not be deemed to work a change in meaning, unless an intent to change is apparent. Brown *v.* Randolph Co., 45 W. Va. 827, 32 S. E. R. 165. Where a chapter of a revised code contains a provision that this law shall not apply to certain counties, and there is a doubt what laws are meant, the court should refer to the original chapter as it formerly existed. Braun *v.* S. (Tex.), 49 S. W. R. 620.]

[3] Crim. Pro., I, § 49; S. *v.* Jones, 8 Halst. 307, 357, 372.

So, white person and slave, formerly.—While, during slavery, white persons and slaves were punished differently, a white person, accessory to an offense by a slave, was dealt with the same as white persons in other cases were, not as slaves. S. *v.* McCarn, 12 Humph. 494; Loughridge *v.* S., 6 Mo. 594.

[4] *Ante*, § 81. And see *ante*, § 90.

[5] *Ante*, §§ 70–73, 78–81.

[6] *Ante*, §§ 74–77.

[7] See 1 East, P. C. 96, 247, 248, 250;

"*Actually occupy.*"— While, in general, one who assists another in a crime is to be regarded as a joint doer with him,[1] the words "actually occupy," referring to the place of committing an offense, seem to have been understood as excluding the idea of guilt in one who did not, in the language of the provision, actually occupy the place.[2] And —

Nature of offense.— The nature of an offense may exclude the idea of criminality in any but the individual personally doing the act.[3]

§ 146. Casus omissus.— When a court has gone to the verge of its powers of construction, there will sometimes remain what is termed a *casus omissus*,— a case within the general scope and meaning of the amended laws, yet not provided for by them.[4] Such a case must be disposed of according to the prior law,[5] and the legislature alone can cure the defect.[6]

Reg. *v.* Nickless, 8 Car. & P. 757. And see Reg. *v.* Whittaker, 1 Den. C. C. 310; Rex *v.* Franklyn, 1 Leach, 255; Fletcher's Case, 1 Leach, 342, note, 2 Stra. 1166; Norton *v.* S., 4 Mo. 461; Baxter *v.* P., 3 Gilman, 368; O'Blennis *v.* S., 12 Mo. 311; Reynolds *v.* Holland, 35 Ark. 56. "It would be dangerous to give scope to make a construction in any case against the express words, when the meaning of the makers doth not appear to the contrary, and when no inconvenience will thereupon follow; and therefore in such a case *a verbis legis non est recedendum.*" Edrich's Case, 5 Co. 118. And see *ante*, §§ 80, 81.

[1] *Ante*, §§ 135, 136.

[2] Com. *v.* Dean, 1 Pick. 387.

[3] Reg. *v.* Wright, 9 Car. & P. 754; 1 Alison, Crim. Law, 153, 158. See, as to the English statutes against poaching, Rex *v.* Dowsell, 6 Car. & P. 398; Rex *v.* Nash, Russ. & Ry. 336; Reg. *v.* Whittaker, 2 Car. & K. 636, 1 Den. C. C. 309; s. c. *nom.* Reg. *v.* Whitaker, 3 Cox C. C. 50. And see Crim. Law, I, § 364 *et seq.*

[4] See Rex *v.* Hill, Russ. & Ry. 483.

[5] Broom, Leg. Max. (2d ed.) 37; Hall *v.* Jacobs, 4 Har. & J. 245.

[6] Pitman *v.* Flint, 10 Pick. 504, 506; 4 Bl. Com. 302; Jones *v.* Smart, 1 T. R. 44, 52; Cobb *v.* Mid Wales Ry. Co., Law Rep. 1 Q. B. 342. See Kilpatrick *v.* Byrne, 25 Miss. 571; New York *v.* Broadway, etc. R. R. Co., 12 Hun, 571; [Clay Co. *v.* Chickasaw, 64 Miss. 534, 1 S. R. 753. In a penal case there can be no such thing as supplying an omission by intendment. S. *v.* Millner, 131 Mo. 432, 33 S. W. R. 15. Even though acts may involve the same mischiefs which the statute was designed to suppress, they are not to be included unless within the plain statutory provisions. U. S. *v.* Chase, 135 U. S. 261, 34 L. ed. 117; Sarlls *v.* U. S., 152 U. S. 575, 38 L. ed. 556; S. *v.* Hunkins, 90 Wis. 271, 62 N. W. R. 1047; S. *v.* Piazza, 66 Miss. 426, 6 S. R. 316.]

CHAPTER XVIII.

THE GENERAL DOCTRINE OF REPEAL.

§§ 147, 148. Introduction.
149, 150. Whether by non-user.
151–152*a*. By express words.
153–162. By implication.
163, 163*a*. In particular states.

§ 147. Power of repeal.— It is a principle of legislative law that one legislature cannot bind a subsequent one, or, beyond the operation of its rules of procedure,[1] even itself, as to future acts. So that no statute can be made which may not afterward be repealed, and no general statutory provision against repeals is effectual.[2] But, in discussions further on, we shall see that our written constitutions indirectly, in some degree, restrain repeals; as, for example, where they would divest vested rights,[3] or impair the obligations of a contract.[4]

[1] Spencer *v.* S., 5 Ind. 41; Dwar. Stat. (2d ed.) 530. The former rules of the two houses of parliament, prohibitory of repeals during the session in which an act was passed, were made inoperative by 13 and 14 Vict., ch. 21, § 1. Wilb. Stat. Law, 309.

[2] *Ante*, § 81; Crim. Law, I, § 35, note; 4 Inst. 42, 43; 1 Bl. Com. 90, 91; Jenk. Cent. 2; Stone *v.* Mississippi, 101 U. S. 814; Musgrove *v.* Vicksburg, etc. R. R. Co., 50 Miss. 677; Oleson *v.* Green Bay, etc. Ry. Co., 36 Wis. 383; S. *v.* Pilsbury, 31 La. An. 1; Freleigh *v.* S., 8 Mo. 606; Thomas *v.* Daniel, 2 McCord, 354; Kellogg *v.* Oshkosh, 14 Wis. 623; Atty. Gen. *v.* Brown, 1 Wis. 513; Wall *v.* S., 23 Ind. 150; S. *v.* Craig, 23 Ind. 185; Hamrick *v.* Rouse, 17 Ga. 56; Shaw *v.* Macon, 21 Ga. 280; Armstrong *v.* Dearborn, 4 Blackf. 208; Brightman *v.* Kirner, 22 Wis. 54. [The unnecessary ratification of a statute within the power of a territorial legislature will not prevent the legislature from changing the statute. Martin *v.* Territory, 8 Okl. 41, 56 Pac. R. 712. The action of the legislature in the exercise of its police powers cannot be limited or controlled by the action of a previous legislature, or by the provisions of contracts between individuals or corporations. Buffalo R. R. Co. *v.* R. R. Co., 111 N. Y. 132, 19 N. E. R., 63; Presbyterian Church *v.* City of New York, 5 Cow. 538. Even where the legislature has granted substantial privileges, there is always an implied condition that the grantees are to be subject to the reasonable regulation of future legislatures. Chicago Ins. Co. *v.* Needles, 113 U. S. 574, 28 L. ed. 1084; Erie R. R. Co. *v.* Pennsylvania, 153 U. S. 642, 38 L. ed. 846.]

[3] S. *v.* Pilsbury, *supra*.

[4] Bloomer *v.* Stolley, 5 McLean, 158.

§ 148. How chapter divided.—We shall consider, I. Whether non-user works a repeal; II. Repeals by express words; III. Repeals by implication; IV. Repeals in particular states.

I. Whether Non-user Works a Repeal.

§ 149. Opinions that it does.— Some have deemed a long course of forbearing to evoke the power under a statute, termed *non-user*, to be a repeal of it.[1] And in South Carolina it was observed: "The court, in *Watson v. Blaylock*,[2] declared the act imposing penalties on lay magistrates for solemnizing marriages obsolete and invalid,— the only instance in our judicial history in which courts have ventured to declare an act of the legislature inoperative from mere non-user."[3] In a later case this doctrine, that a statute may become inoperative by non-user, appears to have been recognized.[4] But,—

That it does not.— In reason, and by most of the authorities, the power alone which can make a law is competent to annul one; so that no usage, either negative or positive, can grow into a law adverse to a statute. Should the matter to which it relates no longer exist, it will cease to have a practical operation;[5] or, should the reason for it have passed away,[6] its repeal by the legislature might be judicious; but, by the better opinion, all unrepealed statutes must be enforced when the subject and occasion call; they do not become void by non-user.[7] Yet,—

[1] Hill *v.* Smith, Morris, 70, 76. Dwarris says: "The Scotch lawyers hold that a statute loses its force by desuetude, if it hath not been put in execution for sixty years. Other writers have extended this term to a century, and make a distinction between statutes half obsolete and those *in viridi observantia*. A vague notion seems, too, from the very frequent renewal of some of our fundamental laws, to have prevailed at different times in England, that a statute might become obsolete; but such opinion is unfounded, and has no warrant in our law." Dwar. Stat. (2d ed.) 529.

[2] 2 Mill, 351.

[3] Canady *v.* George, 6 Rich. Eq. 103, 106.

[4] O'Hanlon *v.* Myers, 10 Rich. 128.

[5] Com. *v.* Hoover, 1 Browne (Pa. Ap.), 25.

[6] James *v.* Com., 12 S. & R. 220, 228; S. *v.* Tidwell, 5 Strob. 1.

[7] White *v.* Boot, 2 T. R. 274; S. *v.* Findlay, 2 Bay, 418; S. *v.* Tidwell, *supra;* Com. *v.* Hoover, *supra;* Dwar. Stat. (2d ed.) 529; Snowden *v.* Snowden, 1 Bland, 550; The India, Browning & L. 221. *Contra*, James *v.* Com., *supra*. [A statute cannot lose its force by non-user unless such non-user be accompanied by the enact-

Meaning — (*Implied legislative repeal*).— In determining the meaning of a statute, contemporaneous usage may, we have seen,[1] be resorted to.[2] And, on this principle, non-usage under it may help the implication of its repeal by inconsistent provisions in a subsequent act.[3] So,—

Discretionary power — (*Information*).— Long disuse of a statute may be among the considerations influencing a court to decline mere discretionary action under it; as, when asked to grant an information.[4]

§ 150. Custom is a species of non-user. It does not differ greatly from usage, and neither the one nor the other can overturn a positive rule of the common law or a statute.[5] Therefore a custom to regard a statute as repealed can never ripen into a repeal; there could never come a time when it would be a valid custom. In partial contradiction or qualification of this doctrine, it has been laid down in England that the common law, or a statute merely declaratory of it, may be repealed by custom, but doubts have been entertained of the latter part of this proposition.[6] Neither part of it would, it is believed, be accepted in our country to the overturning of a positive rule

ment of other irreconcilable statutes. Pearson *v.* Distillery, 72 Iowa, 348, 34 N. W. R. 1. The positive requirements of a statute cannot be treated as obsolete. Kitchen *v.* Smith, 101 Pa. St. 456; Homer *v.* Com., 106 Pa. St. 221, 51 Am. R. 521.]

[1] *Ante*, § 104.

[2] Chesnut *v.* Shane, 16 Ohio, 599, [47 Am. D. 387;] Dwar. Stat. (2d ed.) 530.

[3] Leigh *v.* Kent, 3 T. R. 362, 364.

[4] Rex *v.* Dodd, 9 East, 516.

[5] Bishop, Con., §§ 449–459; Crim. Law, II. § 852; Greene *v.* Tyler, 39 Pa. St. 361; Holmes *v.* Johnson, 42 Pa. St. 159; Delaplane *v.* Crenshaw, 15 Grat. 457; Rex *v.* Gordon, 1 B. & Ald. 524, 527; Noble *v.* Durell, 3 T. R. 271, 273, 274; Reed *v.* Richardson, 98 Mass. 216, 218, [93 Am. D. 155;] Tremble *v.* Crowell, 17 Mich. 493; Hinton *v.* Locke, 5 Hill (N. Y.), 437; Cranwell *v.* Fosdick, 15 La. An. 436; Dunham *v.* Dey, 13 Johns. 40; Dunham *v.* Gould, 16 Johns. 367. [8 Am. D. 323;] Bank of Utica *v.* Wager, 2 Cow. 712; Newbold *v.* Wright, 4 Rawle, 195; Harris *v.* Carson, 7 Leigh, 632, [30 Am. D. 510;] Strong *v.* Bliss, 6 Met. 393; Stoever *v.* Whitman, 6 Binn. 417. And see Burbank *v.* Fay, 65 N. Y. 57. [Statutes are not abrogated or controlled by customs, nor can they be disregarded because in many cases they are of no practical importance. Peterson *v.* Hays, 85 Iowa, 14, 51 N. W. R. 1143; Winter *v.* U. S., Hempst. 344; Mosier *v.* Harmon, 29 Ohio St. 220; Maury *v.* Beekman, 9 Paige, 188; Pickering *v.* Weld, 159 Mass. 522, 34 N. E. R. 1081; Colgate *v.* Penn. Co., 102 N. Y. 120. 6 N. E. R. 114; The Lafayette, 20 Fed. R. 319; Crocker *v.* Schureman, 7 Mo. Ap. 358.]

[6] Dwar. Stat. (2d ed.) 475–477; Bac. Abr., Statute, G.

either of the common or the statutory law; for, with us, custom is admitted simply to supplement, not to supersede, the prior law, whether statutory or common.[1]

II. Repeal by Express Words.

§ 151. Designated statute or provision.—The common form of repeal is where an act says, in terms, that such a statute, clause of a statute or provision of the common law is repealed.[2] If, on the entire face of the repealing act, its intent is plainly less broad than particular words in it, such intent will prevail in the construction.[3] And, in all respects, a repealing clause, like any other,[4] will be rendered by the courts in the sense evidently meant by the repealing power.[5] A provision, subjecting to a fine any one vending merchandise not the product of the United States, was, by a subsequent act in terms repealing so much of this one as required a license to vend coffee, tea and sugar, held to be repealed as to the enumerated articles.[6]

Repeal before enactment complete.— The two houses of a legislature passed an act, then repealed a clause in it before the governor's signature was attached, then the governor signed it. And the repeal of the clause was adjudged to be effectual, on the ground that, since the legislature could abrogate a statute duly signed, it could do the same of one before signing.[7] So,—

Question of validity in suspense.— If, because of a division of opinion among the judges, or for any other reason, the validity of a repealing statute remains however long in suspense, then finally it is decided to be valid, the repealed act will be treated as having had no force during the period of doubt.[8]

[1] See the note before the last.

[2] Chambers *v.* S., 25 Tex. 307; S. *v.* Beneke, 9 Iowa, 203. And see Leard *v.* Leard, 80 Ind. 171. [The specific repeal by one statute of a particular section of another raises a presumption that no further repeal is intended than expressed, except in cases of absolute inconsistency. P. *v.* Henwood (Mich.), 82 N. W. R. 70.]

[3] Smith *v.* P., 47 N. Y. 330. See *ante*, § 87.

[4] *Ante*, § 70.

[5] Townsend Savings Bank *v.* Epping, 8 Woods, 390; Prince George's Commissioners *v.* Laurel, 51 Md. 457; S. *v.* Clay, 12 La. An. 431. And see Madison, etc. Plank-road *v.* Reynolds, 8 Wis. 287.

[6] Taylor *v.* S., 7 Blackf. 93.

[7] Southwark Bank *v.* Com., 26 Pa. St. 446.

[8] Ingersoll *v.* S., 11 Ind. 464.

So, repeal destroying party's interest.— A clause in the charter of a bridge company having forbidden

§ 152. Within "purview." — Another form of direct repeal is by inserting, in a statute, a clause declaring all acts within its "purview" repealed.[1] The meaning of the word "purview," when indicating a particular part of a statute, is, we have seen, variable;[2] and, in the present connection, its sense is evidently still different, denoting the scope or sphere of the statute.[3] So that the effect of this expression is to repeal former statutes simply as to cases provided for in the repealing acts.[4] And it does not differ essentially from a repeal of —

Inconsistent provisions.— Not unfrequently a clause is inserted in a statute repealing all laws in conflict[5] or inconsistent with it,[6] "contravening"[7] it, or the like.[8] If the provisions of the former and present enactments are in direct contrariety, the repeal takes place,[9] but only to the extent of the repugnance.[10] If, on the other hand, by any reasonable contracting, expanding, cutting short, or extending of the old laws or the new, as explained in the foregoing chapter, they can be brought into harmony without repeal, the interpretation should be so, and all suffered to stand together. Thus,—

General and specific.— As already seen,[11] general and specific provisions in apparent contrariety may subsist together without working a repeal, the specific qualifying and supplying exceptions to the general.[12]

the erection of any other bridge within a mile of the one to be erected by the company, a repeal of this clause was held to place the company in precisely the same position, in reference to a second bridge, as if it had never been in the charter. Fort Plain Bridge *v.* Smith, 30 N. Y. 44.

[1] Ely *v.* Thompson, 3 A. K. Mar. 70; Scott *v.* Com., 2 Va. Cas. 54; Payne *v.* Conner, 3 Bibb, 180.

[2] *Ante*, § 52.

[3] Webster quotes, to support this meaning of the word "purview:" "In determining the extent of information required in the exercise of a particular authority, recourse must be had to the objects within the *purview* of that authority. *Federalist, Madison.*"

[4] Payne *v.* Conner, 3 Bibb, 180; P. *v.* Durick, 20 Cal. 94; Lewis *v.* Stout, 22 Wis. 234.

[5] S. *v.* Barrow, 30 La. An. 657.

[6] Hale *v.* S., 15 Conn. 242; S. *v.* Taylor, 2 McCord, 483; Jackson *v.* S., 12 Ga. 1; P. *v.* Durick, 20 Cal. 94; Com. *v.* Costello, 118 Mass. 454.

[7] Tims *v.* S., 26 Ala. 165.

[8] **Same subject-matter, etc.**— See S. *v.* Cunningham, 72 N. C. 469; Hodge *v.* Hodge, 72 N. C. 616; S. *v.* King, 12 La. An. 593.

[9] Tierney *v.* Dodge, 9 Minn. 166; P. *v.* Lytle, 1 Idaho, 161.

[10] Elrod *v.* Gilliland, 27 Ga. 467.

[11] *Ante*, §§ 112*a*, 126, and places there referred to.

[12] Dolan *v.* Thomas, 12 Allen, 421. And see Cain *v.* S., 20 Tex. 355; S. *v.* Macon County Court, 41 Mo. 453; [S.

"*Inconsistent*" *provisions in unconstitutional act.*— The effect of an express repeal, in an unconstitutional act, of inconsistent provisions, is considered in another connection.[1] No prior law is inconsistent with a void statute.[2]

§ 152a. By amendment.— An amendment of a statute, declaring that it shall read in a particular way, repeals all provisions not retained in the altered form.[3] The unaltered provisions remain unaffected by the changes in the rest.[4] The repeal is not retroactive, but the new provisions are treated as fresh enactments,[5] while yet, as to the future, the amended statute operates as if it had always been in its present form.[6] So —

"*In lieu.*"— A provision "in lieu" of another repeals it.[7]

III. Repeals by Implication.

§ 153. Distinction of express and implied.— The forms equally of express and implied repeal are numerous and varying. And there are those of each class so allied to the other that the distinction itself seems in a degree arbitrary. Accu-

v. Taylor, 7 S. D. 533, 64 N. W. R. 548; Cantrell *v.* Seaverns, 168 Ill. 165, 48 N. E. R. 186; Essex Co. *v.* Essex Com., 62 N. J. L. —, 41 Atl. R. 957; P. *v.* Keller, 158 N. Y. 187, 52 N. E. R. 1107; Brown *v.* Lowell, 8 Met. 175; S. *v.* Stoll, 17 Wall. 436, 21 L. ed. 655; P. *v.* Hanrahan, 75 Mich. 611, 42 N. W. R. 1124, 4 L. R. A. 751; Mallory *v.* Com., 115 Pa. St. 25, 7 Atl. R. 790; Louisville R. R. Co. *v.* Williams (Ky.), 41 S. W. R. 287; Louisville *v.* Water Co. (Ky.), 49 S. W. R. 766; Chew Hing Lung *v.* Wise, 176 U. S. 160; Cade *v.* Mitchell, 51 La. An. 1493, 26 S. R. 606; Pratt Com. *v.* Society, 90 Fed. R. 233.]

[1] *Ante*, § 84.

[2] Sullivan *v.* Adams, 3 Gray, 476; Harbeck *v.* New York, 10 Bosw. 366; Childs *v.* Shower, 18 Iowa, 261; Devoy *v.* New York, 35 Barb. 264; [*In re* Rafferty, 1 Wash. 382, 25 Pac. R. 465.]

[3] Goodno *v.* Oshkosh, 31 Wis. 127; S. *v.* Andrews, 20 Tex. 230; Mosby *v.* St. Louis Mutual Ins. Co., 31 Grat. 629. And see Longlois *v.* Longlois, 48 Ind. 60; Breitung *v.* Lindauer, 37 Mich. 217; [Smith *v.* Cosgrove, 71 Vt. 196, 44 Atl. R. 73.]

[4] Moore *v.* Mausert, 49 N. Y. 332, 5 Lans. 173. And see Laude *v.* Chicago, etc. R. R. Co., 83 Wis. 640; St. Louis *v.* Foster, 52 Mo. 513.

[5] Ely *v.* Holton, 15 N. Y. 595.

[6] Holbrook *v.* Nichol, 36 Ill. 161; McKibben *v.* Lester, 9 Ohio St. 627. See Tivey *v.* P., 8 Mich. 128; Grer *v.* S., 22 Tex. 588; P. *v.* Montgomery, 67 N. Y. 109. [A statute incorporated by reference in another becomes a part of it; and though the former statute be repealed, the latter remains in force. Shull *v.* Barton, 58 Neb. 741, 79 N. W. R. 732; Turney *v.* Wilton, 36 Ill. 385; *Ex parte* Crow Dog, 109 U. S. 556, 27 L. ed. 1030; Viterbo *v.* Friedlander, 120 U. S. 726, 30 L. ed. 782; Collins *v.* Blake 79 Me. 218, 9 Atl. R. 358.]

[7] Gossler *v.* Goodrich, 3 Cliff. 71.

rately viewed, a part of the repeals treated of in this sub-title are express, yet not by express words. Thus,—

By negative statute—(Affirmative and negative distinguished). An old division of statutes is into affirmative and negative; the former being such as are in affirmative, the latter in negative, words.[1] A provision, for example, that it *shall be lawful* for a tenant in fee-simple to make a lease for twenty-one years, or that such lease *shall be good*, is affirmative; one that it *shall not be lawful* to make a lease for above twenty-one years, or that a lease for more *shall not be good*, is negative.[2] A negative statute, being in its terms a negation, or denial, of the prior law, repeals it;[3] and obviously this repeal is express.

How interpreted.— Such a statute is, as to the repeal, strictly construed; that is, as abrogating the prior law no further than its actual words require.[4] Herein it follows the same rule as a repugnant affirmative statute, about to be considered.

§ 154. By affirmative statute.— An affirmative statute repeals by implication so much of the prior law as, after the harmonizing work of interpretation is fully done, remains repugnant to it; for it is the last expression of the will of the law-making power.[5] If two acts in seeming conflict can be

[1] Bac. Abr., Statute, G.

[2] Dwar. Stat. (2d ed.) 475.

[3] Bac. Abr., Statute, G.; Dwar. Stat. (2d ed.) 475; Gooch *v.* Stephenson, 13 Me. 371; [City *v.* Sheck, 104 Pa. St. 53.]

[4] Ely *v.* Cash, 15 M. & W. 617; Ely *v.* Bliss, 2 De G., M. & G. 459; Marshall *v.* Martin, Law Rep. 5 Q. B. 239; Evans *v.* Rees, 9 C. B. (N. S.) 391.

[5] Broom, Leg. Max. (2d ed.) 23; Com. *v.* Cromley, 1 Ashm. 179; Harris *v.* Robinson, 2 C. B. 908, 910; Reg. *v.* Salisbury, 2 Q. B. 72, 84; Byrne *v.* Stewart, 3 Des. 135; Britton *v.* Com., 1 Cush. 302; S. *v.* Miskimmons, 2 Ind. 440; U. S. *v.* Irwin, 5 McLean, 178; Sullivan *v.* P., 15 Ill. 233; Adams *v.* Ashby, 2 Bibb, 96; Moore *v.* Vance, 1 Ohio, 1; West *v.* Pine, 4 Wash. C. C. 691; Morrison *v.* Barksdale, Harper, 101; Moore *v.* Moss, 14 Ill. 106; Ham *v.* S., 7 Blackf. 314; McQuilkin *v.* Stoddard, 8 Blackf. 581; Johnston's Estate, 33 Pa. St. 511; Vermillion *v.* Potts, 10 Ind. 286; S. *v.* Wilson, 43 N. H. 415, [82 Am. D. 163;] S. *v.* Maccuaig, 8 Neb. 215; Greeley *v.* Jacksonville, 17 Fla. 174; S. *v.* Chambersburg, 8 Vroom, 258; Jersey City *v.* Jersey City, etc. R. R. Co., 5 C. E. Green, 360; Union Iron Co. *v.* Pierce, 4 Bis. 327; Swinney *v.* Fort Wayne, etc. R. R. Co., 59 Ind. 205; Grant *v.* Sels, 5 Oreg. 243; Hurst *v.* Hawn, 5 Oreg. 275; Peet *v.* Nalle, 30 La. An. 949; Hayden *v.* Carroll, 3 Ridgw. P. C. 545, 599; O'Flaherty *v.* McDowell, 6 H. L. Cas. 142; Davis *v.* S., 2 Tex. Ap. 425; Wells *v.* S., 3 Lea, 70. [In determining which is the last expression of the legislative power, where the acts are passed the same day, their numbers will be taken. S. *v.* Davis, 70 Md. 237, 16 Atl. R. 529; P. *v.* Dobbins, 73 Cal. 257, 14 Pac. R. 860;

reconciled by any fair construction, so that both may stand, they must be; and then no repeal will be held to take place.[1] And it is the same with a provision of the common law and a statute.[2] So that —

How interpreted.— The law does not favor repeals by implication,[3] and they will not be adjudged to occur except when

Brown *v.* Chancellor, 61 Tex. 437; Henrietta Co. *v.* Gardner, 173 U. S. 123, 43 L. ed. 637; Mersereau *v.* Merserau Co., 51 N. J. Eq. 382, 26 Atl. R. 682; Albert *v.* Twohig, 35 Neb. 563, 53 N. W. R. 582; S. *v.* Howe, 28 Neb. 618, 44 N. W. R. 874; Penn *v.* Dunlap, 112 Ind. 322, 13 N. E. R. 403. A subsequent statute prescribing no remedy whatever cannot, in the absence of a clearly expressed intention, repeal a remedy prescribed by a former statute. Greensborough *v.* McAdoo, 112 N. C. 359, 17 S. E. R. 178.

[1] Blain *v.* Bailey, 25 Ind. 165; S. *v.* Bishop, 41 Mo. 16; Nixon *v.* Piffet, 16 La. An. 379; De Pauw *v.* New Albany, 22 Ind. 204; Mullen *v.* P., 31 Ill. 444; Elliott *v.* Locknane, 1 Kan. 126; Conner *v.* Southern Express Co., 37 Ga. 397; P. *v.* Barr, 44 Ill. 198; Desban *v.* Pickett, 16 La. An. 350; McCool *v.* Smith, 1 Black, 459; McDonough *v.* Campbell, 42 Ill. 490; Hume *v.* Gossett, 43 Ill. 297; S. *v.* Young, 17 Kan. 414; Fowler *v.* Pirkins, 77 Ill. 271; Chamberlain *v.* Chamberlain, 43 N. Y. 424; U. S. *v.* Barrels of Spirits, 2 Abb. (U. S.) 305; S. *v.* Draper, 47 Mo. 29; St. Louis *v.* Independent Ins. Co., 47 Mo. 146; Cattaragus *v.* Willey, 2 Lans. 427; *In re* Evergreens, 47 N. Y. 216; S. *v.* Smith, 59 Ind. 179; Forqueran *v.* Donnally, 7 W. Va. 114; Iverson *v.* S., 52 Ala. 170; S. *v.* Doherty, 25 La. An. 119, [13 Am. R. 131;] Staats *v.* Hudson River R. R. Co., 4 Abb. Ap. 287; S. *v.* Bishop, 41 Mo. 16; Powers *v.* Shepard, 48 N. Y. 540; Gropp *v.* P., 67 Ill. 154; Gohen *v.* Texas Pac. Ry. Co., 2 Woods, 346; [Henrietta Co. *v.* Gardner, 173 U. S. 123, 43 L. ed. 637; Frost *v.* Wenie, 157 U. S. 46, 39 L. ed. 614. Special provisions in a code or system of laws must, in any possible way, be so interpreted as to bring them into harmony with the general policy of such code. Cin. *v.* Conner, 55 Ohio St. 321, 44 N. E. R. 582.]

[2] To effect a repeal of the common law, said Goldthwaite, J., "the right which is given by the general law must be plainly and obviously inconsistent with the existing statutes; and, if, upon a just interpretation of the latter, the two can exist together, the intention of the legislature that they should both exist is to be presumed." Tannis *v.* St. Cyre, 21 Ala. 449, 452.

[3] Loker *v.* Brookline, 13 Pick. 343, 348; Haynes *v.* Jenks, 2 Pick. 172, 176; Snell *v.* Bridgewater Cotton Gin Man. Co., 24 Pick. 296, 297; Goddard *v.* Boston, 20 Pick. 407; Bowen *v.* Lease, 5 Hill (N. Y.), 221; Wyman *v.* Campbell, 6 Port. 219, [31 Am. D. 677;] Dugan *v.* Gittings, 3 Gill, 138, [43 Am. D. 306;] McCartee *v.* Orphan Asylum Society, 9 Cow. 437, [18 Am. D. 516;] Lichtenstein *v.* S., 5 Ind. 162; Erwin *v.* Moore, 15 Ga. 361; Aspden's Estate, 2 Wall. Jr. 368, 431; Hockaday *v.* Wilson, 1 Head, 118; Robbins *v.* S., 8 Ohio St. 131; S. *v.* Morrow, 26 Mo. 131; Swann *v.* Buck, 40 Miss. 268; P. *v.* San Francisco, etc. R. R. Co., 28 Cal. 254; Blain *v.* Bailey, 25 Ind. 165; Buckingham *v.* Steubenville & Indiana R. R. Co., 10 Ohio St. 25; S. *v.* Chambersburg, 8 Vroom, 258; Goodrich *v.* Milwaukee, 24 Wis. 422; Horton *v.* Mobile, 43 Ala. 598; Gill *v.* S., 30 Tex. 514; Kerlinger *v.* Barnes,

they are inevitable, or plainly the legislature means them.[1] Such legislative intent is never, *prima facie*, presumed.[2] Hence, in restraint and limitation of repeals, the statutes are strictly construed.[3] Thus,—

§ 155. Derogation of prior law.— As already seen,[4] statutes in derogation of the common law,[5] or of a prior statute,[6] are construed strictly, not operating beyond their words or the clear repugnance of their provisions; that is, the new displaces the old only as directly and irreconcilably opposed in terms. For when the legislative power professes to add to the law, as it does in the enactment of an affirmative statute, we cannot

14 Minn. 526; [Rosecrans *v.* U. S., 165 U. S. 257, 41 L. ed. 708. Repeals by implication will not occur where there is an express saving, so that the legislature apparently intended to adopt two systems. Robinson *v.* Rippey, 111 Ind. 112, 12 N. E. R. 141; Montgomery *v.* Fuller, 111 Ind. 410, 12 N. E. R. 298. Repeals by implication are never favored. Knollenberg *v.* P., 9 Colo. 233, 11 Pac. R. 101; S. *v.* Greene, 87 Mo. 583, 3 West. R. 269; P. *v.* County, 103 N. Y. 541, 9 N. E. R. 311; Montgomery *v.* Board, 74 Ga. 41; Evansville *v.* Summers, 108 Ind. 189, 9 N. E. R. 81; Hyde Park *v.* Ass'n, 119 Ill. 141, 7 N. E. R. 627; Com. *v.* Mason, 82 Ky. 256; *Re* Yick Wo, 68 Cal. 294, 9 Pac. R. 139, 58 Am. R. 12; Adams Express Co. *v.* Lexington, 83 Ky. 657; S. *v.* Babcock, 21 Neb. 599, 33 N. W. R. 247; Shea *v.* Muncie, 148 Ind. 14, 46 N. E. R. 138; Chew Heong *v.* U. S., 112 U. S. 536, 28 L. ed. 770; Gowen *v.* Harley, 56 Fed. R. 973; S. *v.* Palmes, 23 Fla. 620, 3 S. R. 171. They are not even favored where they would reduce a criminal penalty. P. *v.* Gustin, 57 Mich. 407, 24 N. W. R. 156.

[1] Water Works *v.* Burkhart, 41 Ind. 364; *In re* Evergreens, 47 N. Y. 216; Forqueran *v.* Donnally, 7 W. Va. 114; Iverson *v.* S., 52 Ala. 170; Pacific R. R. Co. *v.* Cass, 53 Mo. 17; S. *v.* Severance, 55 Mo. 378; *Ex parte* Warrington, 3 DeG., M. & G. 159; Thames *v.* Hall, Law Rep. 3 C. P. 415; Estate of Walley, 11 Nev. 260.

[2] Furman *v.* Nichol, 3 Coldw. 432.

[3] Wilb. Stat. Law, 318.

[4] *Ante*, § 119.

[5] Melody *v.* Reab, 4 Mass. 471; Gibson *v.* Jenney, 15 Mass. 205; Com. *v.* Knapp, 9 Pick. 496, 514, [20 Am. D. 491]; Wilbur *v.* Crane, 13 Pick. 284: Lock *v.* Miller, 3 Stew. & P. 13; Goodwin *v.* Thompson, 2 Greene (Iowa), 329; Rex *v.* Paine, 1 East, P. C. 5; S. *v.* Norton, 3 Zab. 33; Bailey *v.* Bryan, 3 Jones (N. C.), 357, [67 Am. D. 246;] Smith *v.* Moffat, 1 Barb. 65; Young *v.* McKenzie, 3 Kelly, 31; Schuyler *v.* Mercer, 4 Gilman, 20; Dwelly *v.* Dwelly, 46 Me. 377; Burnside *v.* Whitney, 21 N. Y. 148; [Prior *v.* S., 77 Ala. 56.]

[6] White *v.* Johnson, 23 Miss. 68; Street *v.* Com., 6 Watts & S. 209; Morlot *v.* Lawrence, 1 Blatchf. 608; Clarke *v.* S., 23 Miss. 261; Williams *v.* Potter, 2 Barb. 316. The doctrine of the text is deemed to apply with special force where both acts are passed at the same session of the legislature; for "the presumption of so sudden a change or revolution in the mind of the legislature ought not to be indulged." Peyton *v.* Moseley, 8 T. B. Mon. 77, 80; [Bent *v.* Thompson (N. M.), 23 Pac. R. 234.]

assume for it an intention also to subtract from it, while there is any admissible rule of interpretation which, applied to the old, to the new, or to both, will enable all to stand. For example,—

§ 156. Specific and general.— The rule of specific and general, already more than once mentioned,[1] illustrates this. By interpreting the specific provisions as furnishing exceptions and qualifications for the general ones, without reference to their order or dates, all are made to stand together, and repeal is avoided.[2] Thus,—

"All property" and specific species.— An act exempting a certain class of property from municipal taxation is not repealed by a subsequent one giving cities the power to tax "all property" within their limits. The two acts are construed together, the one as creating an exception to the general terms of the other.[3] Again,—

Tribunal and its incidents — (Liquor licenses — Probate of will).— While the statutes required the applicant for a liquor license to be recommended by a majority of the legal voters, etc., the charter of a city was so amended as to confer on the mayor and aldermen the exclusive right to grant licenses; and it was held that the two provisions could stand together, and so the later did not repeal the earlier.[4] In like manner, a statute authorized a proceeding by "bill in chancery" for contesting wills, and gave the defendant the right to open and close; then a subsequent statute authorized a proceeding for the same purpose by "petition to the court of common pleas." And it was held that the two acts should stand together, entitling one made a defendant under the latter statute to open and close.

[1] *Ante*, §§ 112*a*, 126, 152.

[2] Thames *v.* Hall, Law R. 3 C. P. 415, 421; Gregory's Case, 6 Co. 19*b*; *Ex parte* Smith, 40 Cal. 419; Rounds *v.* Waymart, 81 Pa. St. 395; Covington *v.* East St. Louis, 78 Ill. 548; Cole *v.* Jackson, 11 Iowa, 552; Mobile, etc. R. R. Co. *v.* S., 29 Ala. 573; Pearce *v.* Bank of Mobile, 33 Ala. 693; McFarland *v.* Bank of The State, 4 Pike, 410; Beridon *v.* Barbin, 13 La. An. 458; Ellis *v.* Batts, 26 Tex. 708; Luke *v.* S., 5 Fla. 185; Brown *v.* Com'rs, 21 Pa. St. 37; Hill *v.* Hall, 1 Ex. D. 411; New Haven *v.* New Haven Water Co., 44 Conn. 165; S. *v.* Smith, 8 S. C. 127; Com. *v.* Jessup, 63 Pa. St. 34; [Powell *v.* Parkersburg, 28 W. Va. 698; P. *v.* Jaehne, 103 N. Y. 182, 8 N. E. R. 374; S. *v.* Mullica, 48 N. J. L. 447, 4 Atl. R. 427; Buffalo Ass'n *v.* Buffalo, 118 N. Y. 61, 22 N. E. R. 962; Braceville *v.* Doherty, 30 Ill. Ap. 645; Maxwell *v.* S., 89 Ala. 150, 7 S. R. 894.]

[3] Blain *v.* Bailey, 25 Ind. 165.

[4] House *v.* S., 41 Miss. 737.

The maxim *leges posteriores priores contrarias abrogant*, it was observed, does not apply, except where the inconsistency or repugnancy is such that the two provisions cannot stand as cumulative or concurrent rules of action.[1] So,—

Forbidding streets through burial-ground, then authorizing generally.— A statute forbidding the opening of a road or street through any burial-ground is in no part abrogated by a subsequent one extending the boundaries of a borough, and appointing three persons commissioners, who shall have authority "to survey and lay out, and mark the lines of such streets, roads, lanes and alleys as they shall deem necessary within the said limits."[2]

§ 156a. Other forms.— Besides these cases of general and special, the other forms in which earlier and later affirmative statutes may stand together without repeal are numberless. To illustrate,—

Successive appropriations.— In Missouri, a sum out of a certain fund was by statute appropriated to pay some designated bonds. Then a subsequent act appropriated, out of the same fund, a sum so large as to interfere with the payment of the bonds. It was thereupon held that the latter enactment did in no measure repeal the former; but the appropriation it made

[1] Raudebaugh *v.* Shelley, 6 Ohio St. 307. And see S. *v.* Vernon, 53 Mo. 128.

[2] Egypt Street, 2 Grant (Pa.), 455.

Other illustrations.—Illustrations of this principle might be multiplied indefinitely.

Indictment, then civil action.— Where a statute prohibits an act, under a penalty enforceable by indictment, and subsequently another gives a *qui tam* action, the latter is cumulative of, and does not repeal, the remedy under the former. Bush *v.* The Republic, 1 Tex. 455. Compare with Towle *v.* Smith, 2 Rob. (N. Y.) 489.

Malicious mischief.— An act making it indictable "wilfully, unlawfully and maliciously" to "cut, shoot," etc., "any horse," etc., was adjudged not repealed by one declaring "every wilful trespass" to be a misdemeanor. S. *v.* Alexander, 14 Rich. 247.

Nuisance.— A statute which imposes a penalty for occupying a building in the compact part of a town, as a slaughter-house, without license, does not repeal the common law relative to nuisances. S. *v.* Wilson, 43 N. H. 415, [82 Am. D. 163.]

In general.— Multitudes of other illustrations occur in the cases cited to the opening part of this section and the other sections there referred to. [Where a statute provides that certain steps shall be taken by telegraph companies, as prescribed in the chapter dealing with railroads, an amendment changing the railroad procedure does not change the prior law for telegraph companies. Postal Co. *v.* R. R. Co., 89 Fed. R. 190.]

should take effect only out of what was left after the bonds were paid.[1] But —

Change of salary.— A subsequent statute fixing a salary different from a former one repeals the former;[2] because, in the nature of things, these statutes cannot subsist together. The salary must be either the one sum or the other; it cannot be both.

§ 157. Partial repeal.— In many of the foregoing instances, wherein earlier and later enactments are said to stand together without repeal,[3] there is, in fact, a partial repugnance; and then, accurately speaking, a repeal of the earlier by the later takes place as to the part,[4]— a subject more minutely explained and illustrated in the next chapter. But,—

Without repugnance,— no statute, except by express words or affirmative implication, operates as a repeal of the prior law, whether statutory or common.[5] Still —

Exceptional doctrine.— An exception to this proposition, uncertain in its form and application, is admitted in some of our tribunals; in how many it would be impossible to say. Thus,—

§ 158. Revision of whole subject — (United States).— In the supreme court of the United States, Field, J., after laying down the general doctrine as in the foregoing sections of this sub-title, and after saying that if two acts "are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first," adds: "And even where two acts are not in express terms repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."[6] Now, if this means that the legis-

[1] S. *v.* Bishop, 41 Mo. 16.

[2] Pierpont *v.* Crouch, 10 Cal. 315. For other cases of irreconcilable repugnance, see P. *v.* Burt, 43 Cal. 560; Evansville *v.* Bayard, 39 Ind. 450. [But a statute fixing salary without limitation as to time is not repealed by a statute merely appropriating a less amount for a particular year. U. S. *v.* Langston, 118 U. S. 389, 30 L. ed. 164.]

[3] And see *post*, § 165.

[4] Mongeon *v.* P., 55 N. Y. 613; Mitchell *v.* S., 19 Ind. 381; Oleson *v.* Green Bay, etc. Ry. Co., 36 Wis. 383; New Orleans *v.* Hoyle, 23 La. An. 740; *In re* United Patriots' National Benefit Soc., 4 Q. B. D. 29; U. S. *v.* Tynen, 11 Wall. 88, 92.

[5] Affirmed by all the foregoing cases under this sub-title.

[6] U. S. *v.* Tynen, 11 Wall. 88, 92; [U. S. *v.* Ranlett, 172 U. S. 133, 43 L. ed. 393; Dist. Col. *v.* Hutton, 143 U. S.

lative intent, however expressed, is to be carried out,[1] the doctrine is harmonious with all that has gone before in these elucidations. But if the meaning is that the court is permitted to enter into surmises outside of any statutory words, and from its ideas of the nature of the subject declare, where there is no repugnance, a repeal of the prior law, the doctrine is irreconcilably adverse to the whole body of the law of statutory interpretation.[2] For it is fundamental in our jurisprudence that the intention of the legislature must be ascertained from the words of a statute, and not from any general inferences to be derived from the nature of the subject with which it deals.[3] And in the case under consideration nothing was decided contrary to the common and better doctrine. The point adjudicated was that, "when there are two acts of congress on the same subject, and the latter act embraces all the provisions of the first, and also new provisions, and imposes different or additional penalties, the latter act operates, without any repealing clause, as a repeal of the first."[4] This results from the single rule of repugnance; since, as in the nature of things there cannot be two different salaries for the same service,[5] so there cannot be two different punishments for the same offense. In a subsequent case before the same tribunal, it was laid down that, for a repeal to take place in the circumstances under consideration, the objects of the two statutes must be the same, it is not sufficient that their subjects are.[6] Other statements of the doctrine have been made by single judges in the national tribunals.[7] In the full court at Washington, Strong, J., speaking for all the judges, declared the doctrine of the first mentioned case to be, "that the former statute is impliedly repealed so far as the provisions of the subsequent statute are repugnant to it, or *so far as* the latter statute, making new pro-

18, 36 L. ed. 60; Tracy *v.* Tuffly, 134 U. S. 206, 33 L. ed. 879. The intent must plainly appear. Chicago R. R. Co. *v.* U. S., 127 U. S. 406, 32 L. ed. 180.]

[1] *Ante*, § 70; Butler *v.* Russell, 3 Clif. 251.

[2] *Ante*, §§ 145, 146, 152, 154, 355.

[3] Fordyce *v.* Bridges, 1 H. L. Cas. 1.

[4] Reporter's head-note to U. S. *v.* Tynen, *supra*. And see U. S. *v.* Claflin, 97 U. S. 546; Norris *v.* Crocker, 13 How. (U. S.) 429.

[5] *Ante*, § 156*a*.

[6] U. S. *v.* Claflin, *supra*.

[7] Patterson *v.* Tatum, 3 Saw. 164; Butler *v.* Russell, 3 Clif. 251; U. S. *v.* Cheesman, 3 Saw. 424; U. S. *v.* Barr, 4 Saw. 254.

visions, is plainly intended as a substitute for it. [Here there is an ambiguity, namely, whether the court is to infer an intent which the legislature took care not to express, contrary to the rule in all other cases of statutory interpretation; or whether the inference is to be drawn from what a judge may properly see in the words and surroundings. But the meaning appears to be cleared of doubt by the following.] Where the powers or directions under the several acts are such as *may well subsist together*, an implication of repeal *cannot be allowed*."[1] While thus our high national tribunal seems freed from any just imputation of having absolutely accepted a doctrine to which few legal persons will on adequate reflection, and as a question of principle, assent, we have from it *dicta* creating some uncertainty as to what might be its decision should cases easily to be imagined arise. For the natural expression of the better doctrine would be simply that, where two statutes can be made by construction to subsist together, the later shall not operate as a repeal of the earlier.

§ 159. In our states — (England). — The unfortunate doctrine, thus in a measure explained, originated in some of our state tribunals. It is believed never to have been known in England.[2] Precisely how the question stands in all our states

[1] Henderson's Tobacco, 11 Wall. 652, 657. [This language is cited *verbatim* as the rule of decision in Henrietta Min. Co. *v.* Gardner, 173 U. S. 123, 43 L. ed. 637.]

[2] **How in England.** — Though my attention has long been directed to this doctrine, I have never found it in any English case, not saying that it does not exist in some case overlooked. I extract from Wilberforce on Stat. Law, pp. 328–330, a collection of matter as near to this doctrine as I have seen; but I think the reader will agree with me that none of it reaches so far. "Where an affirmative statute introduces a new law or gives a new right, and it appears to be the intention of the legislature that the new law alone shall be followed, or that a right which previously existed should be merged in the one newly created, the later statute will act as a repeal of the earlier, 'as implying a negative.' Harcourt *v.* Fox, 1 Show. 506, 520, per Eyres, J.; O'Flaherty *v.* McDowell, 6 H. L. Cas. 142, 157, per Lord Cranworth, L. C. Thus the 1 Will. & M., ch. 21, which provided that the *custos rotulorum* should appoint a clerk of the peace to act 'for so long a time only as he shall well demean himself in his said office,' was a repeal *pro tanto* of 37 Hen. 8, ch. 1, giving the appointment of the clerk of the peace to the *custos rotulorum*, but limiting the tenure of the office of clerk of the peace to the time that the person making the appointment should continue *custos rotulorum*. Harcourt *v.* Fox, 1 Show. 506. For the same reason it is said by Lord Coke that the act 33 Hen. 8, ch. 23, enacting that

the author will not attempt to define. Looking at the cases less critically than in the last section, we find the doctrine to have been accepted perhaps in Massachusetts,[1] Maine,[2] Pennsylvania,[3] Vermont,[4] and possibly Alabama,[5] together with

persons examined before the king's council might be tried for treason in any country where the king should please, would have been repealed by 1 and 2 Phil. & M., ch. 10, which provided that all trials for treason should be had according to the course of the common law and not otherwise, even if the later act had not contained the negative words 'and not otherwise.' Foster's Case, 11 Co. 56*b*, 63*a*. Section 57 of 4 and 5 Will. 4, ch. 76, enacted that every man who should marry a woman having legitimate or illegitimate children should be liable to maintain such children, and should be chargeable with all relief granted to them. It was held that these words, though affirmative, operated, in the cases to which the act referred, as a repeal of so much of 18 Eliz., ch. 3, § 2, and 49 Geo. 3, ch. 68, as rendered the putative father of a bastard child liable for its maintenance. Lang *v.* Spicer, 1 M. & W. 129. Section 6 of 8 and 9 Will. 3, ch. 30, provided that appeals against orders of removal should be determined at the quarter sessions of the peace for the county, division, or riding containing the parish from which the removal was ordered, and not elsewhere. 5 and 6 Will. 4, ch. 76, § 105, gave jurisdiction in boroughs to the recorder over all matters cognizable by any court of quarter sessions of the peace for counties. It was at first suggested that this section gave a recorder concurrent jurisdiction (Reg. *v.* St. Edmund's, 2 Q. B. 72); but in a subsequent case the court held that the affirmative words of the later section repealed the earlier provision, and that a recorder had exclusive jurisdiction over appeals against orders of removal from any parish within his borough. Reg. *v.* Suffolk Justices, 2 Q. B. 85." For English cases adverse to the doctrine disapproved in the text, see *post*, § 160, note.

[1] Com. *v.* Cooley, 10 Pick. 37; Goodenow *v.* Buttrick, 7 Mass. 140; Bartlet *v.* King, 12 Mass. 537, 545; Ashley, Appellant, 4 Pick. 21, 23; Mason *v.* Waite, 1 Pick. 452; Ellis *v.* Paige, 1 Pick. 43, 45; Jennings *v.* Com., 17 Pick. 80; Com. *v.* Ayer, 3 Cush. 150; Com. *v.* Foster, 1 Mass. 488; Nichols *v.* Squire, 5 Pick. 168; Com. *v.* Dennis, 105 Mass. 162.

[2] Towle *v.* Marrett, 3 Greenl. 22, [14 Am. D. 206;] Pingeer *v.* Snell, 42 Me. 53; Buck *v.* Spofford, 31 Me. 34, 36.

[3] Com. *v.* Cromley, 1 Ashm. 179; Report of the Judges, 3 Binn. 595, 597. But in this state, Stat. March 21, 1806, had ordained "that in all cases where a remedy is provided, or any thing or things directed to be done by an act of assembly, the directions of the act shall be strictly pursued, and no penalty shall be inflicted or any thing done agreeably to the common law, further than is necessary in carrying such act or acts into effect."

Consequently, illegal fees.—It was held that an indictment did not lie at common law against an officer

[4] Giddings *v.* Cox, 31 Vt. 607; Farr *v.* Brackett, 30 Vt. 344; Isham *v.* Bennington Iron Co., 19 Vt. 230.

[5] S. *v.* Whitworth, 8 Port. 434 Smith *v.* S., 1 Stew. 506. But see George *v.* Skeates, 19 Ala. 738.

some of the other states,[1] to the extent, simply and no further, that where a newly-enacted statute covers the whole ground occupied by a prior one or by the common law, it repeals such law by implication, though there is no repugnance. A part of the cases add, as qualifying this proposition, that the new statute must plainly appear to have been intended as a substitute for the old, or as furnishing the only rule of law for the question. Now, partly to repeat,[2] —

§ 160. Objections — (True rule). — If the legislature did intend the new enactment to be a substitute for the old law, and if it expressed such intention, or if it employed language inconsistent with any other conclusion, such legislative intent[3] must, all concede, be carried into effect by interpretation. But our jurisprudence is full of instances in which two or a dozen distinct laws cover one question, or cluster of facts, and all stand together, parties having their election on which one to proceed. If the legislature says that its statute is a revision of the whole subject, and meant to be a repeal of all prior laws relating thereto, no court will hesitate to give it this effect. But if, instead of saying this, it simply enacts what is consistent with the prior law, or re-enacts such law, how can a court know

for taking illegal fees, the remedy being under the statute of March 28, 1814, § 20. Com. *v.* Evans, 18 S. & R. 426. Still the general doctrine is maintained in Pennsylvania that there is no repeal by implication where the two acts can be construed together. Shinn *v.* Com., 3 Grant (Pa.), 205.

[1] S. *v.* Seaborn, 4 Dev. 305, 310; Dugan *v.* Gittings, 3 Gill, 138, [43 Am. D. 306;] Strauss *v.* Heiss, 48 Md. 292; Caldwell *v.* St. Louis Perpetual Ins. Co., 1 La. An. 85; Smith *v.* S., 14 Mo. 147; Bryan *v.* Sundberg, 5 Tex. 418; Rogers *v.* Watrous, 8 Tex. 62, [58 Am. D. 100;] Erwin *v.* Moore, 15 Ga. 361; Illinois & Michigan Canal Co. *v.* Chicago, 14 Ill. 334; Pankey *v.* P., 1 Scam. 80; Leighton *v.* Walker, 9 N. H. 59; Wakefield *v.* Phelps, 37 N. H. 295; Pulaski *v.* Downer, 5 Eng. 588; Gorman *v.* Luckett, 6 B. Monr. 146; Stirman *v.* S., 21 Tex. 734; Swann *v.* Buck, 40 Miss. 268; Sacramento *v.* Bird, 15 Cal. 294; S. *v.* Conkling, 19 Cal. 501; Industrial School District *v.* Whitehead, 2 Beasley, 290; S. *v.* Jersey City, 11 Vroom, 257; Conley *v.* Calhoun, 2 W. Va. 416; S. *v.* Rogers, 10 Nev. 319; Thorpe *v.* Schooling, 7 Nev. 15; Broaddus *v.* Broaddus, 10 Bush, 299; Cullen *v.* S., 42 Conn. 55; Campbell *v.* Case, 1 Dak. 17; Breitung *v.* Lindauer, 37 Mich. 217; S. *v.* Campbell, 44 Wis. 529; S. *v.* Van Stralen, 45 Wis. 437. See Daviess *v.* Fairbairn, 3 How. (U. S.) 636, 645. In Indiana, to work a repeal, the new provisions must be *inconsistent* with the old. Longlois *v.* Longlois, 48 Ind. 60; Coghill *v.* S., 37 Ind. 111; Hamlyn *v.* Nesbit, 37 Ind. 284; Dowdell *v.* S., 58 Ind. 333. And see Hogan *v.* Guigon, 29 Grat. 705.

[2] *Ante*, § 158.

[3] *Ante*, § 70.

that it means what it does not say, a repeal of laws which may subsist with those which it establishes? Hence, in principle, and equally on the better American authorities and on the English,[1] the just doctrine is that, without exception, a statute in affirmative terms, with no intimation of an intent to repeal prior laws, does not repeal them, unless the new and the old are irreconcilably in conflict.[2]

[1] *Ante*, § 150.

[2] The reader is referred, among other authorities, including those before cited in the course of this discussion, to Twenty-two Packages of Cloth *v.* U. S., 16 Pet. 342, 362; Rex *v.* Paine, 1 East, P. C. 5; Morlot *v.* Lawrence, 1 Blatch. 608; Rex *v.* Carlile, 3 B. & Ald. 161; Reg. *v.* Salisbury, 2 Q. B. 72, 84; 1 Bl. Com. 89; Broom, Leg. Max. (2d ed.) 24; Williams *v.* Pritchard, 4 T. R. 2; Rix *v.* Borton, 12 A. & E. 470; Dakins *v.* Seaman, 9 M. & W. 777, 789; s. c. *nom.* Dakins *v.* Searman, 6 Jur. 788; Wynn *v.* Davies, 1 Curt. Ec. 69, 80; Middleton *v.* Crofts, 2 Atk. 650, 675; Foster's Case, 11 Co. 56, 63; Ashton *v.* Poynter, 1 Cromp. M. & R. 738; Phipson *v.* Harvett, 1 Cromp. M. & R. 473; Rex *v.* Aslett, 1 New Rep. 1, 7; Dore *v.* Gray, 2 T. R. 358, 365; Reg. *v.* Dicken, 14 Cox, C. C. 8; Planters' Bank *v.* S., 6 Sm. & M. 628; Kinney *v.* Mallory, 3 Ala. 626; Chesapeake & Ohio Canal *v.* Baltimore & Ohio R. R. Co., 4 Gill & J. 1; S. *v.* Harker, 4 Harring. (Del.) 559; De Armas Case, 10 Mart. (La.) 158, 172; Herman *v.* Sprigg, 3 Mart. (N. S.) 190, 199; Williams *v.* Potter, 2 Barb. 316; George *v.* Skeates, 19 Ala. 738; U. S. *v.* Twenty-five Cases of Cloths, Crabbe, 356, 370, 382; S. *v.* Moore, 19 Ala. 514; Freeman *v.* S., 6 Port. 372; Morris *v.* Delaware & Schuylkill Canal, 4 Watts & S. 461; Beals *v.* Hale, 4 How. (U. S.) 37; Brown *v.* Miller, 4 J. J. Mar. 474; Alexandria *v.* Dearmon, 2 Sneed, 104; Aspden's Estate, 2 Wall. Jr. 368, 431; Daviess *v.* Fairbairn, 3 How. (U. S.) 636; Mitchell *v.* Duncan, 7 Fla. 13; S. *v.* Fuller, 14 La. An. 667; S. *v.* Kitty, 12 La. An. 805; Beridon *v.* Barbin, 13 La. An. 458; Pratt *v.* Atlantic & St. Lawrence R. R. Co., 42 Me. 579; Richards *v.* Patterson, 30 Miss. 583; Commercial Bank *v.* Chambers, 8 Sm. & M. 9; Ament *v.* Humphrey, 3 Greene (Iowa), 255; Attorney-General *v.* Brown, 1 Wis. 513; Casey *v.* Harned, 5 Iowa, 1; S. *v.* Smith, 7 Iowa, 244; Edgar *v.* Greer, 8 Iowa, 394, [74 Am. D. 316;] S. *v.* Woodside, 9 Ire. 496. In New York, the act of 1824 authorized a divorce from bed and board to the husband for the wife's cruel treatment; the revised statutes of 1830 gave this remedy only to the wife; but by accident the act of 1824 was not expressly repealed, and the courts held that it remained in force. 1 Bishop, Mar., Div. & S., § 1630, note, referring to Perry *v.* Perry, 2 Barb. Ch. 311; Perry *v.* Perry, 2 Paige, 501; Van Veghten *v.* Van Veghten, 4 Johns. Ch. 501; McNamara *v.* McNamara, 2 Hilton, 547, 549. For later New York views on this sort of question, see New York *v.* Broadway, etc. R. R. Co., 12 Hun, 571; Excelsior Petroleum Co. *v.* Embury, 67 Barb. 261. For more as to repeals by general revisions of the laws, see Barker *v.* Bell, 46 Ala. 216; *Ex parte* Birchfield, 52 Ala. 377; Sanders *v.* S., 58 Ala. 371; S. *v.* Twogood, 7 Iowa, 252; Gray *v.* Mount, 45 Iowa, 591; Ballin *v.* Ferst, 55 Ga. 546; Scheftels *v.* Tabert, 46 Wis. 439; Middleton *v.* New Jersey, etc. R. R. Co., 11 C. E.

§ 161. Reasons for objectionable doctrine.—For the objectionable doctrine now being explained, no reasons which will bear scrutiny have yet been assigned in the books. Commonly, when any attempt at giving reasons is made, it is a mere following of a Massachusetts *dictum*, thus: "It is a well-settled rule, that, when any statute is revised, or one act framed from another, some parts being omitted, *the parts omitted are not to be revived by construction*, but are to be considered as annulled. To hold otherwise would be to impute to the legislature gross carelessness or ignorance; which is altogether inadmissible."[1] Here is a ludicrous putting of the "cart before the horse." A repeal of the entire old law, with no words of appeal or occasion for it shown, is first assumed! Then the court says that "the parts omitted are not to be *revived by construction!*" If

Green, 269; Whitaker *v.* Haynes, 49 Cal. 596; Frederick *v.* Groshon, 30 Md. 436. See *ante*, § 98. In the Illinois case of Bruce *v.* Schuyler, 4 Gilman, 221, 271, [46 Am. D. 447,] Wilson, C. J., stated the rule in the following words: "The doctrine of repeal by implication is not favored by the law, and is never to be resorted to except when the repugnance or opposition is too clear and plain to be reconciled. The rule of law is that all laws *in pari materia* are to be construed together." The reporter's head-note to a later Illinois case is: "A statute which covers all the grounds of prior ones on the same subject, and revises the whole law on the given subject, necessarily works a repeal of all *prior conflicting laws*, whether such conflict be found in the provisions of general laws or those of special charters." Andrews *v.* P., 75 Ill. 605. See Booth *v.* Carthage, 67 Ill. 102. The Scotch law also appears to accord with the view in the text. Cumming's Case, Shaw, Crim. Cas. 17. "It is a rule of law that one private act of parliament cannot repeal another, except by express enactment." Even though the second private act is declared to be a public one, the consequence is the same. Birkenhead Docks *v.* Laird, 4 De G., M. & G. 732, 23 Eng. L. & Eq. 389. [It seems to be the general doctrine that there must be a plain intention to replace former laws, though the conflict pointed out still exists. Dickinson *v.* S., 38 Tex. Cr. R. 472, 41 S. W. R. 759; Strickland *v.* Geide, 31 Oreg. 573, 49 Pac. R. 982; S. *v.* Jenkins, 73 Miss. 523, 19 S. R. 206; S. *v.* Jersey City, 40 N. J. L. 257; Swann *v.* Buck, 40 Miss. 268; Com. *v.* Kenneson, 143 Mass. 418, 9 N. E. R. 761; County *v.* County, 64 Miss. 534, 1 S. R. 753; P. *v.* Ames (Colo.), 60 Pac. R. 346; Tracy *v.* Tuffly, 134 U. S. 206, 33 L. ed. 879; S. *v.* Bemis, 45 Neb. 724, 64 N. W. R. 348; Com. *v.* Mann, 168 Pa. St. 290, 31 Atl. R. 1003; S. *v.* Mines, 38 W. Va. 125, 18 S. E. R. 470; S. *v.* Brookover, 38 W. Va. 141, 18 S. E. R. 476; S. *v.* Elks, 69 Miss. 895, 13 S. R. 255.]

[1] Ellis *v.* Paige, 1 Pick. 43, 45. [Concerning omissions and changes in revisions, see Carmichael *v.* Hays, 66 Ala. 543; South *v.* S., 86 Ala. 617, 6 S. R. 52; R. R. Co. *v.* Perryman, 91 Ala. 413, 8 S. R. 699; *In re* Wheelock, 3 N. Y. Sup. 890, 46 Hun. 64; Birdsall *v.* Wheeler, 58 Conn. 429, 20 Atl. R. 607.]

our law is, what Coke and others have said it is, the "perfection of reason," surely this perversion of logic is not law. The question, the reader perceives, has nothing to do with the revival of a repealed statute. But it is, as already explained, whether, when the legislative body makes what on its face is a mere addition to the laws, employing no negative words and saying nothing of repeal, a court should impute to it "gross carelessness or ignorance" and so declare repealed portions of the old law, which may well stand with the new because the law-making power either did not know what the law was before, or did not sufficiently understand the use of language to express what it meant. The most plausible application of this sort of doctrine occurs where a statute of our own has covered the whole subject embraced in some English act which with us is common law. In such a case, it is said by those who follow this doctrine, that our statute repeals the English [1] — a view entitled to grave consideration on the question whether we have adopted the English act; but, supposing it adopted, why may it not stand until the legislature dissents from it, either by direct words or by an inconsistent enactment?

§ 162. In conclusion of this question, an examination of the cases in which was involved the erroneous doctrine will show that there neither is nor can be any uniformity in its application,— in other language, that it is a mere drifting to sea, without rudder or compass,— and that it is equivalent to no rule. It simply permits, in certain circumstances, the courts to make the laws instead of following what the legislature has enacted. Hence, among other objections, it is inconvenient. And it puts the judges in the legislative seat. If the new law is not inconsistent with the old, why infer a repeal where none is declared? All enactments are to be interpreted in harmony with the common law;[2] yet this law recognizes a variety of remedies for a single wrong, a variety of offenses committed by a single act, a variety of modes of procedure to gain a common right, a variety of jurisdictions over a given matter, a variety of results from a single cause.[3] Nature recognizes the

[1] Mason *v.* Waite, 1 Pick. 452; S. *v.* Seaborn, 4 Dev. 305, 310; Report of Judges, 3 Binn. 595, 597; Towle *v.* Marrett, 3 Greenl. 22, [14 Am. D. 206.] And see Com. *v.* Dennis, 105 Mass. 162, where an affirmative statute was held under this rule to repeal the common law received from England.

[2] *Ante*, § 141.

[3] And see the next chapter.

same. And for a court, disregarding the teachings of both, to declare for a repeal where the legislature has not, is to enact, not interpret, the laws.

IV. Repeals in Particular States.

§ 163. Further authorities grouped.— The foregoing discussions disclose some diversities of doctrine in the different states. And there are probably others. Hence, and for purposes of convenience, some of the authorities are here, in a note,[1]

[1] *England.*—Rex *v.* Paine, 1 East, P. C. 5; Rex *v.* Thorne, 2 East, P. C. 622; Williams *v.* Reg., 7 Q. B. 250; Reg. *v.* Wynn, 1 Den. C. C. 365, 1 Temp. & M. 32, 13 Jur. 107, 18 Law J. (N. S.) M. C. 51; Reg. *v.* Overton, 4 Q. B. 83; Reg. *v.* Tivey, 1 Den. C. C. 63; Rex *v.* Farrington, Russ. & Ry. 207; Rex *v.* Robinson, 2 Leach, 749. 2 East, P. C. 1110; Rex *v.* Carlile, 3 B. & Ald. 161; Rex *v.* Waddington, 1 B. & C. 26; Rex *v.* Moor, 2 Mod. 128; Sir John Knight's Case, 3 Mod. 118; Rex *v.* Jackson, Cowp. 297; Rex *v.* Taylor, Russ. & Ry. 373; Reg. *v.* Pugh, 6 Mod. 140, 141; Reg. *v.* Sill, Dearsly, 10, 14 Eng. L. & Eq. 135; Rex *v.* O'Brian, 7 Mod. 378, 379; Reg. *v.* Brecon, 3 New Sess. Cas. 434, 13 Jur. 422; Reg. *v.* Thompson, 20 Law J. (N. S.) M. C. 183, 15 Jur. 654; Rex *v.* Stanley, Russ. & Ry. 432; Rex *v.* Boyall, 2 Bur. 832, 2 Keny. 549; Michell *v.* Brown, 1 Ellis & E. 267; [Thorpe *v.* Adams, 6 C. P. 125; Queen *v.* Justices, 1 Q. B. D. 220; Hill *v.* Hall, 1 Ex. D. 411; Pollock *v.* Company, 37 Ch. D. 661; Reeve *v.* Gibson, 1 Q. B. D. 652 (1891); Dyer *v.* Tulley, 2 Q. B. D. 794 (1894); Summers *v.* Board, Div. Ct. 1 Q. B. 612 (1893); Keep *v.* St. Mary, C. A. 2 Q. B. D. 524 (1894); *In re* Tithe Act, 1 Q. B. 213 (1894); Abbott *v.* Minister, J. C. (1895), A. C. 425; Gwynne *v.* Drewitt, 2 Ch. (1894), 616; Heston *v.* Grout, C. A. (1897), 2 Ch. 306.]

Ireland.—Reg. *v.* Murphy, Jebb, 315.

United States.—U. S. *v.* Pirates, 5 Wheat. 184; U. S. *v.* Halberstadt, Gilpin, 262; U. S. *v.* Jones, 3 Wash. C. C. 209; Morlot *v.* Lawrence, 1 Blatch. 608; U. S. *v.* A Package of Lace, Gilpin, 338; U. S. *v.* Irwin, 5 McLean, 178; The Estrella, 4 Wheat. 298; U. S. *v.* Cushman, 1 Low. 414; [U. S. *v.* Philbrick, 120 U. S. 52, 30 L. ed. 559; Tracy *v.* Tuffly, 134 U. S. 206. 33 L. ed. 879; R. R. Co. *v.* U. S., 127 U. S. 406, 32 L. ed. 180; U. S. *v.* Auffmordt, 122 U. S. 197, 30 L. ed. 1182; D. C. *v.* Hutton, 143 U. S. 18, 36 L. ed. 60; Cope *v.* Cope, 137 U. S. 682, 34 L. ed. 832; National Bank *v.* Peters, 144 U. S. 570, 36 L. ed. 545; Sherman *v.* Grinnell, 123 U. S. 679, 31 L. ed. 278; Gurnee *v.* Patrick, 137 U. S. 141, 34 L. ed. 601; U. S. *v.* Reisinger, 128 U. S. 398, 32 L. ed. 480; *Re* Hall, 167 U. S. 38, 42 L. ed. 69; Frost *v.* Wenie, 157 U. S. 46, 39 L. ed. 614; U. S. *v.* Greathouse, 166 U. S. 601, 41 L. ed. 1130; Rosecrans *v.* U. S., 165 U. S. 257, 41 L. ed. 708; Vance *v.* Vandercook, 170 U. S. 438, 42 L. ed. 1100; Bear Lake Co. *v.* Garland, 164 U. S. 1, 41 L. ed. 327.]

Alabama.—S. *v.* Coleman, 5 Port. 32; Smith *v.* S., 1 Stew. 506; Hodges *v.* S., 8 Ala. 55; S. *v.* Whitworth, 8 Port. 434; S. *v.* Jones, 5 Ala. 666; S. *v.* Flanigin, 5 Ala. 477; Hawkins *v.* S., 3 Stew. & P. 63; Moore *v.* S., 16 Ala. 411; S. *v.* Moseley, 14 Ala. 390; S. *v.* Allaire, 14 Ala. 435; Hirschfelder *v.* S., 18 Ala. 112; Sterne *v.* S., 20 Ala.

collected and cited in the order of the states. Mainly they are not repetitions of what has gone before, but some of them occur

43; S. *v.* Moore, 19 Ala. 514; Huggins *v.* Ball, 19 Ala. 587; De Bernie *v.* S., 19 Ala. 23; Jordan *v.* S., 15 Ala. 746; Turner *v.* S., 40 Ala. 21; Jeffries *v.* S., 39 Ala. 655; Magruder *v.* S., 40 Ala. 347; Luke *v.* Calhoun, 56 Ala. 415; Sanders *v.* S., 58 Ala. 371; Steele *v.* S., 61 Ala. 213; [R. R. Co. *v.* Perryman, 91 Ala. 413, 8 S. R. 699; Beale *v.* Posey, 72 Ala. 323; Washington *v.* S., 72 Ala. 272; Jackson *v.* S., 75 Ala. 26; S. *v.* Warford, 84 Ala. 15, 3 S. R. 911.]

Arkansas.—Scoggin *v.* Taylor, 8 Eng. 380; Campbell *v.* Campbell, 8 Eng. 513; *Ex parte* Trapnall, 1 Eng. 9, [42 Am. D. 676;] Hamilton *v.* Buxton, 1 Eng. 24; S. *v.* Brandon, 28 Ark. 410; S. *v.* Holman, 29 Ark. 58; [Wood *v.* S., 47 Ark. 488, 1 S. W. R. 709; Babcock *v.* Helena, 34 Ark. 499; Zerger *v.* Quilling, 48 Ark. 159, 2 S. W. R. 662; Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. R. 105; Coats *v.* Still, 41 Ark. 149; Chamberlain *v.* S., 50 Ark. 132, 6 S. W. R. 524; Glidewell *v.* Martin, 51 Ark. 559, 11 S. W. R. 882; Hogane *v.* Hogane, 57 Ark. 508, 22 S. W. R. 167; Scales *v.* S., 47 Ark. 476, 1 S. W. R. 769.]

California.—P. *v.* Chu Quong, 15 Cal. 332; *Ex parte* Smith. 40 Cal. 419; Whitaker *v.* Haynes, 49 Cal. 596; *Ex parte* McCarthy, 53 Cal. 412; [Fraser *v.* Alexander, 75 Cal. 147, 16 Pac. R. 757; McAllister *v.* Hamblin, 83 Cal. 361, 23 Pac. R. 357; County *v.* Harris, 97 Cal. 100, 32 Pac. R. 594; P. *v.* McNulty, 93 Cal. 427, 26 Pac. R. 597; Mack *v.* Jastro, 126 Cal. 130; *Re* Ambrosewf, 109 Cal. 264.]

Connecticut.—Hale *v.* S., 15 Conn. 242; Knowles *v.* S., 3 Day, 103; S. *v.* Danforth, 3 Conn. 112; Southworth *v.* S., 5 Conn., 325; Parrott *v.* Stevens, 37 Conn. 93; Leonard *v.* Wolfram, 41 Conn. 481; [Cullen *v.* S., 42 Conn. 55; New Haven *v.* Water Co., 44 Conn. 107; Windham *v.* Himes, 55 Conn. 435, 12 Atl. R. 517; Hinman *v.* Goodyear, 56 Conn. 213, 14 Atl. R. 804; Bissell *v.* Dickerson, 64 Conn. 64, 29 Atl. R. 226.]

Dakota.—P. *v.* Sponsler, 1 Dak. 289; [Ter. *v.* McPherson, 6 Tripp, 27, 50 N. W. R. 351.]

Delaware.—S. *v.* Harker, 4 Harring. (Del.) 559; [*In re* Lord & Polk Co., 7 Ch. R. 248.]

Florida.—Luke *v.* S., 5 Fla. 185; [National Bank *v.* Williams, 33 Fla. 305; S. *v.* Smith, 26 Fla. 427, 7 S. R. 848; Hope *v.* Johnston, 28 Fla. 55, 9 S. R. 830.]

Georgia.—S. *v.* Calvin, R. M. Charl. 151; S. *v.* Maloney, R. M. Charl. 84; S. *v.* Savannah, T. U. P. Charl. 235, [4 Am. D. 708;] Union Branch R. R. Co. *v.* East Tennessee and Georgia Railroad Banking Co., 14 Ga. 327; Gorman *v.* Hammond, 28 Ga. 85; Bloom *v.* S., 20 Ga. 443; Wall *v.* McNeil, 20 Ga. 239; Wheeler *v.* S., 23 Ga. 9; Georgia R. R. Co. *v.* Kirkpatrick, 35 Ga. 144; [Macon Co. *v.* Gibson, 85 Ga. 19, 11 S. E. R. 442; Smith *v.* Oatts, 92 Ga. 694, 18 S. E. R. 1007; McGruder *v.* S., 83 Ga. 616, 10 S. E. R. 281; Swift *v.* Van Dyke, 98 Ga. 726.]

Illinois.—Bruce *v.* Schuyler, 4 Gilman, 221, [46 Am. D. 447;] Ottawa *v.* La Salle, 12 Ill. 339; Illinois and Michigan Canal *v.* Chicago, 14 Ill. 324; Tyson *v.* Postlethwaite, 18 Ill. 727; Perry *v.* P., 14 Ill. 496; Smith *v.* P., 25 Ill. 17, [76 Am. D. 780; Springfield Com. *v.* P., 137 Ill. 660, 27 N. E. R. 698; Cook Co. *v.* Gilbert, 146 Ill. 268, 33 N. E. R. 761; Louisville R. R. Co. *v.* E. St. L., 134 Ill. 656, 25 N. E. R. 962.]

Indiana.—S. *v.* Mullikin, 8 Blackf. 260; Fuller *v.* S., 1 Blackf. 63; Strong *v.* S., 1 Blackf. 193; Cheezem *v.* S., 2 Ind. 149; S. *v.* Miskimmons, 2 Ind. 440; King *v.* S., 2 Ind. 523; S. *v.* You-

also in the notes to the foregoing discussions. They are not meant to be, and are not, an exhaustive collection.

mans, 5 Ind. 280; Simington *v.* S., 5 Ind. 479; Henry *v.* Henry, 13 Ind. 250; S. *v.* Horsey, 14 Ind. 185; S. *v.* Pierce, 14 Ind. 302; Cordell *v.* S., 22 Ind. 1; Webb *v.* Baird, 6 Ind. 13; Dodd *v.* S., 18 Ind. 56; Hamlyn *v.* Nesbit, 37 Ind. 284; Ardery *v.* S., 56 Ind. 328; S. *v.* Miller, 58 Ind. 399; S. *v.* Smith, 59 Ind. 179; Swinney *v.* Ft. Wayne, etc. R. R. Co., 59 Ind. 205; S. *v.* Christman, 67 Ind. 328; Douglass *v.* S., 72 Ind. 385; [Baum *v.* Thoms, 150 Ind. 378, 65 Am. St. R. 368; S. *v.* Brugh, 5 Ind. Ap. 592, 32 N. E. R. 869; Carr *v.* S., 127 Ind. 204, 26 N. E. R. 778, 22 Am. St. R. 624; Thomas *v.* Butler, 139 Ind. 245; Bruce *v.* Cook, 136 Ind. 214. 35 N. E. R. 992.]

Iowa.—S. *v.* Moffett, 1 Greene (Iowa), 247; Jones *v.* S., 1 Iowa, 395; Goodwin *v.* Thompson, 2 Greene (Iowa), 329; Baker *v.* The Milwaukee, 14 Iowa, 214; S. *v.* Donehey, 8 Iowa, 396; Stoneman *v.* Whaley, 9 Iowa, 390; [Snell *v.* R. R. Co., 78 Iowa, 88, 42 N. W. R. 588; Straight *v.* Crawford, 73 Iowa, 676, 39 N. W. R. 920; S. *v.* Courtney, 73 Iowa, 619, 35 N. W. R. 685; Smith *v.* R. R. Co., 86 Iowa, 202, 53 N. W. R. 128; Sherman *v.* Des Moines, 100 Iowa, 88; Brown *v.* McCollum, 76 Iowa, 479, 41 N. W. R. 197, 14 Am. St. R. 228; Hancock *v.* District, 78 Iowa, 550, 43 N. W. R. 527; Pearson *v.* Distillery, 72 Iowa, 348, 34 N. W. R. 1.]

Kansas.—S. *v.* Young, 17 Kan. 414; [Com'rs *v.* Hudson, 20 Kan. 71; S. *v.* Schmidt, 34 Kan. 399, 8 Pac. R. 867; S. *v.* Stiedt, 31 Kan. 245, 1 Pac. R. 635.]

Kentucky.—Ely *v.* Thompson, 3 A. K. Mar. 70; Ervine *v.* Com., 5 Dana, 216; Harrison *v.* Chiles, 3 Litt. 194; Gregory *v.* Com., 2 Dana, 417; Adams *v.* Ashby, 2 Bibb, 96; Eccles *v.* Stephenson, 3 Bibb, 517; Lillard *v.* McGee, 4 Bibb, 165; Hickman *v.* Littlepage, 2 Dana, 344; Com. *v.* Craig, 15 B. Mon. 534; [Com. *v.* Weller, 14 Bush, 218; Auditor *v.* Trustees, 81 Ky. 680; Adams *v.* Lexington, 83 Ky. 657; Beatty *v.* Com., 91 Ky. 313, 15 S. W. R. 856; Com. *v.* Godshaw, 92 Ky. 435, 17 S. W. R. 737.]

Louisiana.—Caldwell *v.* St. Louis Perpetual Ins. Co., 1 La. An. 85; De Armas Case, 10 Mart. (La.) 158; Bernard *v.* Vignaud, 10 Mart. (La.) 482; Herman *v.* Sprigg, 3 Mart. (N. S.) 190; S. *v.* Judge, 14 La. An. 486; S. *v.* Fuller, 14 La. An. 720; New Orleans *v.* Mechanics' and Traders' Bank, 15 La. An. 107; Weaver *v.* Maillot, 15 La. An. 395; S. *v.* Carodine, 28 La. An. 24; Peet *v.* Nalle, 30 La. An. 949; S. *v.* Daniel, 31 La. An. 91; [S. *v.* Labatut, 39 La. An. 513, 2 S. R. 550; New Orleans *v.* St. Anna Asylum, 31 La. An. 292; Wintz *v.* Girardey, 31 La. An. 381.]

Maine.—Gooch *v.* Stephenson, 13 Me. 371; Towle *v.* Marrett, 3 Greenl. 22, [14 Am. D. 206;] Parsons *v.* Brigham, 34 Me. 240; S. *v.* Woodward, 34 Me. 293; S. *v.* Thompson, 70 Me. 196; [Smith *v.* Sullivan, 71 Me. 150; Staples *v.* Peabody, 83 Me. 207, 22 Atl. R. 113; Starbird *v.* Brown, 84 Me. 238, 24 Atl. R. 824.]

Maryland.—Dugan *v.* Gittings, 3 Gill, 138, [43 Am. D. 306;] Wright *v.* Freeman, 5 Har. & J. 467; Chesapeake and Ohio Canal *v.* Baltimore & Ohio R. R. Co., 4 Gill & J. 1; Frederick *v.* Groshon, 30 Md. 436; Cumberland *v.* Magruder, 34 Md. 381; [S. *v.* Benzinger, 33 Md. 481; Yunger *v.* S., 78 Md. 574, 28 Atl. R. 404; Turner *v.* S., 55 Md. 240; Weiskittle *v.* S., 58 Md. 155.]

Massachusetts.—Com. *v.* Worcester, 3 Pick. 462; Jennings *v.* Com., 17 Pick. 80; Wilde *v.* Com., 2 Met. 408; Com. *v.* Cooley, 10 Pick. 37; Shattuck *v.* Woods, 1 Pick. 171; Goodenow *v.* Buttrick, 7 Mass. 140; Bartlet

§ 163a. Course of the discussion.— Having, in this chapter, seen what are the leading doctrines of repeal, we shall in the next chapter follow some of them more into detail. And in

v. King, 12 Mass. 537; Ashley, Appellant, 4 Pick. 21; Mason v. Waite, 1 Pick. 452; Nichols v. Squire, 5 Pick. 168; Com. v. Ayer, 3 Cush. 150; Ellis v. Paige, 1 Pick. 43; Com. v. Kimball, 21 Pick. 373; Com. v. King, 13 Met. 115; Britton v. Com., 1 Cush. 302; Salem Turnpike and Chelsea Bridge v. Hayes, 5 Cush. 458; Com. v. Herrick, 6 Cush. 465; Com. v. Flannelly, 15 Gray, 195; Com. v. Norton, 13 Allen, 550; Carter v. Burt, 12 Allen, 424; New London Northern R. R. Co. v. Boston, etc. R. R. Co., 102 Mass. 386; Com. v. Smith, 103 Mass. 444; Com. v. Costello, 118 Mass. 454; [United Hebrews v. Benshimal, 130 Mass. 325; French v. Conn. Co., 145 Mass. 261, 14 N. E. R. 113; Com. v. Manchester, 152 Mass. 230, 25 N. E. R. 113; Com. v. Kelly, 163 Mass. 169, 39 N. E. R. 776.]

[*Michigan.*— P. v. Com'r, 23 Mich. 270; P. v. Hobson, 48 Mich. 27, 11 N. W. R. 771; P. v. Bussell, 59 Mich. 104, 26 N. W. R. 306; P. v. Hanrahan, 75 Mich. 611, 42 N. W. R. 1124; P. v. Furman, 85 Mich. 110, 48 N. W. R. 169.]

Minnesota.—Maple Lake v. Wright, 12 Minn. 403; Burwell v. Tullis, 12 Minn. 572; S. v. Herzog, 25 Minn. 490; [Moss v. St. Paul, 21 Minn. 421; S. v. Archibald, 43 Minn. 328, 45 N. W. R. 606; S. v. Rieger, 59 Minn. 151, 60 N. W. R. 1087; S. v. Smith, 62 Minn. 540, 64 N. W. R. 1022.]

Mississippi.— White v. Johnson, 23 Miss. 68; Shelton v. Baldwin, 26 Miss. 439; [Pons v. S., 49 Miss. 1; Gibbons v. Brittenum, 56 Miss. 232; S. v. Elks, 69 Miss. 895, 13 S. R. 255.]

Missouri.— S. v. Merry, 3 Mo. 278; Smith v. S., 14 Mo. 147; S. v. St. Louis County Court, 41 Mo. 52; [S. v. Slover, 134 Mo. 607, 31 S. W. R. 1054; St. Jo R. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. R. 581; S. v. School Board, 131 Mo. 505, 33 S. W. R. 3.]

Nevada.— Thorpe v. Schooling, 7 Nev. 15; [S. v. Rogers, 10 Nev. 319; Skyrme v. Occidental Co., 8 Nev. 220.]

New Hampshire.— S. v. Buckman, 8 N. H. 203, [29 Am. D. 646;] Leighton v. Walker, 9 N. H. 59; [S. v. Otis, 42 N. H. 71; Hillsborough v. Manchester, 49 N. H. 56; Spaulding's Appeal, 52 N. H. 336.]

New Jersey.— Perine v. Van Note, 1 Southard, 146; Buckallew v. Ackerman, 3 Halst. 48; S. v. Chambersburg, 8 Vroom, 258; [Road Com. v. Harrington, 25 Vr. 274, 23 Atl. R. 666; Mersereau v. Mersereau, 6 Dick. 382, 26 Atl. R. 682; S. v. Crusius, 28 Vr. 279; Wall v. Bradshaw, 25 Vr. 175, 25 Atl. R. 271.]

New York.— Vallance v. King, 3 Barb. 548; P. v. Townsey, 5 Denio, 70; Crittenden v. Wilson, 5 Cow. 165, [15 Am. D. 462;] Wright v. Smith, 13 Barb. 414; Bowen v. Lease, 5 Hill (N. Y.), 221; Williams v. Potter, 2 Barb. 316; Almy v. Harris, 5 Johns. 175; Platt v. Sherry, 7 Wend. 236; Scidmore v. Smith, 13 Johns. 322; Wheaton v. Hibbard, 20 Johns. 290, [11 Am. D. 284;] Stafford v. Ingersol, 3 Hill (N. Y.), 38; Renwick v. Morris, 3 Hill (N. Y.), 621, 7 Hill (N. Y.), 575; McCartee v. Orphan Asylum Society, 9 Cow. 437, [18 Am. D. 516;] Hand v. Ballou, 2 Kern. 541; P. v. McCann, 16 N. Y. 58, [69 Am. D. 642;] New York v. Walker, 4 E. D. Smith, 258; Manchester v. Herrington, 6 Seld. 164; [McKenna v. Edmundstone, 91 N. Y. 231; Buffalo Ass'n v. Buffalo, 118 N. Y. 61, 22 N. E. R. 962; N. Y. Institution, 121 N. Y. 234, 24 N. E. R. 378; P. v. Keller, 54 N. Y. Sup. 1011; Wirt v. Supervisors, 90 Hun, 205.]

North Carolina.— S. v. Henderson, 2 Dev. & Bat. 543; S. v. Walker, N. C.

the chapter next following we shall consider the consequences of repeal.

Term R. 229; S. *v.* Seaborn, 4 Dev. 305, 310; S. *v.* Nat, 13 Ire. 154; [Greensboro *v.* McAdoo, 112 N. C. 359, 17 S. E. R. 178; S. *v.* Snow, 117 N. C. 774; S. *v.* Williams, 117 N. C. 753; S. *v.* Womble, 112 N. C. 862, 17 S. E. R. 491, 19 L. R. A. 827.]

Ohio.— Carter *v.* Hawley, Wright, 74; Moore *v.* Vance, 1 Ohio, 1; Dodge *v.* Gridley, 10 Ohio, 173, 178; Seymour *v.* Milford & Chillicothe Turnpike, 10 Ohio, 476, 482; Calkins *v.* S., 14 Ohio St. 222; [Commissioners *v.* Board, 39 Ohio St. 628; S. *v.* Rabbits, 46 Ohio St. 178, 19 N. E. R. 437.]

Pennsylvania.— Foster *v.* Com., 8 Watts & S. 77; Drew *v.* Com., 1 Whart. 279; Report of Judges, 3 Binn. 595; Com. *v.* Cromley, 1 Ashm. 179; Street *v.* Com., 6 Watts & S. 209; Com. *v.* Evans, 13 S. & R. 426; Jefferson *v.* Reitz, 56 Pa. St. 44; Gwinner *v.* Lehigh, etc. R. R. Co., 55 Pa. St. 126; Com. *v.* McGuirk, 78 Pa. St. 298; [Homer *v.* Com., 106 Pa. St. 221, 51 Am. R. 521; Mallory *v.* Com., 115 Pa. St. 25, 7 Atl. R. 790; Morrison *v.* County, 127 Pa. St. 110, 17 Atl. R. 755.]

Rhode Island.— S. *v.* Wilbor, 1 R. I. 199, [36 Am. D. 245; Verry *v.* Com., 12 R. I. 578; S. *v.* Beswick, 13 R. I. 211, 43 Am. R. 26.]

South Carolina.— S. *v.* Jones, 1 McMul. 236, [36 Am. D. 257;] S. *v.* Williams, 2 Rich. 418, [45 Am. D. 741;] S. *v.* Baldwin, 2 Bailey, 541; S. *v.* Brown, 2 Speers, 129; S. *v.* Bowen, 3 Strob. 573; S. *v.* Nicholas, 2 Strob. 278; S. *v.* Thompson, 2 Strob. 12, [47 Am. D. 588;] S. *v.* Cattell, 2 Hill (S. C.), 291; S. *v.* Huntington, 3 Brev. 111; S. *v.* Evans, 3 Hill (S. C.), 190; S. *v.* Brock, 11 Rich. 447; S. *v.* Elrod, 12 Rich. 662; Linam *v.* Johnson, 2 Bailey, 137; S. *v.* Stoll, 2 S. C. 538; S. *v.* Gurney, 2 S. C. 559; S. *v.* Branham, 13 S. C. 389; [Scurry *v.* Coleman, 14 S. C. 169; S. *v.* Anderson, 22 S. C. 587; Irwin *v.* Brooks, 19 S. C. 104.]

Tennessee.— S. *v.* Gainer, 3 Humph. 39; S. *v.* Rutledge, 8 Humph. 32; Simpson *v.* S., 10 Yerg. 525; Taylor *v.* S., 7 Humph. 510; S. *v.* Martin, 3 Heisk. 487; France *v.* S., 6 Bax. 478; [Bailey *v.* Drane, 96 Tenn. 16; Hall *v.* S., 3 Lea, 557; Burnett *v.* Maloney, 97 Tenn. 697; Knoxville *v.* Lewis, 12 Lea, 180; R. R. Co. *v.* Thompson, 101 Tenn. 197.]

Texas.— Fowler *v.* Brown, 5 Tex. 407; Rogers *v.* Watrous, 8 Tex. 62, [58 Am. D. 100;] S. *v.* Horan, 11 Tex. 144; Greer *v.* S., 22 Tex. 588; May *v.* S., 35 Tex. 650; S. *v.* Perry, 44 Tex. 100; Monroe *v.* S., 3 Tex. Ap. 341; Ellison *v.* S., 6 Tex. Ap. 248; Hunt *v.* S., 7 Tex. Ap. 212; Myers *v.* S., 8 Tex. Ap. 321; [Stirman *v.* S., 21 Tex. 734; Laredo *v.* Martin, 52 Tex. 548; Tunstall *v.* Wormley, 54 Tex. 476; S. *v.* R. R. Co., 57 Tex. 534; Laughter *v.* Seela, 59 Tex. 177; Brown *v.* Chancellor, 61 Tex. 437; Yarborough *v.* Collins, 91 Tex. 306, 43 S. W. R. 872; S. *v.* Smith, 44 Tex. 444; Gill *v.* S., 30 Tex. 514.]

Vermont.— S. *v.* McLeran, 1 Aikens, 311; S. *v.* Wilkinson, 2 Vt. 480, [21 Am. D. 560;] Pratt *v.* Jones, 25 Vt. 303, 307; [Hogaboon *v.* Highgate, 55 Vt. 412; French *v.* Holt, 57 Vt. 187; *In re* Snell, 58 Vt. 207, 1 Atl. R. 566.]

Virginia.— Com. *v.* Pegram, 1 Leigh, 569; Lanthrop *v.* Com., 6 Grat. 671; McReady *v.* Com., 27 Grat. 982; [Justice *v.* Com., 81 Va. 209; Davies *v.* Creighton, 33 Grat. 696; Hogan *v.* Guigon, 29 Grat. 705.]

Wisconsin.— Schieve *v.* S., 17 Wis. 252; [S. *v.* Richards, 76 Wis. 354, 44 N. W. R. 1104; Schneider *v.* Staples, 66 Wis. 167, 28 N. W. R. 145.]

CHAPTER XIX.

THE DOCTRINE OF IMPLIED REPEAL COMBINING WITH OTHER DOCTRINES.

§§ 163*b*, 163*c*. Introduction.
163*d*–164. Concurrence in laws avoiding repeal.
164*a*–174. Divisibility of laws avoiding repeal.

§ 163b. In general.— It has already been made apparent in this volume that the several doctrines of the law are not separate entities, but each is a thread in a seamless garment.[1] This truth is elemental in our system of jurisprudence, and doubtless in every other. So the doctrine of implied repeal combines with, modifies, and is modified by, every other doctrine in contact wherewith the statute has the effect to place it. We shall not, in this chapter, undertake to trace the consequences of this contact through the entire law, but shall simply examine such of them as will open to the reader's understanding the larger subject, and give him a practical command of all whenever the occasion arises. Limiting, therefore, the sphere of our survey,—

§ 163c. How chapter divided.— We shall consider: I. The doctrine of concurrent remedies and sources of right as avoiding implied repeal; II. The doctrine of the divisibility of laws as avoiding, by admitting of partial repeal, the necessity of entire repeal.

I. The Doctrine of Concurrent Remedies and Sources of Right as Avoiding Implied Repeal.

§ 163d. In nature.— It is a common phenomenon in nature, that, of two or more things, any one, or all in combination, may equally well execute a given function; as, for example, the two eyes of a man may be used severally or jointly to see a given object. So,—

In law.— Two or more separate laws may establish the same right, or provide redress for the same wrong. And the person

[1] And see *ante*, §§ 4–7.

seeking to enforce the right or avenge the wrong may proceed on the law he chooses. And bills of exchange, bills of lading, and other contracts are every day done in duplicate or triplicate; one part being, to a claimant, equally available as all. The forms of this general truth are, in the law, endless. Hence,—

§ 163*e*. Doctrine defined.—The doctrine of this sub-title is that a statute establishing the same right or remedy as a prior law does not by implication repeal it, but a party may proceed under either, at his election, unless the two are repugnant, and then the repeal takes place to the extent of the repugnance.[1] Thus,—

§ 164. Jurisdiction of court—(Election).—The jurisdiction of one court is not taken away by an affirmative statute giving the same to another. Either can then hear the cause, at the election of the suitor.[2] For example, "If, by a former law," says Blackstone, "an offense be indictable at the quarter sessions, and the latter law makes the same offense indictable at the assizes, here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either, unless the new statute subjoins express negative words, as that the offense shall be indictable at the assizes and not elsewhere."[3] But,—

Proceedings pending in one court bar same in another.—Since the common law forbids the harassing of a person by two suits at a time for the same thing,[4] it results that, after a competent tribunal has obtained jurisdiction of a cause, another of con-

[1] And see *ante*, §§ 154, 158–162.

[2] Crim. Pro., I, § 315; *ante*, § 112; Com. *v.* White, 8 Pick. 453; Murfree *v.* Leeper, 1 Tenn. 1; Burginhofen *v.* Martin, 3 Yeates, 479; Overseers *v.* Smith, 2 S. & R. 363; Com. *v.* McCloskey, 2 Rawle, 369; Wright *v.* Marsh, 2 Greene (Iowa), 94; Galsworthy *v.* Durrant, 8 Weekly R. 594; Shaftesbury *v.* Russell, 1 B. & C. 666, 673, 674; Cates *v.* Knight, 3 T. R. 442, 444; Cooke *v.* State Nat. Bank, 52 N. Y. 96.

[3] 1 Bl. Com. 90.

[4] Kerbey *v.* Siggers, 2 Dowl. P. C. 659; Kirby *v.* Siggers, 2 Dowl. P. C. 813; Johnston *v.* Bower, 4 Hen. & M. 487; Buffum *v.* Tilton, 17 Pick. 510; Humphries *v.* Dawson, 38 Ala. 199; Boyce *v.* Douglass, 1 Camp. 60; Combe *v.* Pitt, 3 Bur. 1423, 1432; Prosser *v.* Chapman, 29 Conn. 515; Rogers *v.* Hoskins, 15 Ga. 270; McKinsey *v.* Anderson, 4 Dana, 62; Tracy *v.* Reed, 4 Blackf. 56; Davis *v.* Dunklee, 9 N. H. 545; Parker *v.* Colcord, 2 N. H. 36. And see 2 Kent, Com. 121–126; [Mattel *v.* Conant, 156 Mass. 418, 31 N. E. R. 487; Warner *v.* Hopkins, 111 Pa. St. 328, 2 Atl. R. 83, 56 Am. D. 266; Trawick *v.* Brown, 74 Tex. 522, 12 S. W. R. 216.]

current jurisdiction is precluded from entertaining the like suit while this one is pending. The rule, therefore, is that the court first taking jurisdiction is entitled to retain it to the end.[1] So,—

Indict under statute or common law.— It is every-day practice in the criminal courts to proceed against an offender either under a statute or at the common law, as the prosecuting power elects.[2] Even where an indictment is meant to be drawn on a statute, if it proves defective as such, yet is good at the common law, it stands,— the court rejecting the concluding words, "against the form of the statute," as surplusage.[3] And,—

Election where no repeal.— In all cases where the new statute does not repeal the prior law, both laws have a concurrent efficacy, and suitors may elect under which to proceed.[4]

[1] 1 Bishop, Mar. Women, § 634; 1 Crim. Pro., § 315; Withers *v.* Denmead, 22 Md. 135; Buck *v.* Colbath, 3 Wall. 334; Mason *v.* Piggott, 11 Ill. 85; McNab *v.* Heald, 41 Ill. 326; Stearns *v.* Stearns, 16 Mass. 167; S. *v.* Yarbrough, 1 Hawks, 78; Thompson *v.* Hill, 3 Yerg. 167.

[2] 1 Saund. Wms. ed. (6th) 135*b*, note; Gooch *v.* Stephenson, 13 Me. 371; S. *v.* Abram, 4 Ala. 272. See S. *v.* Savannah, T. U. P. Charl. 235, [4 Am. D. 708;] S. *v.* Wilkinson, 2 Vt. 480, [21 Am. D. 560;] Reg. *v.* Tinsley, Reg. *v.* Brightside Birelow, and Reg. *v.* Attercliffe *cum* Darnall, 4 New Sess. Cas. 47, 14 Jur. 174, 19 Law J. (N. S.) M. C. 50; S. *v.* Morton, 27 Vt. 310, [65 Am. D. 201;] S. *v.* Norton, 3 Zab. 33; S. *v.* Berry, 4 Halst. 374; S. *v.* Branham, 13 S. C. 389; Washington, etc. Turnpike *v.* S., 19 Md. 239; *Ex parte* Birchfield, 52 Ala. 377; S. *v.* Worden, 46 Conn. 349. See S. *v.* Boogher, 71 Mo. 631. Where the charter of a turnpike corporation provided a penalty for a failure to keep the road in repair, but contained no negative words, the court held that an indictment for non-repair against the corporation would still lie at common law. Waterford & Whitehall Turnpike *v.* P., 9 Barb. 161. And see S. *v.* Virt, 3 Ind. 447.

[3] Crim. Pro., I, § 601; Rex *v.* Dickenson, 1 Saund. (Wms. ed.) 135, note; Reg. *v.* Wigg, 2 Ld. Raym. 1163; Benuet *v.* Talbois, 1 Ld. Raym. 149; S. *v.* Walker, N. C. Term R. (Taylor), 229.

So recognizance.— A recognizance not strictly conformable to the statute may be good at the common law. Phelps *v.* Parks, 4 Vt. 488, the court referring to Fanshaw *v.* Morrison, 2 Ld. Raym. 1138; Johnson *v.* Laserre, 2 Ld. Raym. 1459; Young *v.* Shaw, 1 D. Chip. 224; S. P., Reg. *v.* Ewer, Holt, 612. And see Crim. Pro., I, § 264*a*.

[4] Broom, Leg. Max. (2d ed.) 25; Foster's Case, 11 Co. 56, 62; Richards *v.* Dyke, 3 Q. B. 256, 268; Gooch *v.* Stephenson, 13 Me. 371; Fuller *v.* S., 1 Blackf. 63; Almy *v.* Harris, 5 Johns. 175; Platt *v.* Sherry, 7 Wend. 236; Farmers' Turnpike *v.* Coventry, 10 Johns. 389; Colden *v.* Eldred, 15 Johns. 220; [Am. Co. *v.* Batesville, 139 Ind. 77.]

II. THE DOCTRINE OF THE DIVISIBILITY OF LAWS AS AVOIDING, BY ADMITTING OF PARTIAL REPEAL, THE NECESSITY OF ENTIRE REPEAL.

§ 164a. Nature of divisibility.— The law being, alike while it remains the pure common law and when it is augmented by statutes, a seamless mass in distinction from a mere collection of separate parts,[1] a carving off, by a repugnant statute, of a portion from the mass to be held as impliedly repealed, may cut as well through the written as the unwritten old. The separation cannot always be made absolutely anywhere, because the nature of the matter may forbid; but it can be made as well through the statutes, without reference to their clauses in formal terms, as through the common law. Now,—

Illustrations.— For illustrations of this doctrine the reader is referred to the cases in which statutes are held to be void in part for unconstitutionality, and by-laws void in part as unauthorized.[2] Other illustrations will appear as we proceed.

§ 165. Repeal or modification — (Partial, of statute).— In the last chapter we saw something of so much of this doctrine as relates to the implied repeal of a prior statute. It may be partial.[3] And such partial repeal is, in essence, simply a branch of that sort of modification of law by law to which a chapter further back is devoted.[4] It is not always in the books called by the name repeal. Nor would it be a violent departure from usage in legal language to say that, whenever an earlier provision and a later can to any extent stand consistently together, there is no repeal, but only a modification of law by law.[5] If there is a partial conflict, the prior law is, to the extent of it, abrogated; but where such prior law consists of a statute, we do not say, speaking of it as a whole, that it is repealed.

§ 166. Where separable.— In illustration of the doctrine that, for repeal, the law is separable at some places and not at others, according to the matter composing it,[6] and as show-

[1] *Ante*, § 163*b*.

[2] *Ante*, § 34.

[3] *Ante*, § 157.

[4] *Ante*, § 122 *et seq.*

[5] This doctrine was stated in part by Mathews, J., as follows: "A particular law is not repealed by a subsequent general law, unless there be such repugnancy between them that they cannot both be complied with *under any circumstances*." De Armas Case, 10 Mart. (La.) 158, 172.

[6] *Ante*, § 164*a*.

ing something of the bounds of the doctrine, yet not exhausting the subject, the following will be helpful: —

Offense and punishment. — We can always separate the offense from the punishment. So that, for example, a statute which provides a new punishment for an old offense repeals by implication only so much of the prior law as concerns the punishment; leaving it permissible to indict an offender either under the old law, whether statutory or common, and inflict on him upon conviction the punishment ordained by the new,[1] or under the new statute, at the election of the prosecuting power.[2] The offense and punishment, therefore, may be defined by different laws; and so, as we have seen,[3] if a statute simply creates an offense, the common-law punishment may by implication be imposed. But as law without its penal or other like sanction is impossible,[4] if there is a statute, not merely reenacting the common law, but creating an offense and fixing its penalty, then another statute repeals so much of this one as relates to the penalty, all right to prosecute for a violation of it is gone. The abolition of the punishment abolished the crime.[5] Still,—

§ 167. Form of indictment. — In mere form of the indictment, it was ruled at an English trial,[6] and so in authority the better English doctrine seems at the common law to have been,[7] that, where the offense was originally created by a statute, affixing to it a penalty, and a subsequent statute increased the penalty, the indictment must conclude against the form of the statutes, in the plural.[8] But this is at most a mere technical

[1] Com. *v.* Searle, 2 Binn. 332, 339, Mod. 378, 379. See, however, Felix [4 Am. D. 446;] Williams *v.* Reg., 7 Q. B. 250; S. *v.* Wilbor, 1 R. I. 199, [36 Am. D. 245;] McCann *v.* S., 13 Sm. & M. 471; S. *v.* Thompson, 2 Strob. 12, [47 Am. D. 588;] Rex *v.* Berry, 1 Moody & R. 463; S. *v.* Williams, 2 Rich. 418, [45 Am. D. 741;] Rex *v.* Bridges, 8 East, 53. But see S. *v.* Boogher, 71 Mo. 631.

[2] Rex *v.* Dickenson, 1 Saund. (Wms. ed.) 135; Rex *v.* Dixon, 10 Mod. 335, 337, Say. 226; Rex *v.* Urlyn, 2 Saund. (Wms. ed.) 308, note; Rex *v.* Chatburn, 1 Moody, 403; Sir John Knight's Case, 3 Mod. 117; Rex *v.* O'Brian, 7 *v.* S., 18 Ala. 720.

[3] *Ante*, § 138.

[4] Crim. Law, I, §§ 6–8.

[5] Reg. *v.* Adams, Car. & M. 299. See S. *v.* King, 69 N. C. 419; S. *v.* Smith, 44 Tex. 443; Smith *v.* S., 7 Tex. Ap. 286.

[6] Reg. *v.* Adams, Car. & M. 299.

[7] 1 Chit. Crim. Law (2d Eng. ed.), 291, and Am. notes; 2 Gab. Crim. Law, 246; Lee *v.* Clarke, 2 East, 333, 339; Rex *v.* West, Owen, 134.

[8] For the distinction, see Crim. Pro., I, § 605.

rule of pleading, not resting well on principle; and, in this country, the question has been decided both ways.[1] Even in England the plural form has been ruled to be bad and the singular good.[2] Now, although the punishment is the measure of the offense (there being none where there is no punishment, and it being greater or less according as the punishment is so); and although, therefore, the indictment must set out every element of crime which enters into the punishment,[3] since otherwise it does not set out fully the offense, the true view as to this question of pleading seems to have been expressed by Lord Denman, thus: "It is the offense which is the subject of indict-

[1] That the singular form is sufficient, Strong *v.* S., 1 Blackf. 193; S. *v.* Wilbor, 1 R. I. 199, [36 Am. D. 245;] S. *v.* Dayton, 3 Zab. 49, [53 Am. D. 270;] S. *v.* Berry, 4 Halst. 374; Butman's Case, 8 Greenl. 113. That the plural form must be employed, S. *v.* Moses, 7 Blackf. 244, and King *v.* S., 2 Ind. 523, the judges being apparently unaware of their previous decision in Strong *v.* S.; S. *v.* Cassel, 2 Har. & G. 407. See Kane *v.* P., 8 Wend. 203; U. S. *v.* Gibert, 2 Sumner, 19; Sears *v.* U. S., 1 Gallis. 257, 259. In S. *v.* Pool, 2 Dev. 202, a majority of the judges held that, where one statute creates an offense under a penalty recoverable in a civil action, and another makes it indictable, the indictment must conclude against the form of the statutes, in the plural. But Henderson, C. J., dissenting, said: "I am inclined to believe that this is the rule; that, where it is necessary to have recourse to two or more statutes to show that the acts imputed as crimes are in fact so, that is, acts forbidden or duties enjoined, . . . there both or all the acts must be referred to. . . . But it cannot be said that the defendant did an act contrary to the prohibitions of a statute, when the statute did not prohibit it; in fact, was silent in regard to it, and only prescribed the mode of prosecution, and the punishment upon conviction. . . . The defendant cannot be said to act contrary to a statute which prescribes nothing to be done, but only fixes the mode of proceeding against, and the measure of punishment to, those who have violated another." pp. 207, 208. In the supreme court of Maine, Parris, J., drew the distinctions as follows: "Where one statute creates the offense, and another gives the penalty, it seems to be settled that an indictment must conclude against the form of the *statutes*. But if there be more than one statute concerning the same offense, and the first of them was never discontinued, and the latter only qualify the method of proceeding upon the former, without altering the substance of its purview, it seems agreed that it is safe in an indictment on such a statute to conclude against the form of the statute. Where an offense is prohibited by several statutes, if only one is the foundation of the action, and the others are explanatory, it is sufficient to say, against the form of the *statute*." Morrison *v.* Witham, 1 Fairf. 421, 425.

[2] Reg. *v.* Wise, 1 Cox C. C. 80. See Crim. Pro., I, § 606.

[3] Crim. Pro., I, §§ 79–88, 533–542; II, §§ 48, 177, 565, 572.

ment, not the punishment;"[1] and the doctrine is settled in both countries, that, if the offense is originally at common law, and the punishment is by statute, a conclusion at common law is sufficient.[2]

§ 168. Change of punishment.— Two different punishments for precisely the same offense, with no variations in its elements, and no modifying discretion in the court, cannot, in the nature of things, subsist together.[3] And so are all the authorities to the extent that, in these circumstances, a milder new punishment repeals a severer old.[4] We have judicial intimations leading to the inference that the converse is not true; but if by a more recent enactment a heavier punishment than the old is established, a prisoner may be sentenced under either law.[5] If the new law defined the offense, omitting anything, however slight, which was in the old definition, this would be so;[6] but, where nothing of this sort intervenes, it is impossible the two different punishments should stand together. Therefore the only admissible view in principle, and the better in authority, is that the new punishment, whether greater or less than the old, repeals it by force of the repugnance.[7] Where, by two sec-

[1] Reg. *v.* Williams, 14 Law J. (N. S.) M. C. 164.

[2] Reg. *v.* Williams, *supra;* Williams *v.* Reg., 7 Q. B. 250, 1 Cox C. C. 179; Rex *v.* Chatburn, 1 Moody, 403; Fuller *v.* S., 1 Blackf. 63; Rex *v.* O'Brian, 7 Mod. 378, 379; Rex *v.* Jones, 1 Leach, 174; Reg. *v.* Bethel, 6 Mod. 17; S. *v.* Evans, 7 Gill & J. 290; Williams *v.* Reg., 10 Jur. 155; Russell *v.* Com., 7 S. & R. 489. See S. *v.* Flanigin, 5 Ala. 477; S. *v.* Jones, 5 Ala. 666; Rex *v.* Brown, 2 East, P. C. 1007. And see contrary *dictum* in Castro *v.* Reg., 6 Ap. Cas. 229, 232. In King *v.* S., 2 Ind. 523, the court, after laying down the doctrine that, where one statute defines the offense and another prescribes the punishment, the indictment must conclude in the plural, adds: "This is no doubt correct, for the obvious reason that neither statute would of itself support the prosecution." This doctrine can be just in principle only, if at all, in a state like Indiana where there are no common-law crimes. For, the reader will notice, the former statute would have supported the indictment, the same as would the common law in the case of a common-law offense; since, if the former statute had failed to prescribe a penalty, then, as we have seen, *ante*, § 138, the offense created by it would have been punishable at the common law.

[3] *Ante*, §§ 156*a*, 158.

[4] Henderson *v.* Sherborne, 2 M. & W. 236, 239; Smith *v.* S., 1 Stew. 506; S. *v.* Thompson, 2 Strob. 12, [47 Am. D. 588;] S. *v.* Whitworth, 8 Port. 434; U. S. *v.* Jones, 3 Wash. C. C. 209; S. *v.* Upchurch, 9 Ire. 454; S. *v.* Ripley, 2 Brev. 300; Burton *v.* Watkins, 2 Hill (S. C.), 674.

[5] Harrison *v.* Chiles, 3 Litt. 194; S. *v.* Taylor, 2 McCord, 483; Reg. *v.* Pugh, 6 Mod. 140, 141.

[6] *Post*, §§ 171, 172.

[7] Nichols *v.* Squire, 5 Pick. 168;

tions of one statute, jurisdiction over the same offense was given to different courts, and different punishments were prescribed, it was held that only the milder could be ordered by either tribunal.[1] Still,—

§ 169. Remedies differing with punishment.— Several concurrent remedies "of a different nature,"[2] carrying with them their respective penalties, may be provided for one offense; and each remedy may stand, penalty and all, without conflicting with the others.[3] "Therefore —

Indictment or other process for nuisance.— "Keeping of swine in the city, etc., being a nuisance at common law, the prosecutor is at liberty either to proceed by way of indictment for the nuisance, or to take that more expeditious remedy which is given him by the act of parliament, by sale of the swine."[4] So a statute making it penal to "injure a mill-dam" does not take away the common-law right to abate the nuisance, if the mill-dam becomes such.[5] And a statute providing a specific method of abating a nuisance does not abrogate the common-law method.[6]

Why? — There is no repugnance between provisions of different natures for the cure of a common evil. The case is substantially within the doctrine of the last sub-title.

§ 170. Remedies of different natures.—Nice questions arise as to whether or not two remedies are so far different in their natures that they may stand together. The common case is —

Civil and criminal.— A civil action for private redress, and an indictment for public, are of different natures, and they may

Perine *v.* Van Note, 1 Southard, 146; Buckallew *v.* Ackerman, 3 Halst. 48; Carter *v.* Hawley, Wright, 74; Com. *v.* Kimball, 21 Pick. 373; Sir John Knight's Case, 3 Mod. 117; Attorney-General *v.* Lockwood, 9 M. & W. 378, 391. See Clarke *v.* S., 23 Miss. 261; S. *v.* Ward, 6 N. H. 529; Sullivan *v.* P., 15 Ill. 233; *post*, §§ 169–171. In Pennsylvania this has been so provided, substantially, by statute. Com. *v.* Evans, 13 S. & R. 426; [Com. *v.* Hutzinger, 35 P. L. J. 364.]

[1] Scrimegrour *v.* S., 1 Chand. 48.

[2] Lord Abinger, in Henderson *v.* Sherborne, 2 M. & W. 236, 239.

[3] 1 Mod. 34, note; Rex *v.* Jackson, Cowp. 297; Reg. *v.* Wigg, 2 Ld. Raym. 1163; Jennings *v.* Com., 17 Pick. 80; Crittenden *v.* Wilson, 5 Cow. 165; [15 Am. D. 462;] S. *v.* Rutledge, 8 Humph. 32; Hodges *v.* S., 8 Ala. 55; Rex *v.* Moor, 2 Mod. 128; Simpson *v.* S., 10 Yerg. 525; Pitman *v.* Com., 2 Rob. (Va.) 800; U. S. *v.* Halberstadt, Gilpin, 262; Renwick *v.* Morris, 3 Hill (N. Y.), 621, 7 Hill (N. Y.), 575.

[4] Reg. *v.* Wigg, 2 Ld. Raym. 1163.

[5] S. *v.* Moffett, 1 Greene (Iowa), 247.

[6] Wetmore *v.* Tracy, 14 Wend. 250, [28 Am. D. 525.]

always be concurrent, and neither will be a bar to the other.[1] But —

Penal action and indictment.— Can a statutory penalty, imposed for public redress and made recoverable by an action civil in form, and an indictment for the same wrong, subsist thus together? In a sort of general sense it may be said that they can.[2] Yet the books are not in all respects so distinct on this question as one might wish. So let us look a little into the particulars.

Presumed legislative intent.— In New Jersey a statute having prohibited a thing under a penalty of $10, recoverable in an action of debt by any one suing for it, and a subsequent enactment having made it indictable and fixed the punishment at a fine of $20, the former provision was held to be repealed by the latter, because such, it was deemed, was the legislative intent.[3] But this case does not hold that there was any irreconcilable repugnance. On the other hand,—

Indictment and summary fine for nuisance — (Obstructing way).— The Vermont court held that a statutory provision imposing a fine of $7, to be recovered by complaint before a justice of the peace, for placing any obstruction in the highway, was merely cumulative, not interfering with the common-law remedy by indictment; but whether it superseded the common-law punishment, which is the question now under consideration, the court did not say.[4]

§ 171. Two penalties or punishments for one wrong.— There is nothing in the nature of things repugnant in laws which provide any number of distinct penalties or punishments — such as fine, forfeiture, imprisonment, and the like — for the same wrong. And numerous statutes do so provide. Nor does the nature of things forbid the ordaining of separate proceedings for their recovery. But our written constitutions forbid, to the extent of the provision "that no person shall be subject, for the same offense, to be twice put in jeopardy of life or limb."[5] Hence arise complications of doctrine, and the limits of what is constitutionally permissible are not precisely

[1] Crim. Law, I, §§ 264 *et seq.*, 1069.
[2] Crim. Law, I, § 1067.
[3] Buckallew *v.* Ackerman, 3 Halst. 48.
[4] S. *v.* Wilkinson, 2 Vt. 480, [21 Am. D. 560.] And see Salem Turnpike & Chelsea Bridge *v.* Hayes, 5 Cush. 458.
[5] Crim. Law, I, § 961.

defined.[1] It is, of course, no objection that the right to prosecute is derived from statutes passed at different times. Again,—

Offenses variously aggravated.— A part of the indictable offenses are, like successive circles of different dimensions, included within one another; a robbery, for example, being an assault committed under particular circumstances of aggravation.[2] In these cases an offender may be convicted of either the simpler or aggravated form, at the election of the prosecuting power; except that sometimes the line separating felonies and misdemeanors cannot in this way be passed. The several grades of offense thus appearing have their corresponding punishments, while yet a person convicted or acquitted in one degree is ordinarily exempt from prosecution in another.[3] Hence, if the new statute adds aggravations not in the old law of the offense, and creates a higher penalty;[4] or omits an aggravating quality and provides a lower penalty;[5] or, if the new statute is applicable to a particular class only of persons, who owe special duties in the matter,[6] the new punishment does

[1] P. *v.* Stevens, 13 Wend. 341; Reg. *v.* White, Dears. 203, 20 Eng. L. & Eq. 585; Blatchley *v.* Moser, 15 Wend. 215. The Illinois court, holding an officer not indictable for taking illegal fees, said: "A remedy has been provided by the infliction of a penalty for such acts; but the modes of proceeding to enforce such penalty are entirely of a civil nature." Pankey *v.* P., 1 Scam. 80, 82. Still there is doubt whether this view is just. A civil remedy in the nature of a penalty for the offense may well stand with a common-law indictment, the two remedies being enforceable together. [Remanding defendant to penitentiary after decision of appeal sentencing him to death is not a double punishment. P. *v.* Brush, 60 Hun, 399, 15 N. Y. Sup. 512. The legislature has power to provide for the recovery of a certain sum as punitive damages for an illegal act, although the same illegal act subjects the offender to a criminal prosecution. S. *v.* Schoonover, 135 Ind. 526, 35 N. E. R. 119. A civil law imposing penalties and forfeitures for usury, and a criminal law punishing the same, are consistent and may coexist. Waite *v.* Bartlett, 53 Mo. Ap. 378. Under a statute authorizing the court to punish by fine or imprisonment, the court has no right to sentence the offender to pay a fine in a certain time, and in default thereof that he be imprisoned. Root *v.* S., 58 N. J. L. 487, 34 Atl. R. 885. *Cf.* also S. *v.* Walters, 97 N. C. 439, 2 S. E. R. 539, 2 Am. St. R. 310; Com. *v.* Griffin, 105 Mass. 185. A statute imposing one or both of two optional penalties is not unconstitutional. P. *v.* Perini, 94 Cal. 573, 29 Pac. R. 1027.]

[2] Crim. Law, I, § 780.

[3] Crim. Law, I, § 1054.

[4] S. *v.* Maloney, R. M. Charl. 84.

[5] S. *v.* Buckman, 8 N. H. 203, [29 Am. D. 646;] Rex *v.* Taylor, Russ. & Ry. 373; S. *v.* Danforth, 3 Conn. 112; Southworth *v.* S., 5 Conn. 325.

[6] Gregory *v.* Com., 2 Dana, 417.

not supersede the old.[1] This is clear; but, where the change is the reverse of this, the same result does not necessarily follow. Thus, in Alabama it was held that, where the new law provided a less penalty for an offense of a higher grade than the old, it superseded the old.[2]

§ 172. Separate crimes of one transaction.— How far, under our constitutions, it is competent for legislation to make separate crimes of one transaction, providing for each its distinct punishment, this is not the place to inquire.[3] But, to the extent to which this can be constitutionally done, there is no repugnance between statutes which so provide. Therefore the one does not necessarily repeal the other.[4]

§ 173. As to offense in distinction from punishment.— Discarding the exceptional doctrine, peculiar to a limited number of our tribunals,[5] which holds a mere revision of laws, where there is no repugnance, to operate as a repeal of whatever of the old is within the scope of the new, we shall find the instances rare wherein a statute will by implication repeal the prior law, statutory or common, concerning the offense alone, as distinguished from the punishment. If the old and new are identical, there is no occasion for adjudging a repeal, since certainly they are not repugnant.[6] If they vary from each other, there is still no reason in ordinary circumstances for deeming them repugnant. Numerous shades and degrees of offense may, in the nature of things, and as transactions ordinarily are, attach to a single act; and, if the legislature by separate statutes has provided for more than one of these, no just reasons can forbid all to stand.[7] But,—

§ 174. Felony and misdemeanor.— Because of the different natures, under the common-law rules, of felony and misdemeanor, their different punishments, and the diverse modes of proceeding against the offender, the same act cannot be both the one and the other. Therefore if a statute elevates to a

[1] *Ante*, §§ 164, 169. And see S. *v.* Taylor, 2 McCord, 483; Rex *v.* Waddington, 1 B. & C. 26; Knowles *v.* S., 3 Day, 103; Com. *v.* Pegram, 1 Leigh, 569; Allen *v.* Com., 2 Leigh, 727; Taylor *v.* S., 7 Humph. 510.

[2] Smith *v.* S., 1 Stew. 506. And see S. *v.* Jones, 5 Ala. 666; S. *v.* Flanigin, 5 Ala. 477.

[3] Crim. Law, I, §§ 1060–1066.

[4] U. S. *v.* Nelson, 1 Abb. (U. S.) 135.

[5] *Ante*, §§ 158–162.

[6] *Ante*, §§ 163*d*, 163*e*.

[7] See cases cited *ante*, §§ 154–164; Com. *v.* Herrick, 6 Cush. 465.

felony what before was a misdemeanor, or creates a misdemeanor of what was before a felony, the old law is gone by reason of the repugnance, and the offender can be indicted only under the new.[1]

[1] Reg. *v.* Button, 12 Jur. 1017, 1021; Rex *v.* Robinson, 2 East, P. C. 1110, 1114, 1115, 2 Leach, 749; Rex *v.* Walford, 5 Esp. 62; S. *v.* Wright, 4 McCord, 358; Burton *v.* Watkins, 2 Hill (S. C.), 674; S. *v.* Dick, 2 Murph. 388; Warner *v.* Com., 1 Pa. St. 154, [44 Am. D. 114;] Rex *v.* Cross, 1 Ld. Raym. 711; s. c. *nom.* Rex *v.* Crosse, 12 Mod. 634; Rex *v.* Pim, Russ. & Ry. 425; Hayes *v.* S., 55 Ind. 99. [The doctrine of merger applies only when the precise act, viewed in respect of its precise consequences, is in question. St. Louis *v.* Lee, 8 Mo. Ap. 598.]

CHAPTER XX.

THE CONSEQUENCES FOLLOWING ACTUAL AND ATTEMPTED REPEALS.

§ 174*a*. Introduction.
175–180. General doctrine.
181–187. Specific questions.

§ 174a. Complications of doctrine.— Our written constitutions render, we shall see in this chapter, repeals in some circumstances practically impossible; as, where they would divest vested rights.[1] Complicated with this condition of the law are some nice common-law doctrines relating to the effect of conceded repeals. We shall not undertake to separate these two classes of cases under their distinct heads, but —

How chapter divided.— We shall consider, I. The general doctrine; II. Specific questions.

I. The General Doctrine.

§ 175. Right and remedy distinguished.— Both in the nature of things and in adjudication, there is a distinction between what pertains to the right and what to the remedy. And our entire law is separable into these two classes.

Concerning each.— Rights are the product of the legal rule as prevailing when and where the facts transpired;[2] and, when vested, they do not change with changes in the law.[3] Remedies are governed by the law of the place in which the rights are sought to be enforced or their violation avenged,[4] as existing at the time[5] when the proceedings are carried on and the judgment is rendered.

[1] *Ante*, § 85*a*.

[2] Bishop, Con., §§ 567–575; Don *v.* Lippmann, 5 Cl. & F. 1; Scott *v.* Seymour, 1 H. & C. 219.

[3] *Ante*, § 85*a*.

[4] May *v.* Breed, 7 Cush. 15, 34, [54 Am. D. 700;] Story, Confl. Laws, §§ 556–558; De la Vega *v.* Vianna, 1 B. & Ad. 284; Fergusson *v.* Fyffe, 8 Cl. & F. 121.

[5] Hale *v.* S., 15 Conn. 242; Lore *v.* S., 4 Ala. 173; S. *v.* Fletcher, 1 R. I. 193; Davidson *v.* Wheeler, Morris, 238; Knoup *v.* Piqua Bank, 1 Ohio St. 603. [Right of appeal is purely remedial. Hale *v.* Grogan (Ky.), 49 S. W. R. 464.]

§ 176. Remedy — (Procedure).— The procedure in a cause, whether civil or criminal, pertains to the remedy. And, subject to exceptions growing out of special reasons, it must conform to the general law of procedure prevailing at the place and time where and while the cause is instituted and progressing. In respect of past transactions, therefore, the same as of future ones, it may be changed from time to time, at the legislative pleasure.[1] Again,—

Punishment — (*Ex post facto*).— The punishment wherewith the law visits a crime, being, as we have seen, separable from the definition of the crime,[2] pertains to the remedy. A statute increasing it for offenses already committed would be void as *ex post facto;*[3] but, subject to this exception, a convicted prisoner may receive whatever sentence the law provides at the time it is pronounced, and no other can be imposed.[4] Now,—

§ 177. Repeal ends proceedings.— No court can entertain a cause without authority of law. Therefore the repeal of a statute terminates all proceedings under it.[5] And the same rule applies to a municipal by-law.[6] Thus,—

[1] *Ante*, §§ 84, 85*a*; Bishop, Con., §§ 571, 572; Brock *v.* Parker, 5 Ind. 538; Lore *v.* S., 4 Ala. 173; Hale *v.* S., 15 Conn. 242; U. S. *v.* Samperyac, Hemp. 118; Hickory Tree Road, 43 Pa. St. 139; R. R. Co. *v.* Hecht, 95 U. S. 168; Jones *v.* Davis, 6 Neb. 33; P. *v.* Essex, 70 N. Y. 228; De Mill *v.* Lockwood, 3 Blatch. 56; Searcy *v.* Stubbs, 12 Ga. 437; Ralston *v.* Lothain, 18 Ind. 303; Read *v.* Frankfort Bank, 23 Me. 318; Bank of U. S. *v.* Longworth, 1 McLean, 35; Sutherland *v.* De Leon, 1 Tex. 250, [46 Am. D. 100;] Hope *v.* Johnson, 2 Yerg. 125; P. *v.* Phelps, 5 Wend. 9. See Van Valkenburgh *v.* Torrey, 7 Cow. 252. [Though pleadings are made under old laws, the procedure must conform to the new. First Church *v.* Fadden (N. Dak.), 77 N. W. R. 615.]

[2] *Ante*, §§ 166, 167.

[3] Crim. Law, I, §§ 279, 281.

[4] S. *v.* Williams, 2 Rich. 418, [45 Am. D. 741;] S. *v.* Fletcher, 1 R. I. 193; *ante*, § 166.

[5] Hickory Tree Road, 43 Pa. St. 139; Thomas *v.* S., 3 Tex. Ap. 112; Musgrove *v.* Vicksburg, etc. R. R. Co., 50 Miss. 677; Smith *v.* Arapahoe Dist. Court, 4 Colo. 235; Miller's Case, 3 Wils. 420, 1 W. Bl. 451; Hunt *v.* Jennings, 5 Blackf. 195, [33 Am. D. 465;] Road in Hatfield, 4 Yeates, 392; Directors of the Poor *v.* R. R. Co., 7 Watts & S. 236; S. *v.* Lackey, 2 Ind. 285; Reg. *v.* Denton, 18 Q. B. 761, Dears. 3, 14 Eng. L. & Eq. 124; Com. *v.* Hampden, 6 Pick. 501, 508; Illinois & Michigan Canal *v.* Chicago, 14 Ill. 334; North Canal Street Road, 10 Watts, 351, [36 Am. D. 185;] Fenelon's Petition, 7 Pa. St. 173; [Wheeler *v.* S., 64 Miss. 462, 1 S. R. 632; S. *v.* Williams, 97 N. C. 455, 2 S. E. R. 55; Kennedy *v.* Adams (Nev.), 51 Pac. R. 840. The repeal of an act giving certain grounds for attachment has no effect

[6] Kansas City *v.* Clark, 68 Mo. 588.

In criminal prosecutions.— If the common or statutory law, which authorizes a prosecution and conviction for any offense, is repealed or expired [1] before final judgment, the court can go no further with the case.[2] Even after verdict rendered against the prisoner,[3] or after he has pleaded guilty,[4] sentence cannot be pronounced; and he must be discharged. The same result follows if there is a judgment which has been vacated by an appeal[5] or a writ of review.[6] But after final judgment, a repeal of the law will not arrest the execution of the sentence.[7] Again,—

upon attachment proceedings already pending. Mulnix *v.* Spratlin, 10 Colo. Ap. 390, 50 Pac. R. 1078; Fairchild *v.* U. S., 91 Fed. R. 297; Wikel *v.* County, 120 N. C. 451, 27 S. E. R. 117; Detroit *v.* Chapin, 108 Mich. 136, 66 N. W. R. 587, 37 L. R. A. 391. Most states have a saving clause which applies to such cases where the statute is criminal. *Cf.* S. *v.* Hardman, 16 Ind. Ap. 357, 45 N. E. R. 345.]

[1] The Helen, 6 Cranch, 203; The Rachel *v.* U. S., 6 Cranch, 329; Yeaton *v.* U. S., 5 Cranch, 281; The Irresistible, 7 Wheat. 551; Davidson *v.* Wheeler, Morris, 238; Eaton *v.* Graham, 11 Ill. 619. But see *post*, §§ 181, 182; [S. *v.* Mansel, 52 S. C. 468, 30 S. E. R. 481; Mahoney *v.* S., 5 Wyo. 520, 42 Pac. R. 13.]

[2] Com. *v.* Kimball, 21 Pick. 373; Com. *v.* Marshall, 11 Pick. 350, [22 Am. D. 377;] Taylor *v.* S., 7 Blackf. 93; Mayers *v.* S., 2 Eng. 68; Anonymous, 2 Lewin, 22; U. S. *v.* Passmore, 4 Dall. 372; Stoever *v.* Immell, 1 Watts, 258; Com. *v.* Beatty, 1 Watts, 382; Scott *v.* Com., 2 Va. Cas. 54; S. *v.* Cole, 2 McCord, 1; S. *v.* Fletcher, 1 R. I. 193; Attoo *v.* Com., 2 Va. Cas. 382; Com. *v.* Leftwich, 5 Rand. 657; Anonymous, 1 Wash. C. C. 84; P. *v.* Townsey, 5 Denio, 70, 72; 1 Kent, Com. 465; S. *v.* Allaire, 14 Ala. 435; Jordan *v.* S., 15 Ala. 746; S. *v.* Lloyd, 2 Ind. 659; Heald *v.* S., 36 Me. 62; Howard *v.* S., 5 Ind. 188; The Governor *v.* Howard, 1 Murph. 465; S. *v.* O'Conner, 13 La. An. 486; The Rachel *v.* U. S., 6 Cranch, 329; U. S. *v.* The Helen, 6 Cranch, 203; Yeaton *v.* U. S., 5 Cranch, 281; Wall *v.* S., 18 Tex. 682, [70 Am. D. 302;] S. *v.* Ingersoll, 17 Wis. 631; S. *v.* Cress, 4 Jones (N. C.), 421; Genkinger *v.* Com., 32 Pa. St. 99; S. *v.* Edward, 5 Mart. (La.) 474; Lunning *v.* S., 9 Ind. 309; Calkins *v.* S., 14 Ohio St. 222; Griffin *v.* S., 39 Ala. 541; Reg. *v.* Denton, 18 Q. B. 761, Dears. 3; S. *v.* Gumber, 37 Wis. 298; Tuton *v.* S., 4 Tex. Ap. 472; Halfin *v.* S., 5 Tex. Ap. 212; Carlisle *v.* S., 42 Ala. 523; Annapolis *v.* S., 30 Md. 112; U. S. *v.* Finlay, 1 Abb. (U. S.) 364; S. *v.* Long, 78 N. C. 571; Greer *v.* S., 22 Tex. 588; [Breitung *v.* Lindauer, 37 Mich. 217; Rood *v.* R. R. Co., 43 Wis. 146; Van Dyke *v.* McQuade, 86 N. Y. 38; Wheeler *v.* S., 64 Miss. 462, 1 S. R. 632; Anding *v.* Levy, 57 Miss. 51; Snell *v.* Campbell, 24 Fed. R. 880.]

[3] Com. *v.* Duane, 1 Binn. 601, [2 Am. D. 497;] Keller *v.* S., 12 Md. 322, [71 Am. D. 596;] Com. *v.* Pattee, 12 Cush. 501; S. *v.* Stone, 43 Wis. 481.

[4] Whitehurst *v.* S., 43 Ind. 473; Mullinix *v.* S., 43 Ind. 511.

[5] The Rachel *v.* U. S., 6 Cranch, 329; Yeaton *v.* U. S., 5 Cranch, 281; Chaplin *v.* S., 7 Tex. Ap. 87; Hubbard *v.* S., 2 Tex. Ap. 506; Montgomery *v.* S., 2 Tex. Ap. 618; Sheppard *v.* S., 1 Tex. Ap. 522, [28 Am. R. 422.] See S. *v.* Brewer, 22 La. An. 273.

[6] Lewis *v.* Foster, 1 N. H. 61.

[7] S. *v.* Addington, 2 Bailey, 516, [23 Am. D. 150;] Foster *v.* Medfield, 3 Met. 1.

In penal actions.— For the same reason, in cases where no vested private rights interpose, statutes authorizing *qui tam* and other penal actions in civil form for violations of public or *quasi*-public duty, follow the same rules as to the effect of repeal.[1] But,—

Before statute is in force.— Between the time of the enactment of a repealing statute and its going into operation, it produces no consequences whatever in any case.[2]

§ 177a. In other civil causes.— Subject to more numerous exceptions, the repeal of an ordinary civil statute is followed by the same results as of a criminal or penal one. The party loses his rights under it, and pending proceedings can be carried no further. With respect to future steps, the repealed act is regarded as having never existed.[3] Yet,—

Vested rights.— Since, under our written constitutions, vested rights cannot by any form of legislation be divested,[4] while still the remedy may be changed, but not so as to be virtually destroyed,[5] it follows, as a part of the same proposition, that no repeal of a statute can divest this class of rights. We may say

[1] Pope *v.* Lewis, 4 Ala. 487; S. *v.* Tombeckbee Bank, 1 Stew. 347; Eaton *v.* Graham, 11 Ill. 619; Sumner *v.* Cummings, 23 Vt. 427; Lewis *v.* Foster, 1 N. H. 61; Allen *v.* Farrow, 2 Bailey, 584; Com. *v.* Welch, 2 Dana, 330; Saco *v.* Gurney, 34 Me. 14; Broughton *v.* Branch Bank, 17 Ala. 828; Engle *v.* Shurts, 1 Mich. 150; Thompson *v.* Bassett, 5 Ind. 535; Welch *v.* Wadsworth, 30 Conn. 149, [79 Am. D. 236;] Williams *v.* Middlesex, 4 Met. 76; Uwchlan Township Road, 30 Pa. St. 156; Gaul *v.* Brown, 53 Me. 496; Rood *v.* Chicago, etc. Ry. Co., 43 Wis. 146; Union Iron Co. *v.* Pierce, 4 Bis. 327; [Westchester *v.* Dressner, 48 N. Y. Sup. 953. The repeal of a statute providing a penalty in favor of a person injured will not discharge a liability already incurred. Blum *v.* Widdicomb, 90 Fed. R. 220; S. *v.* Helms, 136 Ind. 122, 45 N. E. R. 893; Starr *v.* S., 149 Ind. 592. The rule is that the repeal of a statute affects only rights expressly given by statute. Graham *v.* R. R. Co., 53 Wis. 473, 10 N. W. R. 609.]

[2] *Ante*, § 31; Grinad *v.* S., 34 Ga. 270.

[3] Surtees *v.* Ellison, 9 B. & C. 750; Musgrove *v.* Vicksburg, etc. R. R. Co., 50 Miss. 677; Van Inwagen *v.* Chicago, 61 Ill. 31; Assessors *v.* Osbornes, 9 Wall. 567; U. S. *v.* Six Fermenting Tubs, 1 Abb. (U. S.) 268; Nicholls *v.* Gee, 30 Ark. 135; Hunt *v.* Jennings, 5 Blackf. 195, [33 Am. D. 465;] Illinois, etc. Canal *v.* Chicago, 14 Ill. 334; Macnawhoc Plantation *v.* Thompson, 36 Me. 365; Uwchlan Township Road, 30 Pa. St. 156; Stephenson *v.* Wait, 8 Blackf. 508; North Canal St. Road, 10 Watts, 351, [36 Am. D. 185;] Petition of Fenelon, 7 Pa. St. 173; Hickory Tree Road, 43 Pa. St. 139; [North Street, 1 Pears. (Pa.) 199.]

[4] *Ante*, § 85a.

[5] *Ante*, §§ 84, 84a, 176; *post*, § 178; De Mill *v.* Lockwood, 3 Blatch. 56; Woodruff *v.* Scruggs, 27 Ark. 26, [11 Am. R. 777;] McCreary *v.* S., 27 Ark.

that the effect of the repeal cannot be so, or that the formal repeal is thus far unconstitutional and void, or that the constitution saves the right after the repeal has transpired, or that it so blends with the statute as to render it to this extent irrepealable,— different methods of stating the same legal doctrine.[1] The old remedy, if no new one is provided, remains for the enforcement of the irrevocable, vested right.[2] But—

Not vested.— Any right not vested falls with the repeal of the statute on which it rests.[3]

§ 178. Taking away remedy.— There is no vested right in any particular remedy;[4] hence, as already appears,[5] a statute

425; Beebee *v.* O'Brien, 10 Wis. 481; Langford *v.* King, 1 Mont. 33.

[1] Memphis *v.* U. S., 97 U. S. 293; Rock Hill College *v.* Jones, 47 Md. 1; Milner *v.* Pensacola, 2 Woods, 632; Grey *v.* Mobile Trade Co., 55 Ala. 387, [28 Am. R. 729;] Musgrove *v.* Vicksburg, etc. R. R. Co., 50 Miss. 677; Backes *v.* Dant, 55 Ind. 181; Creighton *v.* Pragg, 21 Cal. 115; Davis *v.* Minor, 1 How. (Miss.) 183, [28 Am. D. 325;] James *v.* Dubois, 1 Harrison, 285; Rice *v.* R. R. Co., 1 Black, 358; *Ex parte* Graham, 13 Rich. 277; Naught *v.* Oneal, Breese, Ap. 29; Taylor *v.* Rushing, 2 Stew. 160; Streubel *v.* Milwaukee, etc. R. R. Co., 12 Wis. 67. Rights of property depend on the statutes as existing at the time they vest. Hunt *v.* Hunt, 37 Me. 333; Mays *v.* Williams, 27 Ala. 267; Yarmouth *v.* North Yarmouth, 34 Me. 411, [56 Am. D. 666; Kennedy *v.* Jarvis (Tex.), 1 S. W. R. 191. Repeal does not affect liability of company for death by wrongful act. Albrecht *v.* R. R. Co., 94 Wis. 397, 69 N. W. R. 63. Repeal of fellow-servant law does not affect liability already incurred. Culpepper *v.* R. R. Co., 90 Tex. 627, 40 S. W. R. 386. A judgment against a state, pending appeal, cannot be taken away by a statute repealing authority to sue state. McCullough *v.* Va., 172 U. S. 123, 43 L. ed. 382.]

[2] Wilson *v.* Herbert, 12 Vroom. 454, [32 Am. R. 243.] See Knoup *v.* Piqua Bank, 1 Ohio St. 603.

[3] Bailey *v.* Mason, 4 Minn. 546; Butler *v.* Palmer, 1 Hill (N. Y.), 324. [There can be no vested right in an existing law which precludes its change. Fitzgerald *v.* R. R. Co., 68 Vt. 169, 22 Atl. R. 76, 13 L. R. A. 70. There is no vested right in an immunity from working the roads. *Ex parte* Thompson, 20 Fla. 887. The exemption from jury duty is not a vested right, though granted to firemen for services. Dunlap *v.* S., 76 Ala. 460. The right of a husband to his children's custody is not a vested right. Bennet *v.* Bennet, 13 N. J. Eq. 114. A statute of limitations cannot be so lengthened as to deprive one of vested adverse possession. Webster *v.* Cooper, 55 U. S. 488, 14 L. ed. 510. An inchoate right of dower or curtesy is not a vested right, and may be changed or abolished. Richards *v.* Billingham Co., 54 Fed. R. 209.

[4] Com. *v.* Hampden, 6 Pick. 501; [Goodbub *v.* Hornung, 127 Ind. 181, 26 N. E. R. 770; Musgrove *v.* R. R. Co., 50 Miss. 677; Rice *v.* Wright, 46 Miss. 679; Schuster *v.* Weiss, 114 Mo. 158, 21 S. W. R. 438. One has no vested right to the testimony of a particular witness. O'Bryan *v.* Allen, 108 Mo. 227, 18 S. W. R. 892.]

[5] *Ante*, §§ 84, 84*a*, 176, 177*a*.

may modify the remedy, yet not so as to leave none,[1] or one so difficult as to be practically without avail.[2]

Rights vested in penal actions.— There may be vested rights in penal actions,[3] and the repeal of the statute will not take them away.[4] Some nice questions arise as to what act, under this rule, will vest, in the person performing it, the right to a penalty incurred by another. There are analogous questions relating to the effect of a pardon, discussed in "Criminal Law."[5] The doctrine probably is, that when the suit is in the name of the government, the right does not vest until final judgment;[6] but, when a private individual is plaintiff, the bringing of the suit vests the right.

Costs — are governed by the statutes existing when final judgment in the cause is rendered;[7] so that an earlier repeal, though while the suit is in progress, terminates the right.[8] At such rendition of judgment, before they are taxed, they become vested, and then a repeal of the statute will not divest them. They can be taxed afterward.[9]

§ 178a. Office.— A public office is not a vested right. In the absence of any positive constitutional restraint, the legislature may repeal the statute creating it, and the dispossessed in-

[1] Story, Const., §§ 1385, 1391; Butler *v.* Palmer, 1 Hill (N. Y.), 324, 328; De Cordova *v.* Galveston, 4 Tex. 470.

[2] Riggs *v.* Martin, 5 Pike, 506, [41 Am. D. 103.] See Newkirk *v.* Chapron, 17 Ill. 344. [Where a new and general statute imposes a condition precedent to the maintenance of a common-law action, the court should, in its discretion, not enforce it, unless reasonable time appear for its observance. Relyea *v.* Tomahawk Co. (Wis.), 78 N. W. R. 412.]

[3] Taylor *v.* Rushing, 2 Stew. 160; Dow *v.* Norris, 4 N. H. 16, [17 Am. D. 400]; Palmer *v.* Conly, 4 Denio, 374; Conly *v.* Palmer, 2 Comst. 182. And see McGowen *v.* Deyo, 8 Barb. 340.

[4] See, also, Rice *v.* R. R. Co., 1 Black, 358; *Ex parte* Graham, 13 Rich. 277; Sinking Fund Com'rs *v.* Northern Bank, 1 Met. (Ky.) 174; Davis *v.* Minor, 1 How. (Miss.) 183, [28 Am. D. 325;] James *v.* Dubois, 1 Harrison, 285; Grace *v.* Donovan, 12 Minn. 580.

[5] Crim. Law, I, §§ 109–111.

[6] S. *v.* Youmans, 5 Ind. 280; Bank of St. Mary's *v.* S., 12 Ga. 475.

[7] Ellis *v.* Whittier, 37 Me. 548; Onondaga *v.* Briggs, 3 Denio, 178; Warfield *v.* Watkins, 30 Barb. 395. And see Com. *v.* McKenney, 14 Gray, 1; Billings *v.* Segar, 11 Mass. 340.

[8] Saco *v.* Gurney, 34 Me. 14; Rader *v.* Southeasterly Road Dist. of Union, 7 Vroom, 273.

[9] Restall *v.* London, etc. Ry. Co., Law Rep. 3 Ex. 141; Steamship Co. *v.* Joliffe, 2 Wall. 450. See Jackett *v.* Judd, 18 How. Pr. 385; Jones *v.* Underwood, 18 How. Pr. 532; Scudder *v.* Gori, 18 Abb. Pr. 207, 28 How. Pr. 155; Steward *v.* Lamoreaux, 5 Abb. Pr. 14; Morgan *v.* Thorne, 7 M. & W. 400.

cumbent will be entitled only to the salary already earned.[1] Or it may reduce the salary or enlarge the duties of the office.[2] So,—

Suing state.— A statute permitting suits against the state is merely of grace, conferring on creditors no vested rights. And if, while a suit under it is pending, it is repealed, the jurisdiction of the court is gone, and it abates.[3]

§ 179. Statutes limiting effect of repeal.— Inevitable as on the principles of the unwritten law the foregoing rules are, a partial failure of justice sometimes arises where, through them, substantial rights not in form vested are taken away, or persons guilty of crime are suffered to escape punishment. Therefore, in some or most of the states, there are statutes limiting the consequences of repeal; such as, that, in criminal cases, or both in criminal and civil, it shall not affect suits pending, or causes of prosecution or action already accrued.[4] A statute of this sort is within the general rule of interpretation requiring all laws to be construed together;[5] so that, though by express terms the legislature may make a repeal contrary thereto,[6] it will in the absence of such terms be treated as a

[1] 1 Bishop, Mar., Div. & S., § 1437; Hall *v.* S., 39 Wis. 79; S. *v.* Baldwin, 45 Conn. 134; Coffin *v.* S., 7 Ind. 157; Benford *v.* Gibson, 15 Ala. 521; Phillips *v.* New York, 1 Hilton, 483; Smith *v.* Philadelphia, 2 Parsons, 293; Barker *v.* Pittsburgh, 4 Pa. St. 49; P. *v.* Haskell, 5 Cal. 357; P. *v.* Banvard, 27 Cal. 470.

[2] S. *v.* Gales, 77 N. C. 283; Butler *v.* Pennsylvania, 10 How. (U. S.) 402; Turpen *v.* Tipton, 7 Ind. 172; Miami *v.* Blake, 21 Ind. 32; P. *v.* Devlin, 33 N. Y. 269, [88 Am. D. 377;] Haynes *v.* S., 3 Humph. 480, [39 Am. D. 187;] Walker *v.* Dunham, 17 Ind. 483; S. *v.* Smedes, 26 Miss. 47; Com. *v.* Bacon, 6 S. & R. 322; P. *v.* Squires, 14 Cal. 12.

[3] *Ex parte* S., 52 Ala. 231. [A state has power to withdraw a remedy providing for enforcement of claims against it. Carr *v.* S., 127 Ind. 204, 26 N. E. R. 778.]

[4] Acree *v.* Com., 13 Bush, 358; Dillon *v.* Linder, 36 Wis. 344; Lakeman *v.* Moore, 32 N. H. 410; U. S. *v.* Barr, 4 Saw. 254; Volmer *v.* S., 34 Ark. 487; Myers *v.* S., 8 Tex. Ap. 321; Simms *v.* S., 8 Tex. Ap. 330; S. *v.* Ross, 49 Mo. 416; Gordon *v.* S., 4 Kan. 489; Luke *v.* Calhoun, 56 Ala. 415; S. *v.* Mathews, 14 Mo. 133; McCuen *v.* S., 19 Ark. 634; Reynolds *v.* S., 3 Kelly, 53; Com. *v.* Adcock, 8 Grat. 661; S. *v.* Shaffer, 21 Iowa, 486; P. *v.* Quinn, 18 Cal. 122; Jordan *v.* S., 38 Ga. 585; Richardson *v.* S., 3 Coldw. 122. [For instances arising under such statutes, see *Re* Taylor, 60 Kan. 87, 55 Pac. R. 340; S. *v.* Warner, 60 Kan. 94, 55 Pac. R. 342; S. *v.* Woolsey, 19 Utah, 486, 57 Pac. R. 426; Seawell *v.* Hendricks, 4 Okla. 435, 46 Pac. R. 557; S. *v.* Hardman, 16 Ind. Ap. 357, 45 N. E. R. 345; S. *v.* Houck, 16 Ind. Ap. 698, 45 N. E. R. 347; Reg. *v.* Cluer, 67 L. J. Q. B. (N. S.) 36; Roddy *v.* R. R. Co., 52 N. Y. Sup. 885.]

[5] *Ante*, §§ 82, 86 *et seq.*

[6] *Ante*, § 147.

part of every repealing enactment.[1] In general, where rights are thus preserved, the procedure, after the repeal, takes the forms ordained by the new law.[2] Again,—

§ 180. Saving clause in repealing statute.— The common-law effect of a repeal may be, and sometimes is, avoided by a saving clause in the repealing statute, authorizing prosecutions under the old law for offenses already committed;[3] or otherwise, and with differing limitations, allowing proceedings under the law repealed.[4] Even,—

Reviving lapsed right.— Where there is no saving clause, and the repeal has gone into effect, a subsequent enactment may revive the lapsed right, by providing steps for its vindication. This occurs, for example, where the repealing statute is repealed.[5] One who had committed a crime under the former laws could not be prosecuted while they were repealed; but, on becoming laws again, like a bridge that had been removed and then replaced, they would sustain the judicial steps. In the language of Wilde, J., the repealing statute "operated only as a suspension of his liability, and not in the nature of a pardon."[6] So if, while civil causes are pending in a court, it is

[1] Com. *v.* Desmond, 123 Mass. 407; S. *v.* Boyle, 10 Kan. 118; S. *v.* Crawford, 11 Kan. 32; Chaplin *v.* S., 7 Tex. Ap. 87. And see Newson *v.* Greenwood, 4 Oreg. 119.

[2] Farmer *v.* P., 77 Ill. 322. See *ante*, §§ 175, 176.

[3] Taylor *v.* S., 7 Blackf. 93; Com. *v.* Marshall, 11 Pick. 350, [22 Am. D. 377;] Com. *v.* Kimball, 21 Pick. 373; U. S. *v.* The Helen, 6 Cranch, 203; The Irresistible, 7 Wheat. 551; Com. *v.* Edwards, 4 Gray, 1; [*Re* Taylor, 60 Kan. 94, 55 Pac. R. 342; S. *v.* Woolsey, 19 Utah, 486, 57 Pac. R. 426; Davenport *v.* Auditor, 70 Mich. 192, 38 N. W. R. 211; Perry *v.* Hepburne, 4 Mich. 165.]

[4] Reg. *v.* West Riding of Yorkshire, 1 Q. B. D. 220; Com. *v.* Bennett, 108 Mass. 30, [11 Am. R. 304.]

[5] Com. *v.* Mott, 21 Pick. 492; Com. *v.* Getchell, 16 Pick. 452. See Van Valkenburgh *v.* Torrey, 7 Cow. 252, 255; S. *v.* Dunkley, 3 Ire. 116; Dawson *v.* S., 6 Tex. 347; McMullen *v.* Guest, 6 Tex. 375; Com. *v.* Leech, 24 Pa. St. 55.

[6] Com. *v.* Getchell, 16 Pick. 452. And see Roby *v.* West, 4 N. H. 285, [17 Am. D. 423;] *In re* Pennsylvania Hall, 5 Pa. St. 204. *Contra*, Roberts *v.* S., 2 Tenn. 423. Yet it seems, both on reason and authority, that, if process has been actually abated because of the repeal of a statute, its re-enactment cannot operate to reinstate the particular abated process. Com. *v.* Leech, 24 Pa. St. 55. And, according to the principle recognized in a Tennessee case, perhaps, if the process were merely abatable, the same result might follow. Tucker *v.* Burns, 2 Swan (Tenn.), 35. A subsequent statute may validate proceedings under one which has been repealed. *In re* Pennsylvania Hall, *supra*.

abolished by law, and by reason of some defect in the law they are not transferred to any tribunal, the legislature at a subsequent period may provide for their transfer.[1] Nor is a statute *ex post facto* which creates a new court, or gives jurisdiction to an existing one, to try offenses previously committed.[2]

II. Specific Questions.

§ 181. Simultaneous repeal and re-enactment.— The repeal of a statute, accompanied by a re-enactment of its terms, or of its substantial provisions in any other forms of expression, does not break its continuity;[3] and there is no moment when, whatever words of repeal are employed, it can be said to be repealed.[4] Among other consequences, a suit brought under the old law can be finished under the new.[5] And all rights created under the old remain under the nominally new.[6] The case would appear, in principle, to be like that of an instantaneous seisin, where a man by one act receives and passes back an estate; and the consequences of ownership do not, therefore, attach to him.[7] But the concurrent enactment of provisions different from the repealed ones does not preserve the continuity of the laws; so that, for example, in a criminal case, the defendant cannot be sentenced under the old law, because it is

[1] Scott *v.* Smart, 1 Mich. 295. And see Freeborn *v.* Smith, 2 Wall. 160.

[2] Com. *v.* Phillips, 11 Pick. 28; Perry *v.* Com., 3 Grat. 632. And see Grinder *v.* Nelson, 9 Gill, 299; S. *v.* Howard, 15 Rich. 274.

[3] St. Louis *v.* Foster, 52 Mo. 513; S. *v.* Gumber, 87 Wis. 298; Scheftels *v.* Tabert, 46 Wis. 439; Laude *v.* Chicago, etc. Ry. Co., 83 Wis. 640; Middleton *v.* New Jersey West Line R. R. Co., 11 C. E. Green, 269; S. *v.* Baldwin, 45 Conn. 134. [A law merely repeating the provisions of another is inoperative. Campbell *v.* Bank, 74 Miss. 530, 23 S. R. 25. A statute substantially re-enacted by a repealing act is not destroyed or interrupted in its operation. Forbes *v.* Escambie Co., 28 Fla. 26, 9 S. R. 446. A re-enactment by an amendatory statute does not prevent a prosecution for felony previously committed; the two acts blending so that there is no intervening time during which no offense existed. Sage *v.* S., 127 Ind. 15, 26 N. E. R. 667; Alexander *v.* Big Rapids, 70 Mich. 224, 38 N. W. R. 227; Northern R. R. Co. *v.* Ellison, 3 Wash. 225, 29 Pac. R. 263; Barton *v.* Moscow, 2 Idaho, 998, 29 Pac. R. 43; S. *v.* Kibling, 63 Vt. 636, 22 Atl. R. 613.]

[4] Martindale *v.* Martindale, 10 Ind. 566; Cordell *v.* S., 22 Ind. 1; Alexander *v.* S., 9 Ind. 337; Fullerton *v.* Spring, 3 Wis. 667; Randolph *v.* Larned, 12 C. E. Green, 557. And see *ante*, § 152*a*; S. *v.* Miller, 58 Ind. 399.

[5] McMullen *v.* Guest, 6 Tex. 275. And see P. *v.* Livingston, 6 Wend. 526.

[6] Capron *v.* Strout, 11 Nev, 304.

[7] 1 Bishop, Mar. Women, §§ 325, 326.

repealed; or under the new, because not in force when the criminal fact transpired.[1]

§ 182. Statute expiring by own limitation.— There is authority for saying that, if the period to which a penal law is by its terms applicable elapses, a prosecution for an offense under it may go on.[2] This seems contrary to a proposition in an earlier section.[3] The distinction in principle is that, if a statute makes an act punishable when committed within a particular time, the expiration of the time does not prevent the punishment; while, on the other hand, if there is no way of proceeding in a case but the one pointed out by it, and it has run its time, then, since there can be no proceeding, there can be no conviction and sentence.

§ 183. Punishment differing with time of offense.— From the foregoing views we learn that an offense may be subjected to a particular punishment when committed before the repeal of a statute, and to a different one when committed after, if such is the expressed will of the legislature. And,—

"*Hereafter.*"— Where the provision was that one "hereafter" doing a thing before penal should receive a particular punishment, different from the old, it was held that sentences for prior offenses should be under the old law.[4] Still,—

Legislative intent distinct — (Bankrupt law — Perjury).— Without a plain expression of the legislative intent, interpretation will not recognize a distinction of this sort, being contrary to the ordinary course of things. Within this principle was the act of congress repealing the earlier bankrupt law. It declared that the repeal should "in no wise affect the execution of any commission of bankruptcy which may have issued prior to the passing of this act, but every such commission shall be proceeded in and fully executed as if this act had not been passed." Yet the liability to prosecution for perjury al-

[1] S. *v.* Long, 78 N. C. 571.

[2] Stevens *v.* Dimond, 6 N. H. 330.

[3] *Ante*, § 177.

[4] Com. *v.* Pegram, 1 Leigh, 569; Allen *v.* Com., 2 Leigh, 727. And see Rex *v.* McKenzie, Russ. & Ry. 429; Pitman *v.* Com., 2 Rob. (Va.) 800; S. *v.* Daley, 29 Conn. 272. ["Heretofore," in a statute, held to be applicable to cases arising after as well as before the passage of the act. Whipple *v.* Saginaw, 26 Mich. 344. "Hereafter" indicates the direction in time merely to which the context refers, and is limited by it. Dobbins *v.* Cragin, 50 N. J. Eq. 640, 23 Atl. R. 172.]

ready committed under the repealed law was held not to be preserved by these terms.[1] Again,—

§ 184. Further of change of punishment.— There is a single case which seems to hold that, if a statute provides a new punishment for a common-law offense, then a person commits the offense, then another statute repeals this one, and likewise ordains a still different punishment for the *future*, the delinquent, whose guilt was incurred while the first statute was in force, yet who could not be punished under it because repealed, could be subjected to the common-law punishment. The reasons for this decision are not given in the report.[2] The only ground for supporting it would seem to be that the repeal of the first statute, with the ordaining of another punishment for the future, was a reinstating of the common-law punishment for the *past;* and, as a prisoner is to receive the punishment provided by the law at the time when sentence is rendered,[3] this one may be subjected to that of the common law.[4] And it is established that, after an offense is committed, the punishment for it may be changed in any way which shall not render it *ex post facto*.[5] Where a statute operated as a repeal of the common law itself, not merely of the punishment,[6] the

[1] Anonymous, 1 Wash. C. C. 84, 89.

[2] Rex *v.* McKenzie, Russ. & Ry. 429. See P. *v.* Townsey, 5 Denio, 70; Roberts *v.* S., 2 Tenn. 423; S. *v.* Daley, 29 Conn. 272.

[3] *Ante*, §§ 166, 168, 176.

[4] In Connecticut, a statute having made manslaughter punishable by imprisonment in the state prison not less than two years nor more than ten, a man committed it, then an act repealed this one, and directed that, when it should be *thereafter* committed, it should be punished by imprisonment in the state prison or county jail not less than ten years. Thereupon the majority of the court held that the offender could not be subjected to the old punishment, because the statute was repealed, or the new, because the new statute did not apply to past offenses. The dissenting judge deemed that the offender could be subjected to the common-law punishment, the offense being at common law. S. *v.* Daley, 29 Conn. 272. Some Alabama cases hold that where a statute provides an increased punishment for an offense if afterward committed, and is silent concerning it when it had been committed before, and there is no express repeal, the old offender can be punished under the old law. The words were: "From and after the passage of this act, any person," etc. Said Judge, J.: "The latter statute has operative effect only as to the offenses named therein when committed subsequent to its passage." Miles *v.* S., 40 Ala. 39, 42; Moore *v.* S., 40 Ala. 49; Stephen *v.* S., 40 Ala. 67; Wade *v.* S., 40 Ala. 74.

[5] Crim. Law, I, §§ 279, 281; Veal *v.* S., 8 Tex. Ap. 474; Perez *v.* S., 8 Tex. Ap. 610; S. *v.* Kent, 65 N. C. 311.

[6] *Ante*, § 178.

court held that a revival of the common law, by a repeal of this statute, could not subject a defendant to the old law, which was not in force when he did the act.[1]

§ 185. Increasing punishment—(Ex post facto).—An enactment increasing the punishment for an offense after it is committed is, under our state and national constitutions, void as being *ex post facto*.[2] On the other hand,—

Mitigating punishment.—A statute thus in mitigation of a punishment already incurred is good.[3] Thus,—

Death to whipping, imprisonment, etc.—Where, at the time of a conviction for forgery, the penalty was death, but the prisoner appealed, and pending his appeal it was reduced to fine, whipping and imprisonment, the milder sentence was pronounced.[4] So,—

Whipping to imprisonment.—Where the change was from whipping not exceeding one hundred stripes to imprisonment not exceeding seven years, this was held in Indiana to be in mitigation, and therefore constitutional.[5] But certainly the

[1] Com. *v.* Marshall, 11 Pick. 350, [22 Am. D. 377.] And see S. *v.* Daley, 29 Conn. 272, stated in note to next section.

[2] Crim. Law, I, §§ 279, 281; Const. U. S., art. 1, §§ 9, 10; Calder *v.* Bull, 3 Dall. 386, 389; Watson *v.* Mercer, 8 Pet. 88, 110; Bennett *v.* Boggs, Bald. 60, 74; S. *v.* Kent, 65 N. C. 311; Hannahan *v.* S., 7 Tex. Ap. 664; Com. *v.* Maloney, 112 Mass. 283. And see Hope *v.* Johnson, 2 Yerg. 123; *ante*, § 85; [Washington *v.* S., 75 Ala. 582, 51 Am. R. 479; P. *v.* McNulty, 93 Cal. 427, 29 Pac. R. 61; Marion *v.* S., 16 Neb. 349, 20 N. W. R. 289; *In re* Medley, 134 U. S. 160, 33 L. ed. 385; *In re* Hunt, 28 Tex. Ap. 361, 13 S. W. R. 145.]

[3] Crim. Law, *ut sup.*; Story, Const., § 1345; Com. *v.* Mott, 21 Pick. 492, 500, 501; Flaherty *v.* Thomas, 12 Allen, 428; Com. *v.* McKenney, 14 Gray, 1; Strong *v.* S., 1 Blackf. 193; Keene *v.* S., 3 Chand. 109; Boston *v.* Cummins, 16 Ga. 102; S. *v.* Arlin, 39 N. H. 179; Rich *v.* S., 9 Tex. Ap. 176; S. *v.* Miller, 58 Ind. 399. See Mullen *v.* P., 31 Ill. 444; [Dinckerlooker *v.* Marsh, 75 Ind. 548; S. *v.* Wish, 15 Neb. 448, 19 N. W. R. 686; P. *v.* Hayes, 70 Hun, 111, 24 N. Y. S. 194; McInturf *v.* S., 20 Tex. Ap. 335; *In re* Tyson, 13 Colo. 482, 22 Pac. R. 810, 6 L. R. A. 472.]

[4] S. *v.* Williams, 2 Rich. 418, [45 Am. D. 741.] And see Leighton *v.* Walker, 9 N. H. 59. In a Texas case the court observes: "Among all nations of civilized man, from the earliest ages, the infliction of stripes has been considered more degrading than death itself." Herber *v.* S., 7 Tex. 69, 73. Still a punishment is not to be estimated, as to its weight or severity, exclusively by its degrading nature.

[5] Strong *v.* S., 1 Blackf. 193. And see Clarke *v.* S., 23 Miss. 261; Dawson *v.* S., 6 Tex. 347; Holt *v.* S., 2 Tex. 363; Herber *v.* S., 7 Tex. 69; Martin *v.* S., 24 Tex. 61. [A statute which provides that an offense hitherto punishable by imprisonment in the penitentiary not less than two nor more than ten years should be punished

court went far in this case. In reason, where the penalties are of different natures, it is often difficult to say that the one is less than the other, though anything not extending to the life is clearly milder than death.

Pillory and fine to imprisonment — (Mayhem).— In Mississippi, prior to 1839, the punishment for mayhem was the pillory and a fine. It was then changed to imprisonment in the penitentiary. But it was also provided that this and other changes should not affect past offenses, except where the punishment was in mitigation, and then the new punishment should be inflicted. Thereupon a man was convicted of mayhem committed before the going into effect of the new statute and sentenced to the old punishment, and this was held to be right. But the court said that the prisoner might have demanded the new punishment, had he chosen it, and then he would have been entitled thereto.[1]

Degrees of offense — (Homicide).— A statute dividing an offense — as, for example, the homicide of murder or manslaughter — into degrees and ordaining new punishments, yet not making the punishment for any degree higher than was provided for the offense by the prior law, may be applied to acts already committed, and to indictments, if adequate in form under the new law, already pending. The continuity of the law of the punishment is not broken;[2] or, if it was, this circumstance would not in principle work a difference.[3] In a measure contrary to this view and some others in the present connection is the —

New York doctrine.— The courts of this state appear to hold that, where a statute prescribing the punishment for a common-law offense, such as felonious homicide, is repealed by another which provides a milder punishment, and declares that

by imprisonment not exceeding ten years is mitigatory. P. *v.* Hayes, 70 Hun, 111; s. c., 140 N. Y. 484, 35 N. E. R. 951, 37 Am. St. R. 572, 23 L. R. A. 830. The contrary is held in an older Connecticut case. S. *v.* Daley, 29 Conn. 272.]

[1] Clarke *v.* S., 23 Miss. 261. And see Veal *v.* S., 8 Tex. Ap. 474; Perez *v.* S., 8 Tex. Ap. 610.

[2] *Ante*, § 181; Keene *v.* S., 3 Chand. 109; Com. *v.* Gardner, 11 Gray, 438. [A statute which divides murder into two degrees, making one punishable with death and the other with imprisonment for life, is valid as applied to an offense committed before its enactment, where it was formerly punishable with death only. Com. *v.* Gardner, 77 Mass. 438.]

[3] *Ante*, § 180.

acts already done shall be punished under the new law, the remedy is gone. It is deemed that, the old law being unqualifiedly repealed, there can be no punishment under it; neither, on the other hand, can the new punishment be inflicted, because this would be *ex post facto*. These and some connected views being special to this state, and not of common interest elsewhere, it will suffice simply to refer to the authorities.[1]

§ 186. Repeal of repealing statute.— Subject to some exceptions, the repeal of a repealing statute revives the old law, whether statutory or common.[2] And this rule prevails even in the case of a repeal by the implication of a conflicting enactment.[3] So, with the repeal of a statute which had merely modified the law, the modification ceases.[4] Now,—

Common-law exceptions.— There are common-law exceptions to this doctrine, growing out of the reasons of particular cases, and probably not reducible to rule. Thus, "if a statute," says Dwarris,[5] "be repealed by several acts, a repeal of one act, or two, and not of all, does not revive the first statute.[6] If a repealing statute, and part of the original statute, be repealed by a subsequent act, the residue of the original statute is revived.[7] If an act of parliament be revived, all acts explanatory of that so revived are revived also."[8] And there are other exceptional cases of like nature.[9] A statute which refers to and adopts the

[1] Hartung *v.* P., 22 N. Y. 95; Shepherd *v.* P., 25 N. Y. 406; Hartung *v.* P., 26 N. Y. 167, 28 N. Y. 400; Ratzky *v.* P., 29 N. Y. 124; McKee *v.* P., 32 N. Y. 239.

[2] S. *v.* Rollins, 8 N. H. 550, 567; Com. *v.* Churchill, 2 Met. 118; Com. *v.* Mott, 21 Pick. 492; Directors of the Poor *v.* R. R. Co., 7 Watts & S. 236; James *v.* Dubois, 1 Harrison, 285; 1 Kent, Com. 466; Wayman *v.* Naylor, 2 Blackf. 32; Janes *v.* Buzzard, Hemp. 259; Harrison *v.* Walker, 1 Kelly, 32. And see Com. *v.* Marshall, 11 Pick. 350, 351, [22 Am. D. 377;] P. *v.* Wintermute, 1 Dak. 63; Gray *v.* Obear, 54 Ga. 231; Lindsay *v.* Lindsay, 47 Ind. 283; Phillips *v.* Hopwood, 5 Man. & R. 15, 10 B. & C. 39; P. *v.* Hunt, 41 Cal. 435; [Wallace *v.* Bradshaw, 54 N. J. L. 175, 23 Atl. R. 759; U. S. *v.* Philbrick, 120 U. S. 52, 30 L. ed. 559. Where a federal statute is repealed, the old state law which it superseded springs into operation. Tua *v.* Carriere, 117 U. S. 201, 29 L. ed. 855; Buckwalter *v.* County, 12 Pa. Sup. Ct. 272. The general repealing clause of a revision refers only to general statutes, and not to those regarding particular matters. S. *v.* Com'r (Wis.), 82 N. W. R. 549.]

[3] Hastings *v.* Aiken, 1 Gray, 168.

[4] Glaholm *v.* Barker, Law Rep. 1 Ch. Ap. 223, 229.

[5] Dwar. Stat. (2d ed.) 534.

[6] The Bishop's Case, 12 Co. 7; Tattle *v.* Grimwood, 3 Bing. 493, 496.

[7] Broughton *v.* Gully, 9 B. & C. 344, 354.

[8] Williams *v.* Roughedge, 2 Bur. 747.

[9] Goodno *v.* Oshkosh, 31 Wis. 127;

provisions of another statute is not repealed by the subsequent repeal of the statute adopted.[1]

Statutory exceptions.— Sometimes the statute which repeals a repealing one specifies an effect different from the common-law rule, and then it must prevail. And of late, both in England[2] and in many of our states, there is a general enactment providing that repealed laws shall not be revived by the repeal of the statute which repealed them. Thus, in Illinois, "no act or part of an act repealed by another act of the general assembly shall be deemed to be revived by the repeal of such repealing act."[3] Like words prevail in Louisiana.[4] In Ohio they are: "Whenever a law shall be repealed which repealed a former law, the former law shall not thereby be revived unless specially provided for." And this regulation is held in the United States circuit court to apply to repeals which are implied by reason of repugnance, as well as to those which are express.[5]

§ 187. Repealing statute expiring —(Temporary).— Where a repealing statute expires of its own limitation, the repealed law does not revive.[6] Where there is a temporary statute, subsequently continued, made perpetual, or revived by another, after its period has elapsed, or, of course, before, all things done are regarded as having transpired under the first statute; though, if there is an intermediate time in which it had no force, such time, unless saved by a special clause, is lost.[7]

P. *v.* Tyler, 36 Cal. 522; P. *v.* Brooklyn, 8 Abb. Pr. (N. S.) 150.

[1] Sikar *v.* Chicago, etc. R. R. Co., 21 Wis. 370.

[2] 13 and 14 Vict., ch. 21, §§ 5, 6; Levi *v.* Sanderson, Law Rep. 4 Q. B. 330; Glaholm *v.* Barker, *supra*, at p. 229.

[3] Sullivan *v.* P., 15 Ill. 233.

[4] Tallamon *v.* Cardenas, 14 La. An. 509; Witkouski *v.* Witkouski, 16 La. An. 232.

[5] Milne *v.* Huber, 3 McLean, 212. As to Wisconsin, see Smith *v.* Hoyt, 14 Wis. 252. As to California, Manlove *v.* White, 8 Cal. 376.

[6] U. S. *v.* Twenty-five Cases of Cloths, Crabbe, 356. [Where a statute has expired, been repealed, or declared void, all subsequent amendments are also void. Helt *v.* Helt, 152 Ind. 142, 52 N. E. R. 699.]

[7] 1 Kent, Com. 466.

CHAPTER XXI.

HOW THE MEANINGS OF STATUTES ARE VARIOUSLY CONTRACTED AND EXPANDED UNDER THE DIFFERING REASONS CONTROLLING THE INTERPRETATION.

§ 188. General and legal interpretation compared.— Every writing must, to be understood, be interpreted by the reader. And the merit of the interpretation is commensurate with its success in ascertaining what the writer meant. All know this to be true, for example, of the letter of a friend describing a country in which he is traveling. And we have seen that the same is true also of the written laws,— they require interpretation, the object whereof is simply to determine the meanings of the makers.[1] In the instance of the letter, should the reader have been born and reared between walls affording no outlook,— should he never have seen a hill, valley, plain, sheet of water, flowing stream, or landscape of any sort,— his understanding of its descriptions would necessarily be very imperfect. For they could be comprehended only by mingling with the words, to illumine, enlarge, compress and otherwise modify their primary meanings, the results of a familiarity with external nature. So interpretation deals with everything; so, we have seen, it does with the written laws. The mind of the interpreter truly comprehends them only as he collates them with the rest of the legal system.[2] Now,—

Doctrine of this chapter defined.— The doctrine of this chapter is that, since all language is elastic in its meanings,[3] since the language of the written laws is to be interpreted by the reasons of the law, and since these reasons are numerous and the results to which they severally press are diverse, statutes are in meaning variously contracted and expanded according to the differing numbers, natures and strength of the reasons which individually or collectively enter into their interpretation.

[1] *Ante*, §§ 70–72, 116.
[2] *Ante*, §§ 82, 86–90, 92*d*, 102, 113*b* *et seq.*, 122 *et seq.*
[3] *Ante*, § 92*d*.

§ 189. Elsewhere — Here — And distinguished. — To the casual thought this chapter may appear the same in subject with a preceding one, in which it was shown how the various provisions of the statutory and common laws, being interpreted together, cut short and extend one another in their effects.[1] But it has been explained that the difference is absolute and complete.[2] Not the minutest particle of what pertains to the one topic is included in the other. We are here inquiring not after the effects, but the meanings; and no wider distinction exists between any two things in the law.

§ 189a. Illustrations of doctrine. — The doctrine of this chapter will be best explained by a series of illustrations; thus,—

Derogation of prior law. — As shown in other connections,[3] affirmative statutes in derogation of the prior law, whether statutory or common, are strictly construed; that is, kept in meaning strictly within their terms.[4] An excellent writer,[5] referring to so much of this rule as relates to the prior common law, attributes it to the high reverence formerly paid to such law, and deems that now, while legislation is greatly changing it, this rule of interpretation has ceased to have any "solid foundation in our jurisprudence." But the thoughtful reader will see that the rule is derived from no such reason as is thus supposed, nor could it ever have depended on any reason even analogous thereto. Every judge is by the character of his duties compelled to pay respect to all the laws which he is sworn to administer, whatever may be his private opinions respecting any particular ones,— he cannot judicially deem one law to be

[1] *Ante*, § 123 *et seq.*

[2] *Ante*, §§ 118*a*, 118*b*.

[3] *Ante*, §§ 119, 155.

[4] *Post*, § 190*e*; Ash *v.* Abdy, 3 Swanst. 664; Boyd *v.* S., 53 Ala. 601; Wood *v.* Woods, Phillips (N. C.), 535; Dewey *v.* Goodenough, 56 Barb. 54; East St. Louis *v.* Maxwell, 99 Ill. 439; Barrett *v.* Long, 3 H. L. Cas. 395; Arthur *v.* Bokenham, 11 Mod. 148, 150; Wear *v.* Adamson, 1 Q. B. D. 546, 554, 2 Ap. Cas. 743; Stevenson *v.* S., 5 Bax. 681; Hawthorne *v.* S., 58 Miss. 778; Springfield *v.* Connecticut River R. R. Co., 4 Cush. 63; [S. *v.* Babcock, 21 Neb. 599, 31 N. W. R. 682; Com. *v.* Barber, 143 Mass. 560, 10 N. E. R. 330; S. *v.* Palmes, 23 Fla. 620, 3 S. R. 171; Dean *v.* R. R. Co., 119 N. Y. 540, 23 N. E. R. 1054; Rogers *v.* R. R. Co., 91 Fed. R. 300; Frazier *v.* R. R. Co., 88 Tenn. 138, 12 S. W. R. 537; Cadwallader *v.* Harris, 76 Ill. 370; Wilbur *v.* Crane, 13 Pick. (Mass.) 284. In many states the rule with respect to statutes in derogation of the common law has been changed by statute.]

[5] Sedgw. Stat. Law (2d ed.), 267–274.

good and another bad,— cannot prefer one to another,— cannot love one and hate another.[1] Therefore he cannot construe one law strictly because he thinks another better than it, or liberally because he deems another poorer. But the reason why an affirmative statute contrary to the prior law is to be kept by the courts within its express terms is that, where two laws stand side by side with no words of repeal, the one later in date is in its very nature powerless to take from the earlier anything which is not directly in conflict with it. Presumption has no room to work. Implication against what is positively ordained is never permitted in our jurisprudence. Again,—

§ 189b. Depriving of life.— The law, in numerous of its provisions, is watchful over human life, and careful to avoid the taking of it away. A judge, as a man, may be of the same mind with the law, or he may not; but, in his judicial capacity, he is required to preserve, as far as he may, the lives of the people. Therefore the courts should and do give a strict construction to statutes which inflict capital punishment.[2] Here the interpretation is the same as of a statute in derogation of the prior law,— that is, it is strict,— but the reason is quite different. Once more,—

§ 189c. Taking away public or private rights.— It being a primary function of all laws to maintain the rights of individuals and the public, statutes taking any of them away, even where not unconstitutional, are to be strictly construed.[3] The reason for this, the reader perceives, is substantially the same as for the like doctrine of the last section. On the other hand,—

[1] *Ante*, § 70; *post*, § 235; Reithmiller *v.* P., 44 Mich. 280.

[2] 2 Hawk. P. C., ch. 18, § 16; Rex *v.* Harvey, 1 Wils. 164; Rex *v.* Whistler, 11 Mod. 25, 28 and note.

[3] *Ante*, §§ 82, 119; Morris *v.* Mellin, 6 B. & C. 446, 449; Oldakar *v.* Hunt, 19 Beav. 485, 489, 490; Randolph *v.* Milman, Law Rep. 4 C. P. 107, 113; Rex *v.* Birmingham Canal, 2 B. & Ald. 570, 579; Harrod *v.* Worship, 1 B. & S. 381; Deptford *v.* Sketchley, 8 Q. B. 394, 408; Yarmouth *v.* Simmons, 10 Ch. D. 518, 527; U. S. *v.* Athens Armory, 35 Ga. 344, 351. [Public grants are strictly construed. Wis. Cent. R. R. Co. *v.* U. S., 164 U. S. 190, 41 L. ed. 399; Y. & M. R. R. Co. *v.* Thomas, 132 U. S. 174, 33 L. ed. 302; Oregon Co. *v.* R. R. Co., 130 U. S. 1, 32 L. ed. 837. But not so strictly as to withhold what is fairly given. U. S. *v.* R. R. Co., 150 U. S. 1, 37 L. ed. 975. See also Hamilton Co. *v.* Hamilton, 146 U. S. 258, 36 L. ed. 963. Statutes allowing compensation to officers are interpreted strictly in favor of the state. U. S. *v.* Clough, 55 Fed. R. 373.]

§ 189*d*. Remedial statutes.— A statute which, in a certain sense, works with the prior law, to help it where it is weak, or furnish a remedy it had not,[1] is, unlike one antagonistic thereto, to receive a wide and liberal construction; expanding the meaning of the words as fully as they will bear,[2] and supplying words where the other rules of interpretation [3] permit.[4] The common expression of this doctrine is, that remedial statutes are to be interpreted liberally, in aid of the remedy.[5] Every thing to advance the remedy is to be done which can be, consistently with any construction permissible.[6] And —

§ 189*e*. Numerous other illustrations — of construing statutes liberally, each instance depending on its special reasons in the law, might be given. But some have been mentioned already;[7] and others, in sufficient numbers to make the doctrine plain, will occur as we proceed. Now,—

§ 190. How far expansion permissible.— There can be no rule to determine, *a priori*, how far interpretation may expand a statute beyond the strict meanings of its terms. Each instance must depend on the particular words, the subject, and the other circumstances.[8] Various attempts at laying down doctrine on this topic have been made; such as,—

Bringing within mischief — Or intent.— We sometimes read that, in liberal interpretation, cases out of the letter of an act, yet within the mischief or cause of making it, should be brought by this power of expansion within its remedy; since the lawmaker could not set down all cases in express terms.[9] The older books, more frequently than the later, employ on occasions very broad language of this sort. For example, it is said in Plowden, that "everything which is within the intent of the makers of the act, although it be not within the letter, is as strongly

[1] Avery *v.* Groton, 36 Conn. 304.
[2] *Ante*, §§ 92*d*, 98, 102.
[3] *Ante*, §§ 79–81, 145, 146.
[4] Perry *v.* Jefferson, 94 Ill. 214.
[5] *Ante*, § 120; *post*, § 192; Avery *v.* Groton, *supra*; Vigo's Case, 21 Wall. 648; York *v.* Middleburgh, 2 Y. & J. 196; Smith *v.* Stevens, 82 Ill. 554.
[6] Johnes *v.* Johnes, 3 Dow. 1, 15; Atcheson *v.* Everitt, Cowp. 382, 391; S. *v.* Powers, 36 Conn. 77; Hyde *v.* Cogan, 2 Doug. 699, 706.
[7] *Ante*, § 120.
[8] *Ante*, § 120.
[9] Broom, Leg. Max. (2d ed.) 59; Co. Lit. 24*b*; 3 Bl. Com. 430, 431; Jenk. Cent. 58, 60, 226; Bac. Abr., Statute, I, 5, 6; York *v.* Middleburgh, 2 Y. & J. 196; Holbrook *v.* Holbrook, 1 Pick. 248, 254; Brown *v.* Thorndike, 15 Pick. 388, 402; S. *v.* Stephenson, 2 Bailey, 334; Brinker *v.* Brinker, 7 Pa. St. 53, 55; Van Valkenburgh *v.* Torrey, 7 Cow. 252.

within the act as that which is within the letter and intent also."[1] And later, said Pratt, J.: "The only question is, whether the case be within the meaning of the act; for no matter whether within the words or not."[2] And Lord Mansfield: "In remedial cases, the construction of statutes is extended to other cases within the reason or rule of them."[3] Some writers have assumed that such is not the law now; and even in our books of reports, instances may be found of judicial dissent. The brief forms of the old English statutes afforded more frequent opportunities for this sort of interpretation than do the plethoric modern ones. And the doctrine does not and never did admit of unreasoning application in all cases of liberal construction. It is greatly limited;[4] and, it may be, subjected to so many exceptions as itself to become rather the exception than the rule. Still, to its widest bound, it does now, as in former ages, prevail, in all cases of liberal interpretation wherein the court can distinctly see that, without it, the legislative intent[5] will not be carried into effect.[6] Thus,—

[1] Stowel *v.* Zouch, 1 Plow. 353*a*, 366.

[2] Hammond *v.* Webb, 10 Mod. 281, 283.

[3] Atcheson *v.* Everitt, Cowp. 382, 391; [Riggs *v.* Palmer, 115 N. Y. 506, 22 N. E. R. 188, 5 L. R. A. 340, 12 Am. St. R. 819; Sullivan *v.* Oregon Co., 24 Pac. R. 408. When statutes confer powers, impose duties and provide for many and various objects, they are necessarily couched in general terms: but they carry by implication all powers necessary for the ends sought to be attained. *Re* Neagle, 39 Fed. R. 833, 5 L. R. A. 78. It is an established rule in the construction of remedial statutes, that cases within the reason, though not within the letter, of a statute are to be considered as embraced within its provisions; and, on the other hand, cases not within the reason, though in the letter, shall not be taken to be within the statute. Evansville *v.* Summers, 108 Ind. 189, 6 West. R. 423; W. U. Tel. Co. *v.* Wilson, 108 Ind. 308, 6 West. R. 548. Even though a remedial statute be penal in character it should be construed liberally. Huyler *v.* Cragin Cattle Co., 13 Stew. (N. J.) 392, 2 Cent. 204.

[4] Smith, Stat. & Const. Law, p. 831. Lord Kenyon, the great conservative corrector of what some deemed the eccentricities of Lord Mansfield, once put the doctrine thus: "In expounding remedial laws, it is a settled rule of construction to extend the remedy *as far as the words will admit.*" Turtle *v.* Hartwell, 6 T. R. 426, 429. And see Bac. Abr., Statute, I, 6; Broom, Leg. Max. (2d ed.) 60; Dwar. Stat. (2d ed.) 622 *et seq.*; *ante*, §§ 145, 146.

[5] *Ante*, §§ 70, 73, 79–81, 145, 146.

[6] In S. *v.* Morris Canal and Banking Co., 1 Green (N. J.), 192, it is said: "The case is not within the words of the statute, but is governed by analogy thereto." And see other cases cited to this section and *post*.

§ 190a. "Single woman" construed to include married woman — (Bastardy). — The English statute of bastardy, 7 & 8 Vict., ch. 101, constituting a part of the system of poor laws, provided, in § 2, "that any *single woman* who may be with child," etc., should be entitled to proceed against the putative father in a way pointed out, to enforce contributions for its support. And this privilege was held, by construction, to extend to *married women* in like circumstances. "The law differently interpreted," said Lord Denman, C. J., "would fail to reach a very large proportion of illegitimate children;[1] while the reasons of the law, and plainly enough the real intent of the legislature, extended equally to all. Moreover, this case seems fairly to be within a principle of our language, everywhere recognized, whereby is put a —

§ 190b. Part for whole. — By a common figure of speech, we often use a word of narrow meaning to signify the whole of the thing to which it belongs. In this way, for example, the expression "a hundred *hands*" is understood to denote a hundred working *persons*, when the connection and obvious intent of the speaker require. And, more largely, a writer sometimes mentions a thing in the form of illustration; meaning, and being understood to mean, not only it, but also all else which it illustrates. In this way, and in proper circumstances, statutes are construed to signify more than they literally express; as, where an act of parliament[2] required persons to make oath that, among other things, "our sovereign lord King George is lawful and rightful king," and they "will bear faith and true allegiance to his majesty King George." The construction given it during a succeeding reign was, not that there should be a swearing to support a dead king, or that the statutory command expired with the life of King George, but that the name of the living sovereign should take the place in the oath of the one deceased.[3] Evidently this rule of construction, sound

[1] Reg. *v.* Collingwood, 12 Q. B. 681, 687. The learned judge also points out that this statute but follows the language of 6 Geo. 2, ch. 31, which it supersedes; "yet Lord Ellenborough and the whole court in Rex *v.* Luffe, 8 East, 193, held that an order might be made on the putative father of the bastard child of a married woman, who was to be considered single under the existing circumstances and for that purpose." p. 686. See Stacey *v.* Lintell, 4 Q. B. D. 291.

[2] 6 Geo. 3, ch. 53, § 1.

[3] Miller *v.* Salomons, 7 Exch. 475.

though it is, can be safely followed only by cautious steps. "Where," said Lord Camden, C. J., "it is clear the person or thing expressed is put by way of example, the judges must fill up the catalogue; yet we ought to be sure, from the words and meaning of the act itself, that the thing or person is really inserted as an example. . . . Wherever this rule is to take place, the act must be general, and the thing expressed must be particular. . . . In all cases that fall within this rule, there must be a perfect resemblance between the persons or things expressed and those implied. Thus, for instance, administrators are the same thing with executors; tenant for half a year and tenant for years have both terms for a chattel interest, differing only in the duration of the term; and so of the rest, which I need not repeat one by one. And, in all these cases, the persons or things to be implied are in all respects the objects of the law as much as those expressed."[1]

§ 190c. In brief.—The doctrine in brief is that, as many times said in the course of these discussions, the full legislative

[1] Entick *v.* Carrington, 19 How. St. Tr. 1029, 1060. Wilberforce (Stat. Law, 215, 216) has collected, as, by some opinions, pertaining to the interpretation of the ancient statutes rather than the modern, the following illustrations: "The usual method in which the language of ancient statutes is extended consists in the treatment of particular words as if they were put for examples. Thus the statute *Circumspecte agatis* (13 Edw. 1) directs the judges to use themselves circumspectly in all matters concerning the Bishop of Norwich and his clergy, 'not punishing them if they hold plea in Court Christian of such things as be mere spiritual.' It was held that the Bishop of Norwich was put for an example, and that the act extended to all bishops. 2 Inst. 487. The same view was taken of the provisions of Westminster the Second (13 Edw. 1, stat. 1, ch. 46), which enumerated windmills, sheep-cotes, cow-houses and curtilages. 3 Inst. 476. In the 31st chapter of the same statute the judges of the common pleas were named, and it was held that all other judges, inferior as well as superior, were included. 2 Inst. 427; Strother *v.* Hutchinson, 4 Bing. N. C. 83. So, too, in Westminster the First (3 Edw. 1, ch. 46), the judges of the king's bench at Westminster were put by way of example for the purpose of describing all courts of justice. 2 Inst. 256. In the 4th chapter of the same statute the words 'man, dog or cat' include all animals escaping alive from a wreck. 2 Inst. 167. Again, the 1 Rich. 2, ch. 12, which gives an action for an escape, mentions the warden of the Fleet, but extends to all jailers. Platt *v.* London, 1 Plow. 35; Plummer *v.* Whichcot, T. Jones, 60, 62. In the statute of Gloucester (6 Edw. 1, ch. 8) the county court is named for example, but hundred courts and courts baron are also within the law, 2 Inst. 311; and in ch. 11, London is named for excellency, but the act extends to all cities and boroughs which have the same privileges. 2 Inst. 322."

intent, whether awkwardly or well expressed, and whether by the use of accurate language or inaccurate, is, when it can be ascertained from the words of the statute, collated with whatever else is permissible, to prevail, especially in liberal constructions, over both the literal meanings and the omissions of words.[1] And, to reach this end, statutes, as they appear on their face, are by interpretation both contracted and expanded in their meanings. Now,—

§ 190d. Extending and shortening compared.— While in rare instances statutes may be extended in their meanings as above described, courts less readily and less frequently deal with them so. Oftener the course is to restrain them, so as to exclude cases within the words but not the mischief.[2] And,—

Excepting out of operation.— It is common, in the interpretation of statutes of every class, to except out of their operation cases clearly not within the mischief intended to be remedied.[3] On the other hand,—

§ 190e. Penal, not extended.— A penal statute "cannot be extended by implication or construction to cases within the mischief, if they are not at the same time within the terms, of the act, fairly and reasonably interpreted."[4]

[1] And see Houk *v.* Barthold, 73 Ind. 21.

[2] Rex *v.* Parker, 2 East, P. C. 592. [What is not within the purpose of meaning, nor within the mischief to be remedied by a statute, cannot be held a part of the law, though the literal words include it. This principle is axiomatic. Taylor *v.* McGill, 6 Lea (Tenn.), 300; Kane *v.* R. R. Co., 112 Mo. 34, 20 S. W. R. 532; S. *v.* McLain, 49 Mo. Ap. 398. A statute intending to prohibit an offense will never be applied to an innocent and lawful act, and an act which is within the prohibitory words may be still shown to be lawful or innocent. S. *v.* Botkin, 71 Iowa, 87, 32 N. W. R. 185.]

[3] Bac. Abr., Statute, I, 5, 6; Williams *v.* Prichard, 4 T. R. 2, 8; Canal Co. *v.* R. R. Co., 4 Gill & J. 1; Holbrook *v.* Holbrook, 1 Pick. 248, 254; Brown *v.* Thorndike, 15 Pick. 388, 402; Hart *v.* Cleis, 8 Johns. 41; Marietta, etc. R. R. Co. *v.* Stephenson, 24 Ohio St. 48; S. *v.* Gregory, 47 Conn. 276; Ball *v.* S., 50 Ind. 595; Watson *v.* Hall, 46 Conn. 204.

[4] Allen, J., in Verona Central Cheese Co. *v.* Murtaugh, 50 N. Y. 314, 317; S. *v.* Jaeger, 68 Mo. 403; Huffman *v.* S., 29 Ala. 40; Young *v.* S., 58 Ala. 358; Dobson *v.* S., 57 Ind. 69; Wood *v.* Erie Ry. Co., 72 N. Y. 196, [28 Am. R. 125;] Gibson *v.* S., 38 Ga. 571; Atlanta *v.* White, 33 Ga. 229. See Williams *v.* Evans, 1 Ex. D. 277; *ante*, § 189*a*; *post*, § 194; [Hanks *v.* Brown, 79 Iowa, 560, 44 N. W. R. 811; S. *v.* Coffing, 3 Ind. Ap. 304, 29 N. E. R. 615; Shultz *v.* Morgan, 1 Kan. Ap. 572, 42 Pac. R. 254; Dudley *v.* W. U. Tel. Co., 54 Mo. Ap. 391; *Ex parte* Bailey, 39 Fla. 734; P. *v.* Peacock, 98 Ill. 172; Siegel *v.* P., 106 Ill. 89; Hines *v.* Wilmington Co., 95 N. C. 434; Johnson *v.* S., 63 Miss. 228.]

CHAPTER XXII.

TO WHAT STATUTES AND UNDER WHAT CIRCUMSTANCES THE PROCESSES OF CONTRACTION AND EXPANSION OF MEANINGS ARE APPLIED.

§ 191. Meaning plain.— When the meaning of a statute of any sort is plain on its face, it can be extended or shortened by the courts only *in its effects*.[1] They are not justified in interpreting what needs no interpretation;[2] their duty is simply to carry out the expressed legislative purposes and intent.[3]

Elsewhere — Here.— It was deemed that the perspicuity and usefulness of these discussions would be promoted by presenting this subject of the strict and liberal interpretation under various aspects, from diverse points of observation. Therefore the general doctrine and distinctions were stated in a chapter a considerable way back.[4] And in the last chapter the topic was further and differently unfolded. The title of this chapter has informed the reader, that in it a third aspect of the doctrine will be presented.

§ 192. Things odious — Things favored — (Strict — Liberal).— There are things which the law deems odious; not as being unnecessary, but in the sense in which a father feels it odious to inflict needful chastisement on a child; and, on the other hand, there are things in which the law delights. To things odious is applied the strict interpretation; to things favored, the liberal: as a father, in chastising his child, would keep within the necessity of the case to the letter;[5] while, in bestowing a merited reward, he would cast in something also from affection. For example,—

Instances of liberal — (Remedial — Suppressing fraud — Beneficial).— The law loves harmony and right; therefore it construes remedial statutes, made to amend defects in the prior law, liberally;[6] it loves honesty and fair dealing, so construes lib-

[1] *Ante*, § 122 *et seq.*
[2] *Ante*, §§ 72, 116 and note.
[3] *Ante*, § 70. And see Cearfoss *v.* S., 42 Md. 403.
[4] *Ante*, §§ 119, 120.
[5] *Ante*, § 190*e*.
[6] *Ante*, § 189*d*; 1 Bl. Com. 86, 87; Broom, Leg. Max. (2d ed.) 60; S. *v.*

erally statutes to suppress frauds,[1] as far as they annul the fraudulent transaction;[2] and, generally, it employs a liberal interpretation for such written laws as operate beneficially for those whom they immediately concern.[3] On the other hand,—

Strict — (Hardships — Forfeitures — Depriving of rights).— Enactments of the opposite tendency, taking away rights, working forfeitures,[4] or creating hardships of any kind, it construes strictly.[5] Again,—

§ 193. In deprivation, strict—(Penal—Forfeiture, again—Against liberty — Summary process).— The law delights in the life, liberty and happiness of the subject; consequently it deems statutes which deprive him of these,[6] or of his property, however necessary they may be, in a sense odious. For which and for kindred reasons,[7] as well as because every man should

Stephenson, 2 Bailey, 334; Neal *v.* Moultrie, 12 Ga. 104; Brown *v.* Thompson, 14 Bush, 538, [29 Am. R. 416;] S. *v.* Blair, 32 Ind. 313; *ante*, § 120.

[1] Twyne's Case, 3 Co. 80*b*, 82*a*; Cadogan *v.* Kennet, Cowp. 432, 434.

[2] "Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule [that penal statutes are to be construed strictly], most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offense, by setting aside the fraudulent transaction, here it is to be construed liberally." 1 Bl. Com. 88. To the last point is also Cumming *v.* Fryer, Dudley (Ga.), 182; Carey *v.* Giles, 9 Ga. 253; Smith *v.* Moffat, 1 Barb. 65. And see Ellis *v.* Whitlock, 10 Mo. 781.

[3] Bac. Abr., Statutes, I, 7, 9. [The statutes authorizing a recovery for death by wrongful act are to be construed as remedial acts, liberally. Hayes *v.* Williams, 17 Colo. 465, 30 Pac. R. 352. Assignment statutes need not be strictly construed. Cunningham *v.* Norton, 125 U. S. 77, 31 L. ed. 624. Mechanics' lien laws are to be strictly construed. Williams *v.* Vanderbilt, 145 Ill. 238, 34 N. E. R. 476. *Contra*, Kendall *v.* Hymes, 96 Wis. 659, 71 N. W. R. 1039; Pinkerton *v.* Le Beau, 3 S. D. 440, 54 N. W. R. 97. Homestead laws are to be liberally construed. Wright *v.* Whittick, 18 Colo. 54, 31 Pac. R. 490; Kolb *v.* Raisor, 17 Ind. Ap. 551, 47 N. E. R. 177. So statutes relating to adoption of children. Parsons *v.* Parsons, 101 Wis. 76, 77 N. W. R. 147. So statutes allowing redemption of lands sold for taxes. Poling *v.* Parsons, 38 W. Va. 80, 18 S. E. R. 379.]

[4] Bac. Abr., Statutes, I, 6, 7; Salters *v.* Tobias, 3 Paige, 338; Smith *v.* Spooner, 3 Pick. 229; Sewall *v.* Jones, 9 Pick. 412; Sullivan *v.* Park, 33 Me. 438; *post*, § 193.

[5] See further, as to these distinctions, Jortin *v.* Southeastern Ry. Co., 3 Eq. R. 281, 24 Law J. (N. S.) 343, 1 Jur. (N. S.) 433, 31 Eng. L. & Eq. 320.

[6] *Ante*, § 189*b*; Reg. *v.* Banes, Holt, 512, 515. [Statutes regulating proceedings for the condemnation of private property are construed strictly. Fork Ridge Ass'n *v.* Redd, 33 W. Va. 262, 10 S. E. R. 405.]

[7] "The rule that penal laws are to be construed strictly is perhaps not

be able to know certainly when he is guilty of crime,[1] statutes which subject one to a punishment or penalty,[2] or to forfeit-

much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the law-maker must govern in the construction of penal as well as other statutes. This is true. But this is not a new, independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this: that, though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous indeed to carry the principle, that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases." Marshall, C. J., in U. S. *v.* Wiltberger, 5 Wheat. 76, 95, 96. "When a law imposes a punishment which acts upon the offender alone, and not as a reparation to the party injured, and where it is entirely within the discretion of the law-giver, it will not be presumed that he intended it should extend further than is expressed; and humanity would require that it should be so limited in the construction." Johnson, J., in S. *v.* Stephenson, 2 Bailey, 334, 335. And see Com. *v.* Loring, 8 Pick. 370; U. S. *v.* Wigglesworth, 2 Story, 369; Strong *v.* Stebbins, 5 Cow. 210; Verona Central Cheese Factory *v.* Murtaugh, 4 Lans. 17.

[1] Beccaria on Crimes, ch. 11; Livingston, J., in The Enterprise, 1 Paine, 32.

[2] *Ante*, § 119; Andrews *v.* U. S., 2 Story, 202, 213; Com. *v.* Martin, 17 Mass. 589; Com. *v.* Keniston, 5 Pick. 420; Carpenter *v.* P., 8 Barb. 603, 605; S. *v.* Upchurch, 9 Ire. 454; Van Rensselaer *v.* Onondaga, 1 Cow. 443; Seaving *v.* Brinkerhoff, 5 Johns. Ch. 329; Courteen's Case, Hob. 270; Searle *v.* Williams, Hob. 288; Hall *v.* S., 20 Ohio, 7; Warner *v.* Com., 1 Pa. St. 154, [44 Am. D. 114;] S. *v.* Solomons, 3 Hill (S. C.), 96; Bettis *v.* Taylor, 8 Port. 564; Van Valkenburgh *v.* Torrey, 7 Cow. 252; Hughes *v.* S., 1 Eng. 131; Reed *v.* Davis, 8 Pick. 514, 517; U. S. *v.* Starr, Hemp. 469; U. S. *v.* Ramsay, Hemp. 481; U. S. *v.* Beaty, Hemp. 487; U. S. *v.* Ragsdale, Hemp. 497; Lair *v.* Killmer, 1 Dutcher, 522; Gunter *v.* Leckey, 30 Ala. 591; S. *v.*

ure,[1] or a summary process[2] calculated to take away his opportunity of making a full defense, or in any way deprive him of his liberty,[3] are to be construed strictly. And the degree of strictness will depend somewhat on the severity of the punishment they inflict.[4]

Derogation of common law — (Testify for self). — Though a statute in derogation of the common law[5] — as, for example, permitting a party to testify for himself in his own cause[6] — is to be construed strictly, the reason for this, we have seen,[7] is different.[8]

Whetstone, 13 La. An. 376; Gibson *v.* S., 38 Ga. 571.

Double damages. — A statute giving a party double damages is to be construed strictly. Smith *v.* Causey, 22 Ala. 568; Bay City, etc. R. R. Co. *v.* Austin, 21 Mich. 390; Cohn *v.* Neeves, 40 Wis. 393. And see further as to this class of statutes, Le Forest *v.* Tolman, 117 Mass. 109, [19 Am. R. 400;] Swift *v.* Applebone, 23 Mich. 252; *post*, § 195*a*. [Statutes imposing a penalty on common carriers for overcharges in freight are subject to rigid construction. Hall *v.* R. R. Co., 44 W. Va. 36, 28 S. E. R. 754, 41 L. R. A. 669. "Citizen" in penal statute. Baldwin *v.* Franks, 120 U. S. 678, 30 L. ed. 766.]

[1] *Ante*, § 192; U. S. *v.* Eighty-four Boxes of Sugar, 7 Pet. 453; S. *v.* Dill, 2 Sneed, 414.

[2] *Ante*, § 119; Logwood *v.* Planters' & Merchants' Bank, Minor, 23; Childress *v.* McGehee, Minor, 131; Crawford *v.* S., Minor, 143; Yancey *v.* Hankins, Minor, 171; Hale *v.* Burton, Dudley (Ga.), 105.

Contempts of court. — Statutes against contempts are strictly interpreted. Maxwell *v.* Rives, 11 Nev. 213. [Attachment laws are strictly construed. Lederer *v.* Rosenthal, 99 Wis. 235, 74 N. W. R. 971. A corrupt practice act providing for forfeiture of office and criminal punishment must be given strict construction. S. *v.* Bland, 144 Mo. 534, 46 S. W. R. 440, 41 L. R. A. 297.]

[3] Pierce's Case, 16 Me. 255. [A statute giving to the state a right of appeal in a criminal case is to be strictly construed. S. *v.* Clipper, 142 Mo. 474, 44 S. W. R. 264.]

[4] See Randolph *v.* S., 9 Tex. 521; *post*, § 199.

[5] Sibley *v.* Smith, 2 Mich. 486; Sugar *v.* Sackett, 13 Ga. 462; Rathbun *v.* Acker, 18 Barb. 393; *ante*, § 155.

[6] Hotaling *v.* Cronise, 2 Cal. 60; Warner *v.* Fowler, 8 Md. 25.

[7] *Ante*, § 189*a*.

[8] **Granting franchise.** — A statute granting a franchise, as a turnpike charter, is to be construed strictly. *Ante*, § 119; S. *v.* Clarksville & R. T. P. Co., 2 Sneed, 88. See also Academy of Fine Arts *v.* Philadelphia, 22 Pa. St. 496. [Statutes conferring power to impose taxes must be construed strictly, and delegated corporate powers to municipalities — particularly those that are out of the usual range, or which touch the right of the citizen to liberty, property or any common-law rights — must be construed strictly. *Ex parte* Sims, 40 Fla. —, 25 S. R. 280; *Ex parte* Florence, 78 Ala. 419; Kirkham *v.* Russell, 76 Va. 956; Brenham *v.* Water Co., 67 Tex. 542, 4 S. W. R. 143; Corvallis *v.* Carlile, 10 Oreg. 139, 45 Am. R. 134; Barber *v.* Asphalt Co., 51 La. An. 1345, 26 S. R. 70; Ratan Co. *v.*

§ 194. Meaning of strict interpretation.— Such statutes are to reach no further in meaning than their words;[1] no person is to be made subject to them by implication,[2] and all doubts concerning their interpretation are to preponderate in favor of the accused.[3] Only those transactions are covered by them which are within both their spirit and their letter.[4]

§ 195. Revenue laws, including taxation.— It being the duty of all persons to bear their several proportions of the public burden, statutes imposing taxes are not penal, and they should be liberally interpreted.[5] But connected with and aiding in the levying and collecting of taxes, there may be and are penal statutes, to be construed strictly.[6] And so it is with the other classes of revenue laws. Their primary object being the collection of duties,[7] not the punishment of crime, they are in the ordinary case construed liberally as being remedial.[8]

Ratan, 9 N. M. 70, 49 Pac. R. 898. Aid grants to railroads are to be strictly construed against the company. Demaree *v.* Johnson, 150 Ind. 419, 49 N. E. R. 1062.]

Taking land.— So of one taking the land of individuals for the public use. *Ante*, § 119; Sharp *v.* Speir, 4 Hill (N. Y.), 76; Sharp *v.* Johnson, 4 Hill (N. Y.), 92, [40 Am. D. 259.] See also Rathbun *v.* Acker, 18 Barb. 393.

[1] *Ante*, §§ 119, 189*a*, 190*e*; P. *v.* Peacock, 98 Ill. 172.

[2] S. *v.* McOmber, 6 Vt. 215; Rex *v.* Mitchell, 2 East, P. C. 936, 937; Rex *v.* Hammond, 2 East, P. C. 1119, 1 Leach, 444; Leonard *v.* Bosworth, 4 Conn. 421; S. *v.* Sumner, 10 Vt. 587, [33 Am. D. 219;] S. *v.* Sanford, 1 Nott & McC. 512, 515; Rex *v.* Parker, 2 East, P. C. 592, 1 Leach, 320, note; Rex *v.* Hickman, 1 Leach, 318, 2 East, P. C. 593; U. S. *v.* Wigglesworth, 2 Story, 369; Rawson *v.* S., 19 Conn. 292; U. S. *v.* Wilson, Bald. 78, 102; The Harriet, 1 Story, 251; Bell *v.* Dole, 11 Johns. 173; *post*, § 220.

[3] The Enterprise, 1 Paine, 32; U. S. *v.* Wigglesworth, 2 Story, 369; P. *v.* Howell, 4 Johns. 296; Com. *v.* Macomber, 3 Mass. 254; Kent *v.* S., 8 Blackf. 163; *post*, § 218.

[4] *Post*, §§ 230, 232; Cearfoss *v.* S., 42 Md. 403.

[5] Cornwall *v.* Todd, 38 Conn. 443. But see Daines *v.* Heath, 3 C. B. 938, 941. And see Alter *v.* Shepherd, 27 La. An. 207.

Special exemptions.— Correspondingly, therefore, statutes conferring special exemptions from the general burdens should be strictly construed. S. *v.* Mills, 5 Vroom, 177; [Robertson *v.* New Orleans, 45 La. An. 617, 12 S. R. 753; Louisville *v.* Bank, 174 U. S. 439, 43 L. ed. 1039; P. *v.* Seminary, 174 Ill. 177, 51 N. E. R. 198; Ford *v.* Delta Co., 164 U. S. 662, 41 L. ed. 590. Where two constructions are possible for a salary act, that most advantageous to the state will be adopted. Madden *v.* Hardy, 92 Tex. 618, 50 S. W. R. 926; Tyrrell *v.* New York, 159 N. Y. 239, 53 N. E. R. 1111.] See also Com. *v.* Maryland, 32 Md. 501.

[6] Coleman *v.* Hart, 37 Wis. 180.

[7] U. S. *v.* Twenty-eight Packages, Gilpin, 306, 326. And see Attorney-General *v.* Radloff, 10 Exch. 84, 26 Eng. L. & Eq. 418.

[8] U. S. *v.* Hodson, 10 Wall. 395, 406; Cliquot's Champagne, 3 Wall. 114, 145.

But a crime connected with these laws must, in reason, be like any other, requiring the statute creating it to be strictly construed.[1] And it is the same of any penal forfeiture in the nature of punishment.[2] The general object of revenue laws being remedial, the forfeitures and penalties by which they are enforced in civil forms of action do not, in principle, require so strict a construction of the provisions which declare them as is given to laws inflicting imprisonment or death. But surely most of them should be deemed equal in this respect to the statutes which give double damages, and which, we have seen, are interpreted strictly.[3] Still the doctrine of the courts appears to be, especially of late, that, even as to these provisions, the revenue laws shall be construed liberally, not in the extreme sense, yet not strictly, but in a sort of equipoise between the two interpretations.[4]

§ 195a. Costs — are unknown at the common law; they are the mere creatures of statutes.[5] Where they are simply an indemnity to the party receiving them,[6] for his expenditures in the case, and the like, they would seem in reason to be remedial, requiring a liberal construction of the statute.[7] On the other hand, where they are penal in their nature, the contrary must be the reasonable consequence. The question has not been much illumined by adjudication, but generally the statutes

[1] U. S. *v.* Buzzo, 18 Wall. 125.

[2] U. S. *v.* Eighty-four Boxes of Sugar, 7 Pet. 453, 462, 463. And see Clifton *v.* U. S., 4 How. (U. S.) 242.

[3] *Ante*, § 195, note. [Revenue statutes must be construed strictly against the government. Rice *v.* U. S., 53 Fed. R. 910. In case of doubt in the construction of a customs act, the court should resolve the doubt in favor of the importer. American Co. *v.* Worthington, 141 U. S. 468, 35 L. ed. 821.]

[4] U. S. *v.* Three Tons of Coal, 6 Bis. 379; U. S. *v.* One Hundred Barrels Spirits, 1 Dill. 49, 2 Abb. (U. S.) 305; U. S. *v.* Watts, 1 Bond, 580; U. S. *v.* Barrels of High Wines, 7 Blatch. 459; U. S. *v.* Mynderse, 7 Blatch. 483; Twenty-eight Cases, 2 Ben. 63; U. S. *v.* Olney, 1 Abb. (U. S.) 275; U. S. *v.* Willetts, 5 Ben. 220; Taylor *v.* U. S., 3 How. (U. S.) 197. See also Adams *v.* Bancroft, 3 Sumner, 384; U. S. *v.* Wigglesworth, 2 Story, 369; Dwar. Stat. (2d ed.) 642; Rex *v.* Hymen, 7 T. R. 536; Walwin *v.* Smith, 1 Salk. 177; Mayor *v.* Davis, 6 Watts & S. 269; [U. S. *v.* Stovall, 133 U. S. 1, 33 L. ed. 555; Prather *v.* U. S., 9 D. C. Ap. 82.]

[5] Crim. Pro., I, § 1313; S. *v.* Kinne, 41 N. H. 238; [Atwater *v.* Russell, 49 Minn. 57, 52 N. W. R. 26; S. *v.* Duestrow, 70 Mo. Ap. 311; Hodge *v.* P., 78 Ill. Ap. 378; Wallace *v.* Sheldon, 56 Neb. 55, 76 N. W. R. 418; Dobler *v.* Warren, 174 Ill. 92, 50 N. E. R. 1048.]

[6] Harold *v.* Smith, 5 H. & N. 381.

[7] Durkin's Case, 2 Lewin, 163.

giving costs appear to have been strictly construed.[1] As to the English doctrine, says a late writer:[2] "The statute of Gloucester, giving costs, was held in one case to be remedial;[3] and, though elsewhere it was said that statutes giving costs were to be construed strictly,[4] this *dictum* has been since declared to be 'hardly consistent with the principle upon which the statute of Gloucester has been interpreted.'"[5]

Double costs.— A statute allowing double costs is plainly penal, to be construed strictly.[6] Now,—

§ 196. Strict and liberal, to different clauses.— Each entire statute is not necessarily to be interpreted in one way, but the clauses will be dealt with differently when from their natures they are subject to different rules. For example, an act may be in part penal and in part remedial, and then the penal part will be construed strictly and the remedial liberally.[7] Within this doctrine,—

Penal, both liberal and strict.— While the parts of a penal statute which subject to punishment or a penalty are, from their odious nature, to be construed strictly,[8] those which exempt from penal consequences will, because of their opposite character, receive a liberal interpretation. Thus,—

Trade, not qualified.— Lord Mansfield, speaking of the offense, under an old English statute, of exercising a trade — "set up, occupy, use, or exercise" — without the statutory qualifications, said: "The constructions made by former judges have been favorable to the qualifications of the persons attacked for exercising the trade, even where they have not *actually* served apprenticeships. They have by a liberal interpretation extended the qualifications for exercising the trade much beyond the letter of the act, and have confined the penalty and prohibition to cases precisely within the express letter." And, in the case in judgment, it appearing that the defendant had not served

[1] Dent *v.* S., 42 Ala. 514; Cone *v.* Bowles, 1 Salk. 205; [S. *v.* Duestrow, 70 Mo. Ap. 311; Montgomery *v.* Foster, 54 Ala. 62; S. *v.* Brewer, 59 Ala. 130; Fanning *v.* S., 47 Ark. 442, 2 S. W. R. 70.]

[2] Wilb. Stat. Law, 231, 232.

[3] Ward *v.* Snell, 1 H. Bl. 10, 18.

[4] Rex *v.* Glastonby, Cas. temp. Hardw. 355, 357; Cone *v.* Bowles, *supra*.

[5] Rex *v.* York, 1 A. & E. 828, 834, by Lord Denman, C. J.

[6] Prescott *v.* Otterstatter, 35 Pa. St. 534. See *ante*, § 193, note.

[7] Hyde *v.* Cogan, 2 Doug. 699, 706.

[8] *Ante*, §§ 119, 189*b*, 192, 193, 195.

an apprenticeship to the trade in question, consequently that he was not qualified within the letter of the statute, he was still held not to be within its penalties, though, having entered into a partnership with a qualified person, he had shared the profits and losses of the partnership, yet had not exercised the trade personally.[1] And, in general terms,—

Liberal in favor of defendants, strict against them.— "Penal statutes," says Hawkins, "are construed strictly against the subject, and favorably and equitably for him."[2] Or, in the words of Gould, J.: "In expounding penal statutes, it is an established rule that the construction must be strict as *against* the defendant, but liberal in his *favor*."[3] And this compressing on the one side, and expanding on the other, constitute together what is meant by the books when they speak of construing this class of statutes strictly. So that not unfrequently the interpretation is carried further on the liberal side in these penal statutes than in any other.[4] Again,—

§ 197. Conflicting demands for strict and liberal.— A single and indivisible provision of a statute may be such as to demand, for one reason, a strict interpretation, and a liberal for another. In which case the interpretation, thus subjected to two opposite forces, will not yield fully to either; but it will be between the two extremes.[5] For example,—

[1] Raynard *v.* Chase, 1 Bur. 2, 6. The statute is 5 Eliz., ch. 4, § 31, the material words of which are: "It shall not be lawful for any person, etc., to set up, occupy, use, or exercise any craft, mystery, or occupation now used or occupied within the realm, etc., except he shall have been brought up therein seven years at the least as an apprentice in manner and form, etc.; nor to set any person on work in such mystery, art, or occupation, etc., except he shall have been apprentice as is aforesaid; or else, having served as an apprentice as is aforesaid, shall or will become a journeyman, or be hired by the year; upon pain that every person willingly offending or doing the contrary shall forfeit and lose for every default forty shillings for every month." [When a penal statute is made to apply only to a certain class of persons, the description of the class becomes descriptive of the offense; and membership in that class becomes of the essence of the offense. Moore *v.* S., 53 Neb. 831, 74 N. W. R. 319.]

[2] 1 Hawk. P. C. (Curw. ed.), p. 90, § 8.

[3] Myers *v.* S., 1 Conn. 502. And see S. *v.* Upchurch, 9 Ire. 454, and the observations of Lord Mansfield in Rex *v.* Parker. 2 East, P. C. 592. See also U. S. *v.* New Bedford Bridge, 1 Woodb. & M. 401; Warrington *v.* Furbor, 8 East, 242, 245; [S. *v.* Bryant, 90 Mo. 534, 7 West. R. 748, citing §§ 193, 194 and 227 of this work.]

[4] *Ante*, § 191: *post*, § 199.

[5] And see *ante*, §§ 195, 195*a*.

Imprisonment for debt.— A statute authorizing imprisonment for debt is remedial because designed to coerce payment, and penal because depriving persons of their liberty. While, therefore, it cannot on the one hand be overmuch condensed in the interpretation, it cannot on the other be extended to include cases not within its terms.[1] Again, to present the doctrine in a somewhat different aspect,—

Two constructions as to jurisdiction.— A statute creating a limited jurisdiction should be construed strictly as to its extent,[2] and liberally as to the mode of proceeding.[3]

§ 198. Exceptions as to strict, for criminal statute.— Even as against defendants, not every criminal statute is to be strictly construed. Thus,—

Jurisdiction, again.— While, to the extent stated in the last section, and as to statutory jurisdictions out of the course of the common law,[4] and perhaps in some other cases, jurisdictional statutes are strictly construed, the rule has nothing to do with the civil or criminal character of the suit. Jurisdictional and other like statutes made for the advancement of justice are remedial, to be interpreted liberally equally in civil causes and in criminal.[5] And a question of jurisdiction may be solved in favor of the tribunal exercising it, as well against the defendant in a criminal cause as in a civil; the rule of strict construction does not apply.[6] So,—

The county — (Venue).— It is of little consequence to one arraigned for crime in what county he is tried, consequently legislative acts determining the venue — that is, the place of trial — are not construed strictly.[7] Again,—

[1] Hathaway *v.* Johnson, 55 N. Y. 93, 95, [14 Am. R. 186,] citing Sturges *v.* Crowninshield, 4 Wheat. 122, 200; Von Hoffman *v.* Quincy, 4 Wall. 535.

[2] S. *v.* Anderson, 2 Tenn. 6, [5 Am. D. 648;] Shawnee *v.* Carter, 2 Kan. 115. [But not so strictly as to defeat manifest legislative intention, as shown by treaty. *In re* Ross, 140 U. S. 480, 35 L. ed. 581.]

[3] Russell *v.* Wheeler, Hemp. 3.

[4] Hartley *v.* Hooker, Cowp. 523, 524; Hudson *v.* Tooth, 3 Q. B. D. 46; Pierce *v.* Hopper, 1 Stra. 249, 260; Walker *v.* Wynne, 3 Yerg. 62; Wakefield *v.* S., 5 Ind. 195; O'Brian *v.* S., 12 Ind. 369.

[5] Mitchell *v.* Mitchell, 1 Gill, 66; S. *v.* Towle, 48 N. H. 97.

[6] Smith *v.* P., 47 N. Y. 330, 341.

[7] P. *v.* Hulse, 3 Hill (N. Y.), 309, 319; Nash *v.* S., 2 Greene (Iowa), 286; 2 Hawk. P. C. (Curw. ed.), ch. 29, § 52. [The words "change of venue" and "removal of causes," in statutes authorizing the transfer of cases, are interchangeable. S. *v.* Wofford, 119 Mo. 375. 24 S. W. R. 764. See also P. *v.* Hurst, 41 Mich. 328, 1 N. W. R.

Preliminary arrest.— Though, in general, statutes authorizing imprisonment are of the penal class, to be strictly construed, a doubt may arise as to how far those of this sort which pertain simply to the procedure constitute an exception. Certainly a mere preliminary arrest is a step in aid of the remedy, and is in harmony with the common law,— two considerations indicating a liberal construction. And in apparent accord with this view is the established interpretation of the English statute of 29 Car. 2, ch. 7, § 6. It forbade arrests on the Lord's day, "except in cases of treason, felony, or breach of the peace," and these words were extended by judicial interpretation to include all indictable offenses.[1] On the other side, we have an interpretation given by the court of exchequer to a provision authorizing any constable of the London police "to take into custody, without warrant, all loose, idle and disorderly persons whom he shall . . . have good cause to suspect of having committed or intending to commit any felony, misdemeanor or breach of the peace." It was held not to justify the arrest of one suspected of having committed a misdemeanor, yet not alleged to have been "loose, idle and disorderly;" Pollock, C. B., observing, "In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute."[2] These two cases are variously distinguishable, and especially in this, that the Sunday arrest was lawful also at the common law, and the particular arrest without warrant was not.[3]

§ 199. Different degrees of strict and liberal.— It is little else than repeating what has already been said[4] to add that the constructions of different statutes will be more or less strict or liberal according to the different pressures of the controlling principles. For the interpretation of no law, written or unwrit-

1027. The term means, strictly, a change of the place of trial to another county; but may be used to denote the transfer of the cause to another judge or court in the same county or district. Felts *v.* R. R. Co., 45 Atl. R. 493 (Pa.).]

[1] Crim. Pro., I., § 207; Rawlins *v.* Ellis, 16 M. & W. 172, 10 Jur. 1039; Cecil *v.* Nottingham, 12 Mod. 348, and the note to Leach's ed.

[2] Bowditch *v.* Balchin, 5 Exch. 378. In the report this statute is stated to be 2 and 3 Vict., ch. 94, § 8. But this is a mistake, the chapter referred to being in one section and on another subject. I find the provision in 2 and 3 Vict., ch. 47, § 64, but am not quite certain that this is the place meant.

[3] And see, on this general subject, Jones *v.* Allen, 1 Head, 626.

[4] *Ante*, §§ 191, 193, 195, 196, 198.

ten, comes from any one rule alone, but from all the legal reasons applicable to the case combined. One principle may bear more or less strongly in a particular direction, and another in another, and the result will be the product of the combined forces. For example, a statute may be more or less penal, the consequence of which is, that the more severe the punishment it directs, and the heavier the crime, the more strict must be its interpretation;[1] or two principles may operate in the same direction, and their power combined is greater than that of one alone; or the one principle may press one way and the other another way. Thus, in construing statutes to prevent frauds, suppress public wrongs, or effect a public good,—objects which the law favors,—there is a pressure toward a liberal interpretation; but if they also provide a penalty, being a thing odious to the law, there is another pressure toward the strict rule; so the balance may be in equipoise, or the one scale or the other may simply preponderate, according to the special circumstances of the case or the views of the particular judge.[2] But rarely will any court so extend an enactment by construction as to involve penal consequences not within its express words.

§ 199a. Statutory changes.— We have seen that some statutes have interpretation clauses,[3] which, of course, must be heeded by the interpreter. And in some of our states there are a few general rules made statutory; whereof most, it is believed, are simply in affirmance of the common law, but occasionally there is an innovation thereon. Of the latter sort,—

Liberal, for penal laws.— There are states in which the rule requiring penal statutes to be construed strictly is abolished by legislation.[4] And in Iowa it is enacted that every statute shall "be liberally construed, with a view to promote its objects, and

[1] S. *v.* Wilcox, 3 Yerg. 278, [24 Am. D. 569;] Rex *v.* Mitchell, 2 East, P. C. 936, 937; Com. *v.* Snelling, 4 Binn. 379; S. *v.* Upchurch, 9 Ire. 454; Reg. *v.* McNeill, 1 Crawf. & Dix C. C. 80; Com. *v.* Fisher, 17 Mass. 46, 49; U. S. *v.* Moulton, 5 Mason, 537; *ante*, § 198.

[2] See and compare Taylor *v.* U. S., 3 How. (U. S.) 197; Fairbanks *v.* Antrim, 2 N. H. 105; Abbott *v.* Wood, 22 Me. 541; Sickles *v.* Sharp, 13 Johns. 497; Van Valkenburgh *v.* Torrey, 7 Cow. 252.

[3] *Ante*, §§ 54, 55.

[4] Com. *v.* Davis, 12 Bush, 240; P. *v.* Soto, 49 Cal. 67. And see *ante*, § 55. [The Interpretation Act (52 and 53 Vict., ch. 63) consolidates the enactments relating to the construction of acts of parliament, and provides for further shortening their language. Similar statutes exist in all the American states.]

in furtherance of justice."[1] In this condition of the laws, will the courts hang or imprison a man by an equitable extension of a statute beyond the fair meaning of its words? Not every act of legislation can, under a just application of judicial rules, do every thing which to the casual observation appears on its face.

[1] S. v. Stoller, 33 Iowa, 321. [In Ohio, Indiana, Illinois, Iowa, Kansas, Nebraska, Kentucky, Arkansas, Texas, California, Oregon, Colorado, Washington, North Dakota, South Dakota, Idaho, Wyoming and Utah, the code is to be liberally construed. Ann. St. Law, § 1021 *et seq.*] Statutes in derogation of the common law are not to be strictly interpreted in New York, Ohio, Iowa, Kansas, Nebraska, Kentucky, Arkansas, California, Oregon, South Carolina, North Dakota, South Dakota, Wyoming, Utah. See Stimson,

CHAPTER XXIII.

EXPOSITIONS OF THE STRICT INTERPRETATION.

§ 199b. Scope and purpose.— Though, as just seen,[1] the pressure for a strict interpretation is not uniform in the cases wherein it prevails, so that a correct exposition in one instance is not necessarily a reliable guide for another, it, like the liberal,[2] has in a general way its bounds. This chapter will attempt, by minuter investigations than were descended to in the foregoing ones,[3] to discover with greater exactness what the bounds are.

§ 200. Legislative intent.— Equally in strict interpretation as in liberal, the object is simply to ascertain the true legislative will,— to arrive at which, is the end of all interpretation.[4] A rendering so strict as to defeat this will is never admissible.[5] Again,—

Other rules — (Absurd — Eluded — Title — Preamble).— The rule of strict interpretation does not prevent our calling in the aid of other rules, and giving each its appropriate scope, yet not so as to overturn this one.[6] For example, penal statutes, like others, are to be so construed as not to work an absurdity,[7] or defeat their purpose, or the process of the court instituted for their enforcement,[8] or be eluded;[9] and we may gather light concerning their meaning from the title and preamble.[10] So,—

§ 201. Intent clear.— Where the legislative intent is clear without interpretation, this rule is, with all the others, quies-

[1] *Ante*, §§ 197, 199.

[2] *Ante*, §§ 189*d*–190*d*.

[3] *Ante*, § 194, and places referred to.

[4] *Ante*, §§ 70, 75, 82; S. *v.* Brooks, 4 Conn. 446; Rawson *v.* S., 19 Conn. 292; Com. *v.* Loring, 8 Pick. 370; The Enterprise, 1 Paine, 32; U. S. *v.* Wilson, Bald. 78; Pike *v.* Jenkins, 12 N. H. 255.

[5] Walton *v.* S., 62 Ala. 197.

[6] The Harriet, 1 Story, 251; Pike *v.* Jenkins, 12 N. H. 255.

[7] Rawson *v.* S., 19 Conn. 292; Com. *v.* Loring, 8 Pick. 370; The Harriet, 1 Story, 251; *ante*, § 82.

[8] Bartolett *v.* Achey, 38 Pa. St. 273. Compare with *ante*, § 198.

[9] The Emily and The Caroline, 9 Wheat. 381, 388; Com. *v.* McGeorge, 9 B. Monr. 3; *ante*, § 82.

[10] S. *v.* Stephenson, 2 Bailey, 334; S. *v.* Fields, 2 Bailey, 554; S. *v.* Smith, Cheves, 157; *ante*, §§ 46, 48–51.

cent.[1] Its mission is simply to illumine what is obscure, and help what is weak. Therefore the propositions of this chapter are to be applied only where there is occasion for them,— in cases of doubt, not doubt in the uninformed, but in the educated, legal mind. Now,—

§ 202. Propositions.— Remembering that what is to be construed strictly is not to be uniformly pressed within the narrowest limits permissible in strict interpretation, for the degrees of strictness vary,[2] let us examine the subject of this chapter under the following propositions:

§ 203. First. *Equally in strict interpretation as in liberal, the statutes may be extended by other provisions of statutory law, and by the common law, combining with them:—*

Explained elsewhere.— This doctrine, as to all kinds of statutes, is explained in a previous chapter. And the reader there observed that the illustrations of it are largely from criminal statutes, the construction of which is strict.[3] But it is a doctrine of the effect of the statutes, not of their interpretation.

§ 204. Secondly. *The rule of strict interpretation is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings.* Otherwise expressed,—

Meaning intended.— As already seen,[4] the meaning intended by the legislature is to prevail in strict construction, the same as in any other. And though, by the general rule, legal and other technical words are to be rendered in their narrow, technical sense,[5] they may, even in strict construction, have their wider popular meaning when the court is able to see that the legislature so intended. And all the words are to be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.[6] Thus,—

[1] *Ante*, § 191, and places referred to.
[2] *Ante*, §§ 196, 197, 199*b*.
[3] *Ante*, §§ 128–130, 134–137, 139–144.
[4] *Ante*, § 200.
[5] *Ante*, §§ 96, 99.
[6] Pike *v.* Jenkins, 12 N. H. 255; P. *v.* Howell, 4 Johns. 296; The Mayor *v.* Davis, 6 Watts & S. 269; S. *v.* Powers, 36 Conn. 77. For illustrations of this doctrine, see the cases cited to the six sections next following; also, Rex *v.* Glover, 2 Russ. Crimes (3d Eng. ed.), 146; Reg. *v.* Hale, 2 Car. & K. 326; Rex *v.* Taylor, Russ. & Ry. 373; Stone *v.* S., Spencer, 401; Hodgman *v.* P., 4 Denio, 235; Rex *v.* Hickman, 1 Leach, 318, 2 East, P. C. 593; Rex *v.* Parker, 2 East, P. C. 592; 1 Leach, 320, note; S. *v.* Anone, 2 Nott & McC. 27; Reg. *v.* Bowden, 2

§ 205. "Subject."— A foreigner living in England under the sovereign's protection is an English *subject*, within an act of parliament defining crimes; "but it was admitted that if the

Moody, 285, 1 Car. & K. 147; Reg. v. Charretie, 13 Q. B. 447; Reg. v. Wallace, 2 Moody, 200; Com. v. Stearns, 2 Met. 343; Smith v. Com., 4 Gratt. 532; Com. v. Phillips, 11 Pick. 28; Com. v. Smith, 14 Mass. 374; Rex v. Willoughby, 2 East, P. C. 944; Rex v. Shepherd, 2 East, P. C. 944; s. c. *nom.* Rex v. Sheppard, 1 Leach, 226; Hopkins v. Com., 3 Met. 460; Com. v. Briggs, 5 Met. 559; Com. v. Homer, 5 Met. 555; Rex v. Foster, 7 Car. & P. 495; Rice v. Com., 12 Met. 246; S. v. Cullum, 2 Speers, 581; P. v. Mather, 4 Wend. 229, 255, [21 Am. D. 122;] S. v. Taylor, 2 McCord, 483; S. v. Bell, 3 Ire. 506; Linney v. S., 6 Tex. 1, [55 Am. D. 756;] Hudgins v. S., 2 Kelly, 173; Downman v. S., 14 Ala. 242; Com. v. Pash, 9 Dana, 31; Cole v. Com., 8 Dana, 31; S. v. Gurney, 33 Me. 527; S. v. Robinson, 33 Me. 564; Rex v. Moore, 2 Car. & P. 235, 1 Moody, 122; Com. v. Smith, 7 Pick. 137; Com. v. Kneeland, 20 Pick. 206; Ream v. Com., 3 S. & R. 207; Reg. v. Oldham, 14 Eng. L. & Eq. 568, 2 Den. C. C. 472; Reg. v. Wiley, 1 Eng. L. & Eq. 567, 2 Den. C. C. 37; Collins v. S., 14 Ala. 608; S. v. Fearson, 2 Md. 310; S. v. Girkin, 1 Ire. 121; S. v. Crawford, 2 Dev. 425; Bell's Case, Foster, 430; Reg. v. West Riding of Yorkshire, 2 Eng. L. & Eq. 296; Rex v. Ridgeley, 1 East, P. C. 171; s. c. *nom.* Rex v. Ridgelay, 1 Leach, 189; Angel v. Com., 2 Va. Cas. 228; U. S. v. Brewster, 7 Pet. 164; U. S. v. Staats, 8 How. (U. S.) 41; U. S. v. Bailey. 9 Pet. 238; P. v. Hennessey, 15 Wend. 147; S. v. Stutson, Kirby, 52; White v. Com., 4 Binn. 418; S. v. Carr, 5 N. H. 367; Bagley v. S., 1 Humph. 486; Reg. v. Evans, Car. & M. 298; S. v. Britt, 3 Dev. 122; Rex v. Cornwall, Russ. & Ry. 336; S. v. Findlay, 2 Bay, 418; Rex v. Beacall, 1 Car. & P. 310, 454; Thomas v. Com., 2 Leigh, 741; Nancy v. S., 6 Ala. 483; Rex v. Wyer, 1 Leach, 430; Rex v. Reekspear, 1 Moody, 342; Rex v. Cox, 1 Moody, 337, 5 Car. & P. 297; James v. Elder, 23 Miss. 134; S. v. Glace, 9 Ala. 283; Rex v. Robinson, 2 Stark. 485; Rex v. Thomas, 2 East, P. C. 605, 2 Leach, 877; Rex v. Rowley, Russ. & Ry. 110; Reg. v. Mence, Car. & M. 234; S. v. Brown, 4 Port. 410; Redman v. Sanders, 2 Dana, 68; U. S. v. Jones, 3 Wash. C. C. 209; S. v. Smith, 33 Me. 369, [54 Am. D. 576;] Com. v. Houghton, 8 Mass. 107; Brown v. Com., 8 Mass. 59; Com. v. Whitmarsh, 4 Pick. 233; S. v. Blythe, 3 McCord, 363; S. v. Clarksville & R. T. P. Co., 2 Sneed, 88; Walton v. S., 62 Ala. 197; Bowden v. S., 2 Tex. Ap. 56; [S. v. Boyd, 2 G. & J. (Md.) 365; Wood v. Adams, 35 N. H. 32; S. v. Myers, 146 Ind. 36, 44 N. E. R. 801; Eyre v. Harman, 92 Cal. 580, 28 Pac. R. 779; S. v. Cadwell, 79 Iowa, 432, 44 N. W. R. 700. Where a defendant is seen three or four times distilling rum from refuse cane, it is enough to constitute "engaging in" the business. Grant v. S., 73 Ala. 13. A "sufficient guard" is not necessarily a statutory fence. Cole v. S., 72 Ala. 216. The words "owner" or "proprietor" may include tenant or lessee. Poteete v. S., 72 Ala. 558. "Concubinage" does not require any protracted period of residence with. S. v. Bussey, 58 Kan. 879, 50 Pac. R. 891. "Game" includes all wild fowl or birds fit for food. P. v. O'Neil, 71 Mich. 325, 39 N. W. R. 1. A single sale is sufficient, even in an emergency, to constitute an offense against a law forbidding stores to be kept open on Sunday. Dixon v. S., 75 Ala. 39. "Closed" for a saloon means that all sales should be effectually stopped. Kurtz v. P., 33 Mich. 279. "Highway" includes streets.

statute had said *natural-born subjects*, etc., it would not have extended to him."[1]

"*Not authorized by law*"— (*Lottery*).— An act of one of our states, making penal the sale of lottery tickets in "any lottery not authorized by law," prohibits the sale of tickets in lotteries authorized by the laws of other states and countries, unless also authorized by some law, either federal or state, having force in the particular locality.[2] And —

Kidnaping by foreign command. — A provision to punish those who, without lawful authority, forcibly confine any person in this state, or carry any person out of the state against his will, extends to soldiers coming from another state, by order of its military powers, while it is under martial law in a time of civil insurrection, to seize and carry back its insurgent citizens found here.[3]

Otherwise as to other states, etc. — (*Larceny of "bank-note" — Betting on election — "Exportation"*).— A statute forbidding the larceny of "any bank-note" extends to bank-notes of other states;[4] against betting "upon any election in this state," to a betting, within this state, on an election for president of the United States.[5] So the words "designed for

Indianapolis *v.* Higgins, 141 Ind. 1, 40 N. E. R. 671. A private residence may become a "public place." White *v.* S., 89 Tex. Cr. 269, 4 S. W. R. 702. To "flee from justice" a man need not leave the state. S. *v.* Harvell, 89 Mo. 588, 6 West. R. 432. "Railroad" includes street railroad. Price *v.* S., 74 Ga. 378. "Money" includes not only legal tender coin and currency, but any other circulating medium. S. *v.* McFetridge, 84 Wis. 473, 54 N. W. R. 1, 20 L. R. A. 223. Gross lewdness is "open," though committed in the presence of a child of tender years. S. *v.* Juneau, 88 Wis. 180, 59 N. W. R. 580, 24 L. R. A. 857. A house may be "dwelling-house of the head of a family," though owned by wife. Harrison *v.* S., 74 Ga. 801.]

[1] 1 East, P. C. 53, 54; Anonymous, J. Kel. 38, referring to Calvin's Case, 7 Co. 1, 6*b*. [An act prohibiting sale of liquors to "citizens" will be interpreted to include "residents." Skinner *v.* S., 120 Ind. 127, 22 N. E. R. 115. "To engage in" a business without a license is to pursue such business for a profit. It is not necessary that it should be the sole occupation. Grant *v.* S., 73 Ala. 13.]

[2] Com. *v.* Dana, 2 Met. 329. And see *post*, § 959; P. *v.* Warner, 4 Barb. 314; Com. *v.* Cone, 2 Mass. 132; Sims *v.* Sims, 75 N. Y. 466.

[3] Com. *v.* Blodgett, 12 Met. 56.

[4] Cummings *v.* Com., 2 Va. Cas. 128.

Forgery.— The same principle applies to the forging, in this state, of a deed of lands lying in another state. P. *v.* Flanders, 18 Johns. 164. And see Rex *v.* McKeay, 1 Moody, 130; Rex *v.* McKay, Russ. & Ry. 71.

[5] Quarles *v.* S., 5 Humph. 561; Givens *v.* Rogers, 11 Ala. 543.

exportation," in the inspection laws of a state, refer to exportation to another of the United States, as well as to a foreign country.[1]

§ 206. **Forging "order."**— The English statute of 7 Geo. 2, ch. 22, against the forging of orders for the payment of money, and the like, was not confined in its interpretation to commercial transactions; but extended to an order, drawn by a justice of the peace on a high constable or treasurer, to pay a reward.[2] So —

"*Street, lane, passage-way*" — (*Smoking in*).— The Massachusetts statute imposing a penalty on "any person who shall smoke, or have in his possession, any lighted pipe or cigar in any street, lane or passage-way" in Boston, applies to all open ways used for purposes of travel, though not legally established as such.[3]

§ 207. "**Dwelling-house**"— (**Jail**).—A jail is held to be an "inhabited dwelling-house," within the statutes against arson.[4]

"*Advertisement*" — (*Sign-board — Lotteries*).— A sign-board, at a person's place of business, giving notice of lottery tickets being for sale there, is an "advertisement;" and, if erected before the passage of the act making the advertising of lottery tickets penal, a continuance of it is within the act.[5]

[1] Com. *v.* King, 1 Whart. 448.

[2] Rex *v.* Graham, 2 East, P. C. 945. And see further, as to the meaning of this and kindred terms, *post*, §§ 325–335.

[3] Com. *v.* Thompson, 12 Met. 231. Compare with Crim. Law, II, § 1267.

[4] P. *v.* Cotteral, 18 Johns. 115; Com. *v.* Posey, 4 Call, 109, [2 Am. D. 560.] So it is a "house." Rex *v.* Donnavan, 1 Leach, 69; s. c. *nom.* Rex *v.* Donnevan, 2 East, P. C. 1020; Stevens *v.* Com., 4 Leigh, 683. And see also *post*, §§ 279, 289. Yet in the jury case of Reg. *v.* Connor, 2 Cox, C. C. 65, Parke, B., ruled that a jail was not, under the circumstances of the case, a "house" within the statute then in question. He said that, in the above case of Rex *v.* Donnevan, referred to as in 2 W. Bl. 682, "it was held that a jail was a house within the meaning of the words 'any house' in the statute 9 Geo. 1, ch. 22; but there the jailer's house was a part of the jail, and the court gave this as the reason for their decision. A jail is not a house at common law." There is no reference to any authority for this *dictum*. It is a place where people, though prisoners, are under the protection of the law, and eat, drink and sleep. One, therefore, would find it difficult to suggest a reason why it is not both a house and a dwelling-house. In the facts of this case, the jail was used only as a lock-up, and it was under the same roof with the court-house,— circumstances, perhaps, which properly varied the result.

[5] Com. *v.* Hooper, 5 Pick. 42. See *post*, § 958.

§ 208. "Erect and build" — (Wooden buildings — Suffer to remain — Alter). — To elevate and enlarge a wooden building, in a way materially to alter its character, is to "erect and build" it, within statutes and ordinances for preventing the spread of fires in populous places.[1] But to make mere internal alterations therein, and apply it to a new use, — as, to convert a meeting-house or a joiner's shop into a dwelling-house, — is not to "erect and build" it.[2] Nor is it such to remove a building from one part of a lot to another,[3] or to suffer one to remain which was built before the passage of the statute.[4] Again,—

"*Wooden building.*" — A building partly of wood and partly of brick, called brick-pane, has been held not to be a "wooden building" within a penal statute of this class; though, had the statute been remedial, the result would have been otherwise.[5] So,—

§ 209. "Crew." — Where a statute made it an offense for "any master or other officer" of a vessel maliciously to "beat, wound or imprison any one or more of the crew," the word "crew" was held to include the under-officers as well as the common seamen; consequently a master committed the offense by imprisoning his first mate.[6]

"*Goods and merchandise*" — "*Personal goods.*" — The luggage of a steamboat passenger is "goods or merchandise," within a statute against larceny from any vessel in any navigable river;[7] but the words "personal goods," in another

[1] Douglass *v.* Com., 2 Rawle, 262. And see Tuttle *v.* S., 4 Conn. 68; McGary *v.* P., 45 N. Y. 153. And see *post*, § 232.

So, **nuisance.** — Under statutes against the "erecting" of buildings which may become nuisances, one "erects" a livery-stable who enlarges and fits up a dwelling-house for use as such. Hastings *v.* Aiken, 1 Gray, 168.

[2] Booth *v.* S., 4 Conn. 65.

[3] Brown *v.* Hunn, 27 Conn. 332, [71 Am. D. 71.]

[4] S. *v.* Brown, 16 Conn. 54; Tuttle *v.* S., 4 Conn. 68.

So, "**receiving.**" — Keeping possession of a thing is not within a statute against "receiving" it. Attorney-General *v.* King, 5 Price, 195.

And, "**spread awning.**" — A city ordinance forbidding any person "to spread any awning," etc., is not violated when the person continues to keep spread an awning spread before. S. *v.* Cleveland, 3 R. I. 117.

[5] Stewart *v.* Com., 10 Watts, 306, decided on a city ordinance.

[6] U. S. *v.* Winn, 3 Sumner, 209. As to the meaning of the word "mariner," see Brush *v.* Bogardus, 8 Johns. 157.

[7] Stat. 7 & 8 Geo. 4, ch. 29, § 17; Rex *v.* Wright, 7 Car. & P. 159. See *post*,

criminal statute, have been held not to include *choses in action*.[1]

"*Materials for lottery*."—Books kept in relation to the proceedings of a lottery are "materials for a lottery."[2]

§ 210. "**Pedler, hawker, petty chapman.**"—One who carries about goods, offering them for sale, is held to "trade, deal and traffic" in them "as a pedler, hawker or petty chapman."[3] And—

"*Deal in selling*."—To sell spirituous liquors in a single instance is to "deal in the selling" of them.[4] But—

"*Dealer*."—The word "dealer" alone, in a variety of statutes, including criminal ones, is held not to be satisfied by a single instance of traffic.[5]

Causing false entry—False statement.—A woman in England went to a register of births, to have registered the birth of a child. She stated the necessary particulars, every one of which was false; and, when he had written the entry, she signed it as the person giving the information. This was held to constitute the felony of causing a false entry, within the words of 6 and 7 Will. 4, ch. 86, § 43, "shall wilfully insert or cause to be inserted, etc., any false entry of any birth," etc.; and not merely the misdemeanor, under section 41, of making a "false statement."[6]

§ 211. "**Stage, etc., of manufacture.**"—Goods remain in "a stage, process, or progress of manufacture," after the

§§ 344, 345; Chamberlain *v.* Western Transp. Co., 44 N. Y. 305, [4 Am. R. 681.]

[1] U. S. *v.* Davis, 5 Mason, 356, the court observing: "It is true the words 'goods or chattels' may, in the construction of wills, include bonds, notes, bank-bills, etc.; but this is upon the presumed intention of the testator, where a liberal exposition of his words is allowable, and upon principles derived from the civil and canon law. But in penal statutes a more strict construction is adopted; and the analogy of the common law, in respect to larceny, may well furnish the proper rule for decision." See *post*, §§ 344, 345.

[2] Com. *v.* Dana, 2 Met. 329.

[3] Merriam *v.* Langdon, 10 Conn. 460. See, however, Page *v.* S., 6 Mo. 205.

[4] S. *v.* Paddock, 24 Vt. 312. And see S. *v.* Von Glon, 1 McMul. 187. For more on this expression and others of the sort, see *post*, §§ 1016–1018, 1090–1092.

[5] Carter *v.* S., 44 Ala. 29; Overall *v.* Bezeau, 37 Mich. 506; Barton *v.* Morris, 10 Phila. 360. And see S. *v.* Yearby, 82 N. C. 561.

[6] Reg. *v.* Dewitt, 2 Car. & K. 905. And see Reg. *v.* Brown, 2 Car. & K. 504; Smith *v.* S., 5 Humph. 163; Rex *v.* Harley, 4 Car. & P. 369.

texture is complete, until brought into a fit condition for sale.[1]

"*Within ten feet*" *of road, foot-path.*—Where a statute prohibits the erection of buildings within ten feet of a particular road, and directs that the foot-path be deemed part of the road, a building within ten feet of the foot-path is within the prohibition.[2]

"*Deliver manifest.*"—The captain of a vessel does not deliver a manifest of his cargo, within a statutory requirement, unless the manifest he delivers is true.[3]

"*Disturb congregation.*"—If it is made penal to "disturb any congregation assembled in any church, meeting-house, or other place of religious worship," a Methodist camp-meeting, on camp-ground, at times when religious services are not actually progressing, is within the protection.[4]

"*Woman.*"—A girl under twelve years of age, not attained to puberty, is a "woman," within the former statute of Virginia making it felony, punishable by death, for a slave, free negro or mulatto to attempt to ravish a white woman.[5] But such a girl is not included in the word "woman" in every statute of this sort.[6]

Sale of services.—To sell the services of a slave is to sell the slave within a former act to prevent the introduction of this class of persons into the state.[7] So—

"*Lottery ticket.*"—A quarter-ticket in a lottery is a lottery ticket.[8] And—

"*Mould, etc., adapted to coining.*"—A statute against being possessed of any mould, pattern, die, etc., adapted to coining is violated by having one-half, or any smaller part, of such apparatus,[9] or the apparatus to make one side only of a counterfeit coin.[10]

[1] Rex *v.* Woodhead, 1 Moody & R. 549.

[2] Rex *v.* Gregory, 2 Nev. & M. 478, 5 B. & Ad. 555.

[3] Phile *v.* The Anna, 1 Dall. 197.

[4] Com. *v.* Jennings, 3 Grat. 624. More particularly, see Crim. Law, II, §§ 302–305.

[5] Com. *v.* Watts, 4 Leigh, 672; Charles *v.* S., 6 Eng. 389, 406, 410.

[6] Com. *v.* Bennet, 2 Va. Cas. 235.

[7] Link *v.* Beuner, 3 Caines, 325.

[8] Freleigh *v.* S., 8 Mo. 606.

[9] S. *v.* Griffin, 18 Vt. 198.

[10] Com. *v.* Kent, 6 Met. 221.

A part, in larceny.—See, under Stat. 14 Geo. 2, ch. 6, as to killing a sheep with intent to steal a part of the carcass, Rex *v.* Williams, 1 Moody, 107; Rex *v.* Clay, Russ. & Ry. 387.

§ 212. Thirdly. *It is not a violation of the rule of strict construction to give the words of a statute a reasonable meaning, according to the intent of the makers, disregarding captious objections, and even the demands of an exact grammatical propriety.*[1] Thus,—

"*Person*"—(*State — Corporation*).— In this class of statutes as in others, the state,[2] United States[3] or a corporation[4] may be included in the word "person." But such is not necessarily the construction;[5] as, for example, not in every statute has the word "person" been held to extend to a corporation.[6] The rule would seem to be, that *prima facie* it does,[7] because a corporation is an artificial person created by the law;[8] but considerations of the subject, object and connected words of the particular statute may lead to the contrary result.[9] So,—

[1] For illustrations of this doctrine, see the cases cited to this and the next four sections; also Com. *v.* Martin, 17 Mass. 359; Com. *v.* Keniston, 5 Pick. 420; S. *v.* Mairs, Coxe, 453; Rex *v.* Atkinson, Russ. & Ry. 104; Rex *v.* Harris, 7 Car. & P. 446; Rex *v.* Shadbolt, 5 Car. & P. 504; Com. *v.* Loring, 8 Pick. 370.

[2] Stewart *v.* S., 4 Blackf. 171; Martin *v.* S., 24 Tex. 61.

[3] S. *v.* Herold, 9 Kan. 194.

[4] Germania *v.* S., 7 Md. 1; Planters' & Merchants' Bank *v.* Andrews, 8 Port. 404; P. *v.* Utica Ins. Co., 15 Johns. 358, 381, [8 Am. D. 243;] Fisher *v.* Horicon Iron & Man. Co., 10 Wis. 351; Miller *v.* Com., 27 Grat. 110; P. *v.* May, 27 Barb. 238; Beaston *v.* Farmers' Bank, 12 Pet. 102, 134; Society, etc. *v.* New Haven, 8 Wheat. 464; Olcott *v.* Tioga R. R. Co., 20 N. Y. 210, [75 Am. D. 393;] Bartree *v.* Houston, etc. R. R. Co., 36 Tex. 648; Norris *v.* S., 25 Ohio St. 217, [18 Am. R. 291;] Newcastle Corporation, 12 Cl. & F. 402; Memphis *v.* Laski, 9 Heisk. 511, [24 Am. R. 327.] See S. *v.* Ohio & Mississippi R. R. Co., 23 Ind. 362. Of this there seems to have been formerly some doubt. See Rex *v.* Harrison, 1 Leach, 180, 2 East, P. C. 926, 988; Rex *v.* Jones, 1 Leach, 366, 2 East, P. C. 991.

[5] S. *v.* Bancroft, 22 Kan. 170; *In re* Fox, 52 N. Y. 530; U. S. *v.* Fox, 94 U. S. 315.

[6] S. *v.* Cincinnati Fertilizer Co., 24 Ohio St. 611, a case which in some of the other states would probably be held the other way. ["Non-resident person" includes foreign corporations. Aldrich *v.* Blatchford (Mass.), 56 N. E. R. 700. Where a statute exempts from license barbers "now engaged in the business of a barber in this state and who have been so engaged for two years," *so* refers to both business and state. Wass *v.* Board (Mich.), 82 N. W. R. 234.]

[7] Miller *v.* Com., 27 Grat. 110; *In re* Oregon Bulletin Publishing, etc. Co., 13 Bankr. Reg. 199; Douglass *v.* Pacific Mail Steamship Co., 4 Cal. 304; Northwestern Fertilizing Co. *v.* Hyde Park, 3 Bis. 480.

[8] Crim. Law, I, § 417; Louisville, etc. R. R. Co. *v.* Com., 1 Bush, 250; Douglass *v.* Pacific Mail Steamship Co., 4 Cal. 304.

[9] Pharmaceutical Society *v.* London, etc. Supply Assoc., 5 Ap. Cas. 857, in which the H. of L. held the word "person" in 31 and 32 Vict.,

Continued — (*Negro* — *Indian* — *Judge*).— A negro,[1] Indian,[2] or judge holding court,[3] may be comprehended under this word "person." Again,—

Masculine includes feminine—("*His*"—"*Man*"—"*Woman*"). A woman may be meant by the masculine pronoun "his."[4] And, in a statute not penal,[5] probably also in a penal one, she may be by the word "man."

"*Sheep*."— The word "sheep" may include a ewe[6] or a lamb.[7] And —

"*Cattle*"—may comprehend horses,[8] geldings,[9] asses,[10] pigs[11] and sheep.[12] Moreover,—

§ 213. Singular and plural.— The singular number may be comprehended in the plural. For example,—

"*Bank-notes*," "*bills obligatory*"—(*Larceny*).— A statute making it felony to purloin from the postoffice "bank-*notes*" is broken by taking a single bank-note.[13] And one punishing the larceny of "*bills* obligatory" is infringed when a single bill obligatory is stolen.[14] So,—

"*Tippling-houses*" — (*Lord's day*).— Under a statute declaring it an offense "to keep open tippling-*houses* on the Sabbath day," a person may incur the guilt by so keeping open one tippling-house.[15] But,—

"*House*," "*dwelling-house*."—Between "house" and "dwelling-house" there is a distinction which, though nice, is palpable in the law.[16] Therefore when the legislature had taken away clergy from the felony of burning a *dwelling*-house, one

ch. 121, not to include a corporation, sustaining the court of appeal in 5 Q. B. D. 310, and overruling the queen's bench division in 4 Q. B. D. 313; Saint Leonards, Shoreditch, *v.* Franklin, 3 C. P. D. 377; Com. *v.* Phœnix Bank, 11 Met. 129, 149.

[1] S. *v.* Peter, 8 Jones (N. C.), 19; Hammond *v.* S., 14 Md. 135.

[2] U. S. *v.* Shaw-mux, 2 Saw. 364.

[3] Bass *v.* Irvin, 49 Ga. 436.

[4] Rex *v.* Smith, Russ. & Ry. 267.

[5] Smith *v.* Allen, 31 Ark. 268.

[6] Reg. *v.* Barran, Jebb, 245; Reg. *v.* Bannam, 1 Crawf. & Dix, C. C. 147.

[7] Reg. *v.* Spicer, 1 Car. & K. 699; S. *v.* Tootle, 2 Harring. (Del.) 541.

[8] Rex *v.* Moyle, 2 East, P. C. 1076.

[9] Rex *v.* Mott, 2 East, P. C. 1075, 1 Leach, 73, note.

[10] Rex *v.* Whitney, 1 Moody, 3.

[11] Rex *v.* Chapple, Russ. & Ry. 77; Decatur Bank *v.* St. Louis Bank, 21 Wall. 294.

[12] U. S. *v.* Mattock, 2 Saw. 148. See *post*, §§ 245–248.

[13] Rex *v.* Hassel, 1 Leach, 1, 2 East, P. C. 598.

[14] Com. *v.* Messinger, 1 Binn. 273.

[15] Hall *v.* S., 3 Kelly, 18. So, in another sort of case, under a grant to "orphans" a single orphan will take. Averit *v.* Alleam, 23 Ga. 382.

[16] *Post*, §§ 277, 289.

convicted of burning a *house*, omitting the word "dwelling," was held not to be excluded therefrom.[1] Again,—

§ 214. **"Demolish" — "Destroy."** — To consume a house by fire is to demolish it;[2] and to destroy the parts of a threshing machine which the owner has taken down in apprehension of a mob is to destroy the machine.[3]

"*Similar pieces*" — (*Counterfeiting*). — A statute against having in possession ten similar pieces of gold or silver counterfeit coin is violated if the offender has ten pieces of either kind, though not all of the same denomination.[4]

Standing a jack.— Under the prohibition of standing a jack without license, and letting him to mares for profit and hire, an unlicensed standing under a contract to purchase the mules at a price below their value was held to constitute the offense.[5]

§ 215. **False grammar** — and other verbal inaccuracies no more impair a statute which is to be construed strictly than any other.[6] For example,—

"*Sell from.*"— An Alabama act made it punishable to "buy, *sell* or receive *from* any slave" certain things without his master's consent. And it was held to be infringed by a sale *to* the slave; for its obvious meaning should not be defeated by the inaccurate use of a preposition.[7] So —

Rejecting "of" — (*Carnal abuse*). — In the following statute of Missouri, the second "of"— printed in italics — is rejected in the construction: "If any guardian of any white female under the age of eighteen years, or *of* any other person to whose care or protection any such female shall have been confided,

[1] S. v. Sutcliffe, 4 Strob. 372. But see Com. v. Posey, 4 Call, 109, 2 Am. D. 560.

[2] Reg. v. Howell, 9 Car. & P. 437; Reg. v. Harris, Car. & M. 661. And see Reg. v. Bowen, 1 Den. C. C. 22.

[3] Rex v. Mackerel, 4 Car. & P. 448. And see Rex v. Fidler, 4 Car. & P. 449. A similar rule prevails as to the halves of bank notes cut apart, and so sent in a letter for greater safety. Rex v. Mead, 4 Car. & P. 535.

Destroy vessel.— As to what is destroying a vessel, see U. S. v. Johns, 1 Wash. C. C. 363; Crim. Law, I, § 570, note.

[4] Brown v. Com., 8 Mass. 59, 71. And see Com. v. Whitmarsh, 4 Pick. 283; Com. v. Smith, 7 Pick. 137. Yet, consistently with this, the court said in Brown v. Com.; "To be convicted of the crime, the prisoner must be proved to have had in his possession at least ten gold pieces or ten silver pieces." p. 71, Sedgwick, J. And see *ante*, §§ 94, 95; Crim. Law, II, §§ 336, 338.

[5] Com. v. Harris, 8 B. Monr. 373.

[6] *Ante*, §§ 79, 81; *post*, § 243.

[7] Worrell v. S., 12 Ala. 732.

shall defile her by carnally knowing her," etc.; and thus its penalties extend to persons in care who are not guardians, as well as to those who are.[1]

§ 216. On the other hand,—

Fourthly. *The words of a penal or other statute requiring a strict construction must not be extended beyond what they will fairly and reasonably bear.*[2] Thus,—

"*Beat*"—"*Assault.*"—Pulling a person to the ground and holding him there is not "beating" him.[3] And where an act makes an assault indictable it means a real assault, not a constructive one.[4]

"*Wound inflicted.*"—A wound incurred by forcing a part of one's body against a weapon with which another is attacking him is not a wound inflicted by the other.[5]

"*Ship or vessel.*"—An open boat is not a "ship or vessel," within the acts of congress of 1820 and 1823, prohibiting commercial intercourse with the British colonies.[6]

"*Stack of straw.*"—A stack, of which the lower part is coleseed[7] straw, and the upper is wheat stubble, is not a stack of straw.[8]

"*Officer*"—(*Resisting*).—One specially deputed by a justice of the peace, under authority of a statute, to serve a particular

[1] S. v. Acuff, 6 Mo. 54.

[2] For illustrations of this doctrine, see, besides the other cases cited to this section and the next, the following: S. v. Jim, 3 Murph. 3; Rex v. Snell, 2 Moody & R. 44; S. v. Smith, Cheves, 157; Rex v. Mountford, 7 Car. & P. 242, 1 Moody, 441; Rex v. Aris, 6 Car. & P. 348; U. S. v. Tenbroek, 2 Wheat. 248; Williams v. S., 12 Sm. & M. 58; Com. v. Catlin, 1 Mass. 8; Willington v. Stearns, 1 Pick. 497; Reg. v. Deneny, Jebb, 255; Rex v. Pateman, Russ. & Ry. 455; Reg. v. Sanders, 9 Car. & P. 79; Lord Duffus' Case, 2 Comyns, 440; Rex v. Nixon, 7 Car. & P. 442; Calvert v. Com., 5 B. Monr. 264; Rex v. Richardson, 6 Car. & P. 335; S. v. Briley, 8 Port. 472; Rex v. Wakeling, Russ. & Ry. 504; Reg. v. Adams, Car. & M. 299; Hickerson v. Benson, 8 Mo. 8, [40 Am. D. 115;] S. v. Shoemaker, 7 Mo. 177; Rex v. Palmer, 2 Leach, 680, 2 East, P. C. 586; Rex v. Davis, 2 East, P. C. 593, 1 Leach, 496, note; S. v. Pinchback, 2 Mill, 128; Leonard v. Bosworth, 4 Conn. 421; Culp v. S., 1 Port. 33, [26 Am. D. 857;] Rex v. Pike, 1 Leach, 317, 2 East, P. C. 647; Wash v. S., 14 Sm. & M. 120; U. S. v. Pearce, 2 McLean, 14; Reg. v. Thorn, Car. & M 206; Moore v. S., 13 Sm. & M. 259.

[3] Reg. v. Hale, 2 Car. & K. 328.

[4] S. v. Freels, 3 Humph. 228; Evans v. S., 1 Humph. 394; Humphries v S., 5 Mo. 208.

[5] Rex v. Beckett, 1 Moody & R. 526 For the meaning of "wound," see *post*, § 314.

[6] U. S. v. An Open Boat and Lading, 5 Mason, 120.

[7] A species of cabbage.

[8] Rex v. Tottenham, 7 Car. & P. 237.

process, the Vermont court has held, is not an "officer" within a provision making it criminal to "impede or resist any officer" in the execution of his office.[1]

"*Implements of gaming.*" — Game-cocks, being live animals, are not "implements" of gaming.[2]

Located "in" — (*Wooden building*). — An act made penal, among other things, the erection, to any building, of a wooden addition having "in" it a chimney or fireplace. And an addition warmed from a chimney and fireplace put solely in the old part, for the exclusive accommodation of the new, was held not to be within the inhibition.[3]

§ 217. **"Security for money."** — Money, which means simply what is legal tender,[4] is not indicated by the words "security for money."[5]

"*Instrument, arms,*" *etc.* — (*Escape*). — A writing, informing a prisoner that he has a friend, and may be released from confinement, is not "any instrument, arms, or other thing calculated to aid his escape."[6]

"*Alter*" — (*Forgery*). — One does not "alter"[7] bank-bills, who so cuts them as, by putting the parts together, to make a greater number.[8]

"*Countersigned,*" *etc.* — (*Forgery*). — A counterfeit bill on an existing bank, the cashier's name wherein is fictitious, is not in the similitude of a bank-bill "countersigned by the cashier thereof."[9]

"*Greater or other fees*" — (*Extortion*). — A statute against "any officer taking greater or other fees" than are prescribed in it is not violated by one who, out of office, receives such fees for services rendered while in office.[10]

"*Stack of wheat.*" — Wheat thrashed from the straw is not a "stack of wheat."[11]

[1] S. *v.* McOmber, 6 Vt. 215. Possibly not all courts would so hold; there being room for the opinion that, though the deputy was not an officer for general purposes, he was such for this particular occasion. Yet see Kavanaugh *v.* S., 41 Ala. 399.

[2] Coolidge *v.* Choate, 11 Met. 79. See *post*, § 319.

[3] Daggett *v.* S., 4 Conn. 60, [10 Am. D. 100.]

[4] *Post*, § 346.

[5] Rex *v.* Skutt, 1 Leach, 106, 2 East, P. C. 582.

[6] Hughes *v.* S., 1 Eng. 131.

[7] Crim. Law, II, §§ 573–578.

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

[9] Com. *v.* Boynton, 2 Mass. 77.

[10] Gallagher *v.* Neal, 3 Pa. St. [P. & W.] 183. See *ante*, § 171, note; Crim. Law, II, § 390 *et seq.*

[11] Com. *v.* Erskine, 8 Grat. 624. See *ante*, § 216.

§ 218. Fifthly. *If, in a criminal case requiring the strict construction of a statute, the court entertains a reasonable doubt of its meaning, this doubt will prevail in favor of the accused.*

Not multiply felonies.— Within this doctrine, the court will lean to a construction which will not multiply felonies.[2] Likewise —

Computation of time in sentence.— The day on which a prisoner is sentenced will be reckoned as a part of his term of imprisonment.[3] So, also,—

"*Until or until*"— (*Deserting seamen*).— Under an act of congress authorizing the commitment of a deserting seaman "to the house of correction or common jail . . . there to remain until the ship or vessel shall be ready to proceed on her voyage, *or* until the master shall require his discharge," the seaman cannot be detained after the vessel has sailed.[4] Now,—

§ 219. **Concerning the propositions.**— The foregoing propositions, with their illustrations, bring to view not many departures, in strict interpretation, from what would be held in liberal, though they do some. They are chiefly helpful as showing what meanings the words may take under pressure of ordinary rules of interpretation, without violating the principles governing penal and other like laws, which require a strict construction. It is our next proposition which, more than any other, distinguishes the strict interpretation from the liberal; namely,—

§ 220. Sixthly. *In strict construction, no case is to be brought within the statute unless completely within its words.* Or,—

Otherwise expressed — (*Within mischief, not words*).— As stated by Hawkins, the doctrine is: "No parallel case, which comes within the same mischief, shall be construed to be within the purview of it [the statute], unless it can be brought within the meaning of the words."[5] In slightly different language, though a case of this sort is fully within the mischief to be remedied, and is even of the same class and within the same reason as other cases enumerated in the statute, construction

[1] *Ante*, § 194.

[2] Com. *v.* Macomber, 3 Mass. 254; Com. *v.* Barlow, 4 Mass. 439.

[3] Com. *v.* Keniston, 5 Pick. 420. See *ante*, §§ 105–111.

[4] S. *v.* Patterson, T. U. P. Charl. 311.

[5] 2 Hawk. P. C. (Curw. ed.), ch. 18, § 16.

will not be permitted to bring it within the statute unless it is also within the statutory words.[1] Thus,—

§ 221. "Breaking" or not — (Burglary). — Under words making punishable those who, with intent to commit any felony, "shall in the night-time enter *without* breaking, or in the day-time break and enter, any warehouse," an entry in the night by breaking was held not to be included.[2]

***Place not within enumeration* — (*Gaming*).** — It being forbidden to set up a faro-table "in any dwelling-house, out-house, or place occupied by any tavern-keeper, retailer of wine, spirituous liquors, beer or cider," one in a locality not in terms mentioned — as, for instance, in a house used solely for this purpose — was held not to be prohibited.[3]

***One party only prohibited* — (*Living in fornication*).** — It was provided in Tennessee that "if any white man or woman shall presume to live with any negro, mustee or mulatto man or woman, as man and wife, each and every of the parties so offending shall be liable to forfeit," etc. And this was held to make the act penal only in the white person, not also in the other.[4]

Clergy excluded under circumstances. — Where a statute ousts clergy from an offense when committed under specified circumstances, all, for a case to be within it, must transpire in the county of the trial.[5] Again,—

[1] *Ante*, § 194, and places there referred to; Rex *v.* Hammond, 2 East, P. C. 1119, 1 Leach, 444; Leonard *v.* Bosworth, 4 Conn. 421; Hall *v.* S., 20 Ohio, 7; Rex *v.* Senior, 1 Leach, 496, 2 East, P. C. 593; Melody *v.* Reab, 4 Mass. 471, 473. For further illustrations, see the cases cited to the five next following sections; also Rex *v.* Ellis, 8 D. & R. 173; S. *v.* Lovett, 3 Vt. 110; Rex *v.* Paddle, Russ. & Ry. 484; Carpenter *v.* P., 8 Barb. 603; S. *v.* Cooper, 16 Vt. 551; Hamuel *v.* S., 5 Mo. 260; Sharpe's Case, 2 Lewin, 233; Kyle *v.* S., 10 Ala. 236; 2 East, P. C. 919; Hawkins *v.* S., 3 Stew. & P. 63; S. *v.* Smitherman, 1 Ire. 14; Rex *v.* Remnant, 5 T. R. 169; Rex *v.* Mellish, Russ. & Ry. 80; Reg. *v.* Turner, 8 Car. & P. 755; Reg. *v.* Scott, 3 Q. B. 543; Campbell *v.* Com., 2 Rob. (Va.) 791; S. *v.* Curtis, 5 Humph. 601; Com. *v.* Barrett, 9 Leigh, 666; U. S. *v.* An Open Boat and Lading, 5 Mason, 120; Rex *v.* Watson, 2 East, P. C. 562, doubted in Rex *v.* Lavender, 2 East, P. C. 566; S. *v.* Savage, 32 Me. 583; Rex *v.* Ross, Russ. & Ry. 10, 2 East, P. C. 1067; Rex *v.* Ellis, 5 B. & C. 395, 8 D. & R. 173; U. S. *v.* Nott, 1 McLean, 499; S. *v.* Clemons, 3 Dev. 472; Williams *v.* Matthews, 3 Cow. 252; S. *v.* Black, 9 Ire. 378; Com. *v.* Gee, 6 Cush. 174; U. S. *v.* Hiler, Morris, 330.

[2] Com. *v.* Carrol, 8 Mass. 490.

[3] Baker *v.* S., 2 Har. & J. 5.

[4] S. *v.* Brady, 9 Humph. 74. See and compare *ante*, §§ 135, 136, 139, 140, 145; Crim. Law, I, §§ 225–228, 657–659.

[5] 2 East, P. C. 773.

§ 222. Time for penalty added to time of delay — (Recording marriage).— An Indiana statute required the official person who solemnizes a marriage to file the marriage certificate in the proper office within three months from its solemnization, under a penalty, for the delay after the first three months, of $5 a month. And it was held that no criminal liability arises until the lapse of four months; that is, until the full penalty for a month's delay is matured.[1]

"*Cord of wood.*"— Where a statute, regulating the sale of cord-wood, imposed a penalty of so much per cord "for every cord of wood bought and sold" contrary to its provisions, the court held that no penalty could be incurred in the purchase or sale of less than a cord.[2]

"*Free negro,*" *omitted from penal part.*— By a former Georgia statute, "if any slave, *free negro*, Indian," etc., shall do certain things mentioned, "any such slave or slaves, and his and their accomplices," shall suffer death. This was held not to apply to a free negro, who was mentioned only in the first clause.[3]

Contemplated circumstances wanting — (Credit to student).— A statute provided "that no person or persons shall give credit to any student of Yale College, being a minor, without the consent in writing of his parents or guardian, or of such officer or officers of the college *as may be authorized by the government thereof to act in such cases*, except for washing and medical aid." And it was held that, to render the commission of the offense possible, authority must have been conferred on some officer of the college, "by the government thereof," to give or withhold the consent.[4]

"*Privately*"— (*Larceny*).— A statute against "privately" stealing is not violated when force is used;[5] though, in matter of proof, the prosecutor need not show affirmatively that there was no force.[6] So —

[1] Kent *v.* S., 8 Blackf. 168; 1 Bishop, Mar., Div. & S., § 812.

[2] Pray *v.* Burbank, 12 N. H. 267.

[3] *Ex parte* George, T. U. P. Charl. 80. For another illustration of the same principle, see S. *v.* Roberts, 1 Tread. 116. So also S. *v.* Conover, 3 Harring. (Del.) 565; S. *v.* Moseley, 14 Ala. 390; Butler *v.* Cook, 14 Ala. 576; Frierson *v.* Hewitt, 2 Hill (S. C.), 499.

[4] Morse *v.* S., 6 Conn. 9.

[5] Rex *v.* Cartwright, 2 East, P. C. 641; Rex *v.* Jones, 2 East, P. C. 641.

[6] Rex *v.* Matthews, 2 East, P. C. 642.

§ 223. "Suffer"— (Animals at large).— An enactment that "no swine shall be *suffered* to go at large" is not violated when the animals escape without the owner's will.[1]

"*Adjoining.*"— Grounds separated from a dwelling-house by a narrow walk, and a paling with a gate in it, are not "adjoining" the dwelling-house.[2]

Place and distance specified — (Liquor laws).— Intoxicating liquor was forbidden to be sold at a "booth, tent, wagon, huckster's shop, or other place erected, brought, kept, continued or maintained within the distance aforesaid." And it was held that a sale within the prohibited distance was no offense unless made at one of the specified places.[3]

Bills of non-existing bank — (Forgery).— A statute against passing bills "purporting to be" the bills "of a bank, company or association which never did in fact exist" is not infringed by fraudulently passing bills of a bank in fact existing, though unincorporated and illegal.[4]

"*Threatening*" *officer acting unauthorized — (Election frauds).*— One who resisted by threats a demand made upon his father, by the judges of an election, to answer questions they had no right to put, was held not to have committed the statutory offense of threatening an officer of the elections in the discharge of his duty; because the judges, in putting the questions, were not in the discharge of their duty.[5]

"*Begin to destroy*" — (*Malicious mischief*).— Under the English statute of 7 and 8 Geo. 4, ch. 30, § 8, against beginning to destroy any house ("shall unlawfully and with force demolish, pull down, or destroy, or *begin to* demolish, pull down, or destroy," etc.), one cannot be convicted unless he intended to proceed so far as to leave really no house.[6]

"*Maintain owners no right of property.*"— Under a statute punishing "any free person who, by speaking or writing, shall

[1] Com. *v.* Fourteen Hogs, 10 S. & R. 393.

[2] Stat. 7 & 8 Geo. 4, ch. 29, § 38; Rex *v.* Hodges, Moody & M. 341.

[3] Bouser *v.* S., Smith (Ind.), 406. See, as to the constitutionality of this sort of legislation, Fetter *v.* Wilt, 46 Pa. St. 457.

[4] Cahoon *v.* S., 8 Ohio, 537.

[5] Com. *v.* Gibbs, 4 Dall. 253.

[6] Reg. *v.* Adams, Car. & M. 299; Rex *v.* Price, 5 Car. & P. 510; Reg. *v.* Thomas, 4 Car. & P. 237. And see Reg. *v.* Howell, 9 Car. & P. 437; Reg. *v.* Phillips, 2 Moody, 252. For other cases requiring the intent, as well as the act, to come within the statute, see Com. *v.* Morse, 2 Mass. 128; P. *v.* Griffin, 2 Barb. 427.

maintain that owners have not right of property in their slaves," a simple denial of the right was adjudged insufficient. The denial must be *maintained*, which means something more; and the right denied must be a legal, not simply a moral right.[1] But —

§ 224. **"Cut down"—"Destroy"—(Trees—Vessel).**—This sort of doctrine will not be unreasonably extended. For example, it having been made by statute criminal to "unlawfully and maliciously *cut down* or *otherwise destroy* any trees," a total destruction was adjudged unnecessary. It was sufficient if the tree was "cut down," though the stump left could be grafted.[2] So in the act of congress punishing with death those who destroy vessels, the word "destroy" has been held not to require an irreparable disruption of all the parts; it is generic in meaning, and includes "castaway." In legal contemplation, "to 'destroy a vessel' is to unfit her for service, beyond the hopes of recovery by ordinary means."[3] Still, as many of the foregoing illustrations show,—

§ 225. **Fully done.**—The act forbidden by a statute must be fully done in all its parts, else the offense is not complete;[4] though, indeed, there may be an indictable attempt.[5] For example,—

"*Sell.*"—A statute made it criminal knowingly to *sell* "any free person for a slave." Thereupon one transferred to another the possession of a free negro, under a written agreement to be paid the price; with the proviso that the vendee should take him on trial for a month, and at the end thereof make the payment if he liked him, and receive a bill of sale. But before the month elapsed the negro ran away, and the court held that the offense was not committed, the sale not having been finished.[6] So,—

[1] Bacon *v.* Com., 7 Grat. 602.

[2] Rex *v.* Taylor, Russ. & Ry. 373. See *ante*, §§ 214, 223.

[3] U. S. *v.* Johns, 1 Wash. C. C. 363, 372.

[4] Leonard *v.* Bosworth, 4 Conn. 421; Redman *v.* Sanders, 2 Dana, 68; U. S. *v.* Battiste, 2 Sumner, 240; Barefield *v.* S., 14 Ala. 603; P. *v.* Genung, 11 Wend. 18, [25 Am. D. 594;] Reg. *v.* Charretie, 18 Jur. 450, 18 Law J. (N. S.) M. C. 100; Mayers *v.* S., 3 Eng. 222; U. S. *v.* Twenty-eight Packages, Gilpin, 306. See Com. *v.* Hancock Free Bridge, 2 Gray, 58.

[5] *Ante*, §§ 138, 140.

[6] Com. *v.* Nix, 11 Leigh, 636. As to what acts constitute a sale, see *post*, §§ 1013–1015.

"*Persuading to enlist*" — (*Treason*).— Where it was made criminal knowingly and willingly to "aid or assist any enemies, at open war with this state, by *persuading others to enlist* for that purpose," the offense was adjudged not complete until the person persuaded had actually enlisted.[1] In like manner,—

"*Administer poison*" — (*Attempt to murder*).— A statute against administering poison with intent to murder is not violated until something more is done than a mere delivery of it from the party administering; though perhaps it need not be taken into the stomach.[2] Again,—

"*Coin resembling*," *etc.*— (*Counterfeiting*).— Under a statute against buying "any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, at or for a lower rate or value than the same by its denomination imports," the offense is possible only where the counterfeits have been finished ready for circulation.[3]

[1] Respublica *v.* Robert, 1 Dall. 39.

[2] Rex *v.* Cadman, 1 Moody, 114; Car. Crim. Law (3d ed.), 237. Carrington says the judges thought it necessary that the poison should be taken into the stomach; Moody says they "seemed to think swallowing not essential." See *post*, § 747.

[3] Reg. *v.* Bradford, 2 Crawf. & Dix C. C. 41.

CHAPTER XXIV.

THE LIBERAL INTERPRETATION WHICH MINGLES WITH THE STRICT.

§ 226. Already — Here.— We have already seen, in general, how the liberal interpretation mingles with the strict, as applied to different clauses and parts, and even to the same parts, of the same statute.[1] Here we are to extend the doctrine into some details.

Doctrine defined.— The doctrine is that when, from any of the recognized reasons, the main provisions of a statute are to be construed strictly, the same reasons require those which create exceptions, exemptions and the like to be interpreted liberally. And, beyond this, the strict construction as well as, and even more than, the liberal, excepts and exempts, without the aid of any statutory words, whatever, while within the terms of a statute, is not within its motives and purposes.

To what clauses.— The most familiar applications of this doctrine are to criminal statutes, and from them the illustrations of this chapter will be chiefly drawn. But it is applied equally to all other statutes which are strictly construed. Thus,—

§ 227. Liberal for defendants.— As already seen, while a criminal statute is to be construed strictly in those parts which are against defendants, its construction is to be liberal in those which are in their favor; that is, for their ease or exemption.[2] And an entire statute, made for their benefit or defense, is equally to be rendered in the same liberal way. To illustrate,—

Counsel in treason.— While, in England, the common law denied counsel to persons on their trials for treason or felony,[3] the statute of 7 Will. 3, ch. 3, § 1, was passed. It provided that, in indictments for high treason, "all and every person, etc., shall be received and admitted to make his and their full

[1] *Ante*, §§ 196–198.

[2] *Ante*, §§ 196, 197. And see Heward *v.* S., 13 Sm. & M. 261; Sneed *v.* Com., 6 Dana, 338; Dull *v.* P., 4 Denio, 91.

[3] Crim. Pro., I, §§ 14–19; 5 How. St. Tr. 471, note.

defense by counsel, etc.; and the court, etc., is required immediately, upon his or their request, to assign to such person and persons such and so many counsel, not exceeding two, as the person or persons shall desire." This provision, the reader perceives, was in favor of the accused; to be, therefore, liberally construed. So it was held that, where more persons than one were indicted jointly, each was entitled to two counsel.[1] Again,—

§ 228. **"Name subscribed" — (Threatening letters).**— Under the English statutes of 9 Geo. 1, ch. 22, § 1, and 27 Geo. 2, ch. 15, against sending threatening letters[2] "without any name subscribed thereto, or signed with a fictitious name," a threatening letter, to be within the inhibition, must be not only within these statutory words but within their spirit also. If the letter in question, while not signed by any name real or fictitious, is in the undisguised handwriting of the accused, and the person threatened is familiar with it,— or, if it contains allusions showing that the sender meant to make known who he was,— the statutory offense is not committed; because, although the letter is "without any name subscribed thereto" within the words of the act, it is still not unsigned within its spirit.[3] The provision requiring the name to be fictitious or unsigned, the reader perceives, creates an exemption in favor of the prisoner; so that, by the liberal construction demanded, facts within the spirit of the words are equivalent to those within the words. So, on the other hand,—

§ 229. **"Divorced" — (Proviso in polygamy).**— If the statute has an exception or proviso in the defendant's favor, he, for his protection, need only bring himself within its letter, regardless of its spirit. For example, the first English act against polygamy excepted out of its penalties persons "divorced;"[4] and this was held, correctly, yet contrary to the entire policy of the law, to shield from punishment those who should contract second marriages after a judicial separation from bed and board, such a separation being called a divorce.[5] "It is also,"

[1] 1 East, P. C. 111. And see Crim. Pro., I, § 1040.

[2] Crim. Law, II, § 1200.

[3] Rex *v.* Heming, 2 East, P. C. 1116, 1 Leach, 445, note.

[4] *Post*, § 579; 1 Bishop, Mar., Div. & S., § 715.

[5] 3 Inst. 89; 1 Hale, P. C. 694; Porter's Case, Cro. Car. 461; Middleton's Case, J. Kel. 27.

adds East, "agreed that a second marriage, pending an appeal from a divorce *a vinculo matrimonii*, is aided by this exception; though the appeal suspends, and possibly may repeal, the sentence; in which case the second marriage would of course be invalid."[1] Hence,—

§ 230. Contract and expand. — The doctrine is that, in favor of accused persons, criminal statutes may be either, according to the form of the provision, contracted or expanded by interpretation in their meanings, so as to exempt from punishment those who are not within their spirit and purpose; while, at the same time, as the last section shows, and as explained in the last chapter, they can never be expanded against the accused, so as to bring within their penalties any person who is not within their letter. Otherwise expressed, whenever the thing done is not within the mischief evidently intended by the statute, though it is within its words, the doer is not punishable; while, on the other hand, one may defend himself by showing, if he can, that either the main part of the enactment, or some exceptive clause thereof, is so unguardedly worded as to open an escape for him through the letter, his act being still a complete violation of its spirit. Further to particularize,—

§ 231. First. *In favor of defendants, criminal statutes will be contracted by interpretation, so as to avoid punishing those who, though breaking their letter, have not violated also their spirit.* Thus,—

Cutting short in effect. — Their *effect* will be cut short, as explained in a previous chapter.[2] Within this principle,—

Wilful transgression. — Statutes in general terms may be restricted by interpretation to cases in which the transgression was wilful.[3] In this way, too,—

[1] 1 East, P. C. 467.

[2] *Ante*, § 122 *et seq.*

[3] *Ante*, §§ 131, 132; Crim. Pro., I, §§ 522, 523; Reg. *v.* Cohen, 8 Cox, C. C. 41, 42; S. *v.* Simpson, 73 N. C. 269; P. *v.* Powell, 63 N. Y. 88; Reg. *v.* Matthews, 14 Cox, C. C. 5; Marietta, etc. R. R. Co. *v.* Stephenson, 24 Ohio St. 48; Watson *v.* Hall, 46 Conn. 204; White *v.* S., 44 Ala. 409. [The rule that an intent is an ingredient of every offense is not universal. Knight *v.* S., 64 Miss. 802; Strahan *v.* S., 68 Miss. 347, 8 S. R. 844; Grand Rapids *v.* Bateman, 93 Mich. 135, 53 N. W. R. 6; S. *v.* Adams, 108 Mo. 208, 18 S. W. R. 1000. *Cf.*, however, P. *v.* Welch, 71 Mich. 548, 39 N. W. R. 747; P. *v.* Umlauf, 88 Mich. 274, 50 N. W. R. 251; S. *v.* Johns, 124 Mo. 379, 27 S. W. R. 1115.]

False pretenses, etc. — Interpretation greatly restricts the statutes against false pretenses;[1] indeed, the books are full of illustrations of the same principle.[2] And, generally,—

Meaning of makers. — If the thing done is not within the intention of the law-makers, it is not within the law, though within its letter.[3]

§ 232. Another form of the doctrine. — This doctrine is commonly stated in terms somewhat narrower than the above; namely, that the acts to be punishable must come, not only within the words of the statute, but also within its *reason and spirit, and the mischief it was intended to remedy.*[4] Thus,—

Slave trade. — An act of congress made it punishable "to import or bring in any manner into the United States or territories thereof, from any foreign kingdom, place, or country, any negro, mulatto, or person of color, with intent to hold, sell, or dispose of such negro, mulatto, or person of color as a slave, or to be held to service or labor." And this act was adjudged, in the time of slavery, not to be violated by conveying slaves from the United States to Europe, and thence back, to be held again in bondage; because its object was to put an end to the slave trade; so that, though the case was within its letter, it was not within the mischief to be suppressed.[5] Again,—

"*Selling for slave*" — (*Consent of injured person*). — The sale of a free negro into slavery, with his own consent,[6] under the collusive agreement between him and the seller to divide

[1] See *ante*, § 133; also P. *v.* Stetson, 4 Barb. 151; Rex *v.* Douglas, 1 Moody, 462; Reg. *v.* Henderson, Car. & M. 328.

[2] See *ante*, §§ 123, 141, 190. And see Reg. *v.* Marner, Car. & M. 628; Richardson *v.* Broughton, 3 Strob. 1.

[3] S. *v.* Clarksville & R. T. P. Co., 2 Sneed, 88.

[4] Haynes *v.* S., 5 Humph. 120; Daggett *v.* S., 4 Conn. 60, [10 Am. D. 100;] S. *v.* Sumner, 10 Vt. 587, [33 Am. D. 219;] Com. *v.* Clark, 2 Ashm. 105. And see, for illustrations, besides the other cases referred to, Reg. *v.* Marner, Car. & M. 628; S. *v.* Boozer, 5 Strob. 21; S. *v.* Mahan, 2 Ala. 340; Rex *v.* Corry, 5 East, 372; S. *v.* Newbegin, 25 Me. 500; S. *v.* Lane, 8 Ire. 256; Hancock *v.* Sturges, 18 Johns. 331; Preston *v.* Hunt, 7 Wend. 53; Richardson *v.* Broughton, 3 Strob. 1; S. *v.* Johnson, 1 Dev. 360; Rex *v.* Sharpe, 1 Moody, 125; Wood *v.* Smith, 23 Vt. 706; Com. *v.* Slack, 19 Pick. 304; Wragg *v.* S., 14 Ala. 492; U. S. *v.* Hiler, 1 Morris, 330; Rex *v.* Williams, 1 Leach, 529; [S. *v.* Botkin, 71 Iowa, 87, 32 N. W. R. 185; Hanks *v.* Brown, 79 Iowa, 560, 44 N. W. R. 811; S. *v.* Bancroft, 22 Kan. 202; *Ex parte* Bailey, 39 Fla. 734, 23 S. R. 552; R. R. Co. *v.* Jones, 149 Ill. 361, 37 N. E. R. 247; Cearfoss *v.* S., 42 Md. 403.]

[5] U. S. *v.* The Garonne, 11 Pet. 73.

[6] Crim. Law, I, §§ 257–263.

the proceeds, was adjudged not to be within a statute against "selling a free person for a slave, knowing the person so sold to be free."[1] But the consent of a boy eight years old would not excuse the offense.[2] So —

Under claim of right.— An act of this sort done under a *bona fide* claim of right will not be punished, though it is within the general terms of a statute.[3] Hence, for example,—

Deer stealing.— A man killing deer under color of right is not within the English statutes against deer stealing.[4]

Judicial sale — (Champerty).— A judicial sale is not within the statutes against champerty.[5]

§ 233. Larcenies from places specified in statute.— The principle under consideration finds frequent illustration in statutes visiting with special consequences larcenies committed in specified places.[6] By construction, these statutes extend only to things usually kept in the places, under their protection, and by persons within the spirit of their provisions. Thus,—

From shop, etc.— The statute of 10 and 11 Will. 3, ch. 23, forbade clergy to "any person who, by night or day, shall, in any shop, ware-house, coach-house, or stable, privately and feloniously steal any goods of the value of five shillings or more, though such shop, etc., be not broken open, and though the owner or any other person be or be not in such shop." And the construction was, that it "was made as a remedy for the owners of shops to preserve their own goods which might be left there by way of trade;" therefore, that it did not apply where one had left his shirt in another's shop, to be sent to a third person to mend.[7] So —

[1] Mercer *v.* Com., 2 Va. Cas. 144.

[2] Davenport *v.* Com., 1 Leigh, 588.

[3] Gordon *v.* Farquhar, Peck, 155.

[4] Rex *v.* Speed, 1 Ld. Raym. 583, the judge observing: "The case is out of the intent of the act, but is plainly within the words. The intent of the act was to punish rogues and vagabonds; and not to punish persons who by mistake in the execution of their trusts exceed what the law warrants. If the keeper of a walk gives leave to third persons to kill a deer, though this license does not give sufficient authority to the third person to kill it, yet it will not be an unlawful killing within the statute, because there is a color of right." See also *post*, § 237.

[5] Sims *v.* Cross, 10 Yerg. 460; Tuttle *v.* Hills, 6 Wend. 213; Anderson *v.* Anderson, 4 Wend. 474; Hoyt *v.* Thompson, 1 Seld. 320.

[6] Crim. Law, II, §§ 900–903.

[7] Anonymous, 8 Mod. 165; s. P., Rex *v.* Stone, 1 Leach, 334, 2 East, P. C.

From dwelling-house.— The statute of 12 Anne, stat. 1, ch. 7, against stealing goods "being in any dwelling-house, etc., although such house, etc., be not actually broken in by such offender, and although the owner of such goods or any other person or persons be or be not in such house," is not violated where one steals, in his own house, the goods of another;[1] or where a wife does the same in her husband's house;[2] or where the larceny is of property found upon the person, though in a dwelling-house, but therefore not under its protection;[3] or where the things stolen are such as are not ordinarily deemed to be under the protection of the dwelling-house.[4] For like reasons,—

§ 234. "Enter" and steal — (Consent to entry).— An Alabama statute having made punishable any person who should "enter any dwelling-house" and commit larceny therein, one who, before entertaining the criminal intent, entered by the owner's permission, was held not to have committed the offense.[5] But under the differently-worded Georgia enactment the contrary was adjudged, because, said the court, "larceny from the house is defined to be either the breaking or entering any house with an intent to steal; *or*, after breaking and entering said house, stealing therefrom any money or thing of value."[6] Perhaps some may dissent from this on the ground that, in favor of the accused, or even where a strict interpretation is required,

643; Rex *v.* Seas, 1 Leach, 304, 2 East, P. C. 643.

[1] Rex *v.* Thompson, 1 Leach, 338; s. c., Rex *v.* Macdaniel, 2 East, P. C. 644. But a lodger who invites a man into his room, and there steals his goods, is within the statute. Seven judges against three, in Rex *v.* Taylor, Russ. & Ry. 418. See, further, § 234.

[2] Rex *v.* Gould, 2 East, P. C. 644, 1 Leach, 339, note; Com. *v.* Hartnett, 3 Gray, 450.

[3] Rex *v.* Campbell, 2 Leach, 564, 2 East, P. C. 644; Rex *v.* Watson, 2 East, P. C. 680, 681; Rex *v.* Owen, 2 East, P. C. 645, 2 Leach, 572. And see S. *v.* Chambers, 6 Ala. 855. A man went to bed with a prostitute, first putting his watch in his hat on the table. She stole it while he was asleep; and this was held to be larceny from a dwelling-house, though if he had been awake, the legal consequences might have been different. Reg. *v.* Hamilton, 8 Car. & P. 49.

[4] 2 East, P. C. 644, 680, 681. And see 2 East, P. C. 647; Rex *v.* Rourke, Russ. & Ry. 386. But if the property is such as is usually under the protection of the dwelling-house, and by mistake is left in the possession of the occupier under the supposition that it is for one of the persons therein, the stealing of it will come within these statutes. Rex *v.* Carroll, 1 Moody, 89.

[5] S. *v.* Chambers, 6 Ala. 855.

[6] Berry *v.* S., 10 Ga. 511, 517.

"breaking and entering," in the second clause, should be taken in an evil sense, such being the ordinary effect of the expression in the law.

In dwelling-house, by later English statute.— In England, the before-mentioned statute of Anne was superseded by 7 and 8 Geo. 4, ch. 29, § 12, the words of which are simply, "shall steal in any dwelling-house any chattel, money or valuable security to the value in the whole of £5 or more." And it was held that one may commit the offense in his own house by there stealing another's goods.[1] This interpretation does not overrule the earlier, the statutory expressions being different; yet it may create some doubt whether the present English judges would interpret the old words, were they modern, as the former judges did. Still,—

§ 235. Just and beneficial.— Whatever may be said of any particular application of the doctrine, the doctrine itself, properly applied, is highly just and beneficial. Criminal punishment should be kept within the conscience of mankind, and be withheld where it refuses assent.[2] In the nature of things, statutes cannot be so framed as, by express exemption, to provide for every possible, unforeseen and even foreseen case thereafter to arise, which, while within the terms of their main provisions, is still outside of their spirit and purpose.[3] And what cannot be done the courts should understand as not having been attempted. Therefore, though a case in judgment is within the letter of a statute, if they can see that it is exceptional to its spirit and purpose, and so the law-makers did not mean punishment for it, they ought not to inflict the punishment. By excepting it in the interpretation they fulfill their highest duty, which is to carry out the true legislative intent.[4] And —

Mischiefs avoided.— The mischiefs resulting from a contrary course are endless. To punish one who has not violated the spirit of the law, however contrary to the letter his act may have been, is to strike a blow at the root of our jurisprudence, as well as to wrong the individual. Especially in this country, where emphatically the law emanates from the people,— not

[1] Reg. *v.* Bowden, 2 Moody, 285. And see Com. *v.* Hartnett, 3 Gray, 450.

[2] Crim. Law, I, §§ 210, 211.

[3] And see *ante*, § 124.

[4] *Ante*, § 70.

always the whole people, many acts depending on bare majorities,— there is no way in which a legislative enactment, good or bad, can be brought so effectually into disrepute, or be made the instrument of so much real injustice, as to construe it in disregard of the principle we are considering. When a statute comes into being under a divided public sentiment, the judges necessarily form their private opinions; and, if adverse, they are liable in fact, whatever may be their real purpose, to construe it so rigidly by the letter as to punish some whom its framers never meant to punish; and suffer to escape others whom, if they had followed more its spirit, they would have seen to be within the letter. Clearly the legislature alone is to determine its own policy; and if what it does is within its powers, the judges have no right to interfere: they are, on the other hand, to concur judicially in the propriety of its enactments, and construe them as it, had it foreseen the case, would have dictated.[1] At the same time,—

§ 236. Words the guide.— The legislative words are the primary guide to the intent.[2] What else can be looked at by the courts we saw in another connection.[3] And,—

Beyond mischief which prompted.— If the court knows the mischief which prompted an enactment, its construction is not necessarily to be so narrow. For, in the words of Shaw, C. J., "it is not unusual in legislation, where a particular apprehended wrong or grievance is the immediate occasion for the passing of an act, to extend it to other wrongs of the like kind, and make a general, instead of a special, provision."[4] Therefore,—

Kidnaping.— In the case before the tribunal, an act, the motive for which was probably to prevent negroes from being kidnaped and reduced to slavery in other states, was held applicable to the seizure and carrying away of white men for a different purpose.[5]

§ 237. Limits of doctrine.— The doctrine under consideration should not be carried beyond where its reason — namely, the following of the legislative intent, as apparent in the entire

[1] And see *ante*, § 70 and note.
[2] *Ante*, § 146.
[3] *Ante*, §§ 74–77.
[4] Com. *v.* Blodgett, 12 Met. 56, 79. But see Rex *v.* Williams, 1 Leach, 529.
[5] Com. *v.* Blodgett, *supra*. And see for a further statement of this case, *ante*, § 205.

words, illumined by such surroundings as the judicial mind may look into[1] — will lend it support.[2] Thus,—

Permit "in writing."— Where a statute requires, to render the doing of a thing lawful, a permit "in writing," no consent not written will suffice.[3] Within this doctrine,—

Consent of parents to marriage.— An officiating clergyman violates a statute forbidding the joining of minors in marriage "unless the parent be present and consent to the marriage, or give a certificate in writing under his hand," if, without such presence, he proceeds on a mere verbal expression of approbation from the parent.[4] So,—

Selling to minors.— Under a statute forbidding the selling of intoxicating drinks to minors without the parental consent, mere proof of the father's willingness that the son should drink the sort of beverage sold will not excuse the seller.[5] Again,—

Lord's day.— A general prohibition against doing worldly business on the Lord's day extends to persons who conscientiously observe the seventh day of the week as the Christian Sabbath.[6] Moreover,—

§ 238. Doubtful cases and judicial differences.— In this class of cases as in others, there will be those lying near the line separating the one result from the other, and those on which judicial opinions differ.[7] Of the latter sort,—

Selling liquor for medical use.— Under statutes forbidding in general terms the unlicensed sale of intoxicating liquors, some courts hold that no necessity of a purchaser, and no prescription of a physician, even in a case where there is no person in the county authorized to sell the liquor, and it is an essential medicine, will protect the vendor.[8] Other courts, it is believed the majority, execute these laws in the spirit which prompted their

[1] *Ante*, §§ 70–77.

[2] And see, besides the other cases cited to this section, Rex *v.* Ledbitter, 1 Moody, 76; S. *v.* Findley, 1 Brev. 107.

[3] S. *v.* Hart, 4 Ire. 246; S. *v.* Stroud, 1 Brev. 551; 1 Bishop, Mar., Div. & S., §§ 803, 804. As to what words in a permit are sufficient, see Hurt *v.* S., 19 Ala. 19.

[4] Wyckoff *v.* Boggs, 2 Halst. 138. See *ante*, § 232 and note; 1 Bishop, Mar., Div. & S., §§ 803, 804.

[5] Adler *v.* S., 55 Ala. 16.

[6] Specht *v.* Com., 8 Pa. St. 312, [49 Am. D. 518.]

[7] See, besides the other cases cited to this section, S. *v.* Griffin, 3 Harring. (Del.) 560; S. *v.* Isaacs, 1 Speers, 223.

[8] Com. *v.* Sloan, 4 Cush. 52; Com. *v.* Kimball, 24 Pick. 366.

enactment; holding, for example, that a druggist is justified, upon a proper occasion, *bona fide*, and with due caution, in retailing liquor to be used merely as a medicine.[1]

Near the border line are such cases as —

Practicing medicine.— A statute against permitting slaves "to go about the country under the pretext of practicing medicine, or healing the sick," was interpreted to embrace all circumstances of medical practice, even those in which the slave is competent, and undertakes it with his master's encouragement from motives of humanity.[2] So,—

Concealed weapons.— A prohibition of carrying weapons concealed about the person has been adjudged broken by so carrying a pistol for the purpose of merely exhibiting it as a curiosity.[3]

§ 239. Secondly. *In favor of defendants, criminal statutes, like remedial, will be expanded in their meanings.* Already —

Illustrated.— This doctrine has been variously illustrated in foregoing discussions;[4] as, for example, in the interpretations given by the English judges to the statutes against the exercise of trades by unqualified persons.[5] It is further illustrated in those cases[6] wherein acts general in terms are construed to require the concurrence of a wrongful intent with the thing done; and in most of the cases cited to the point that a statute will not be suffered to extend beyond the mischief contemplated by it,[7] — the court in fact inserting, by construction, a clause in favor of the accused.[8] Again,—

§ 240. **House-breaking.**— The English interpretations of 1 Edw. 6 (ch. 12, § 10) illustrate the doctrine. It took clergy from persons convicted of the "breaking of any house by day or by night," any one being therein put in fear, and also from the perpetrators of certain other enumerated crimes, which were felonies; adding, that clergy shall be *allowed* "*in all other*

[1] Donnell *v.* S., 2 Ind. 658. See also P. *v.* Safford, 5 Denio, 112; Wood *v.* Smith, 23 Vt. 706; Anderson *v.* Com., 9 Bush, 569. And see, as illustrative, Brown *v.* Maryland, 12 Wheat. 419; Bode *v.* S., 7 Gill, 326; Hall *v.* S., 4 Harring. (Del.) 132; *post*, §§ 1019, 1020.

[2] Macon *v.* S., 4 Humph. 421.

[3] Walls *v.* S., 7 Blackf. 572.

[4] And see 1 East, P. C. 248; Duchess of Kingston's Case, 1 Leach, 146.

[5] *Ante*, § 196.

[6] *Ante*, §§ 132, 231; Reg. *v.* Allday, 8 Car. & P. 136; Smith *v.* Kinne, 19 Vt. 564.

[7] *Ante*, §§ 232, 233.

[8] Com. *v.* Slack, 19 Pick. 304.

cases of felony." Thereupon it was held that, for a case to be within the former clause, the breaking must be such as amounts to a felony. "So that," observes East, "the general words of it ought to be supplied with an intendment; namely, where the party is convicted of breaking the house in the night *burglariously*, or in the day, and *stealing goods* therein."[1] So,—

Heavier punishment for second offense.— Whenever a statute makes a second offense felony, the first being misdemeanor, or punishes the second more heavily than the first, it is enlarged by construction to mean, after *conviction* for the first, not merely after it is committed.[2]

[1] 2 East, P. C. 625, 631.

[2] P. *v.* Butler, 3 Cow. 347. And see Dwar. Stat. (2d ed.) 643.

CHAPTER XXV.

SOME MISCELLANEOUS DOCTRINES OF STATUTORY INTEPRETATION.

§ 241. Introduction.
242–242*b*. Technical meanings for technical words.
243. Grammatical construction.
244. Provisions in the alternative.
245–246*b*. General words following particular.
246*c*–248. Meanings overlying one another.
249, 249*a*. Express mention implying exclusion.
249*b*–253. Statutory and common-law remedies mingling.
254–256. Mandatory and directory statutes.
256*a*. Concluding suggestions and views.

§ 241. What for this chapter and how divided.— While the foregoing chapters have brought to view most of the rules of statutory interpretation, a few, of a miscellaneous character, were found not to be distinctly within the scope of any of them. Therefore they were left unexplained, or explained only in part. We shall, in this chapter, consider them under the following heads: I. Giving the technical meanings to technical words; II. Grammatical construction; III. Provisions in the alternative; IV. General words following particular; V. Meanings overlying one another; VI. The express mention of one thing implying the exclusion of another; VII. How statutory and common-law remedies mingle; VIII. Mandatory and directory statutes; IX. Concluding suggestions and views.

I. Giving the Technical Meanings to Technical Words.

§ 242. In general.— That, *prima facie*, interpretation is to give to those words of a statute which are technical to its subject their technical meanings we have already seen.[1] And this is because the legislature may reasonably be presumed to have so intended. The most frequent application of this doctrine is to —

Terms of fixed legal meanings.[2] — As the result of constant adjudication, very many words and phrases commonly em-

[1] *Ante*, §§ 96–100.

[2] *Ante*, § 96 *et seq.*

ployed in statutes, contracts and pleadings have acquired fixed legal meanings, unlike or more limited or extended than their popular ones. Then, as all laws are to be construed together,[1] when a statute employs a word or phrase of this sort, it is, in the absence of any express indication to the contrary, to be interpreted in the sense which the law has thus ascertained.[2] For example,—

"*Infamous crime*"— (*Threatening letters — Solicitations to sodomy*).— It having been made punishable in England to send to any person, with an intent mentioned, any letter threatening to accuse him of (among other things) "any *infamous crime*,"[3] — the judges "were of opinion that a charge of making overtures to commit sodomy was not within this act; that they were bound to take the word '*infamous*' in its legal sense;[4] and that such overtures, however they would disgrace and expose to detestation, would not subject the person making them to an infamous punishment, or prevent his being a witness."[5] So —

"*Charged with crime*"— "*Accused of crime*"— are severally phrases the meaning of which in the law is familiar. They imply certain legal steps. Therefore a former statute in Alabama, against the concealment or carrying away of any slave "charged with a capital crime," could, as construed by the courts, be violated only after legal proceedings were commenced against the slave.[6] And, in a similar South Carolina statute, the words "accused of crime" were held to mean when complaint is made to a magistrate for the purpose of having a warrant issued.[7] But —

"*Fleeing from justice*"— (*Limitations*).— A "fleeing from justice," within the proviso of a limitations statute, may take place before prosecution begun.[8]

[1] *Ante*, §§ 86 *et seq.*, 113*b et seq.*

[2] U. S. *v.* Magill, 1 Wash. C. C. 463; Adams *v.* Turrentine, 8 Ire. 147; U. S. *v.* Wilson, Bald. 78, 95; Reg. *v.* Ellis, Car. & M. 564; Kitchen *v.* Tyson, 3 Murph. 314; Macy *v.* Raymond, 9 Pick. 285; Bennac *v.* P., 4 Barb. 164; Eason *v.* S., 6 Eng. 481; Spencer *v.* S., 20 Ala. 24; U. S. *v.* Smith, 5 Wheat. 153; U. S. *v.* Pirates, 5 Wheat. 184; S. *v.* Mace, 5 Md. 337; *Ex parte* Vincent, 26 Ala. 145, [62 Am. D. 714.]

[3] Stat. 4 Geo. 4, ch. 54, § 8.

[4] Crim. Law, I, §§ 972, 974.

[5] Rex *v.* Hickman, 1 Moody, 34. Substantially the same meaning is given to the words "infamous crime" in the constitution of Pennsylvania. Com. *v.* Shaver, 3 Watts & S. 338.

[6] S. *v.* Duncan, 9 Port. 260. And see Willington *v.* Stearns, 1 Pick. 497.

[7] S. *v.* South, 5 Rich. 482.

[8] U. S. *v.* Smith, 4 Day, 121.

"*On complaint.*"— A statute authorizing a criminal prosecution to be instituted "on complaint," means a complaint as technically understood, usually under oath.[1] And —

"*Manslaughter*"— in a statute has its common-law meaning.[2] So —

"*Negligent escape*"— signifies the same in a statute as at the common law.[3]

Meaning by statutory use.— Statutory use, equally with use at the common law, may have imparted to a word a particular import, so that in a subsequent act it will have the same meaning.[4]

§ 242a. Technical not meant.— Where, from the connection, subject, or otherwise, it is plain that the technical meaning was not intended by the legislature, the court, we have already seen,[5] will not impute it. To illustrate,—

"*Dwelling-house.*"— The word "dwelling-house," the meaning of which is fully explained further on,[6] includes, in the law of burglary and generally in the law, a structure for business uses whereof any internally connected room is occupied for sleeping and abode.[7] But if, in a statute exempting property from the claims of creditors, it was given this wide meaning, one might protect against them any amount of real estate by living in some inferior room thereof, to the utter subversion alike of justice and the legislative will. Therefore, in such a statute, the word will not extend to parts of a building devoted to business purposes.[8] Again,—

"*Outlaw.*"— The word "outlaw," in a statute, will not have its common-law meaning[9] in a state where outlawry is un-

[1] Campbell *v.* Thompson, 16 Me. 117. But the requirements of the complaint, under the statutes of our several states, and at the common law, differ. Crim. Pro., I, §§ 152, 230–232.

[2] S. *v.* Fleming, 2 Strob. 464. And see U. S. *v.* Magill, 1 Wash. C. C. 463; S. *v.* Taylor, 2 McCord, 483.

[3] Adams *v.* Turrentine, 8 Ire. 147. For "rob," "jeopardy," "dangerous weapons," see U. S. *v.* Wilson, Bald. 78; for "party," see Merchants' Bank *v.* Cook, 4 Pick. 405, 411.

[4] S. *v.* Nates, 3 Hill (S. C.), 200.

[5] *Ante*, § 100.

[6] *Post*, §§ 277–290.

[7] *Post*, §§ 280, 282; Samanni *v.* Com., 16 Grat. 542; S. *v.* Mordecai, 68 N. C. 207; S. *v.* Outlaw, 72 N. C. 598; S. *v.* Potts, 75 N. C. 129.

[8] *In re* Lammer, 7 Bis. 269, 14 Bankr. Reg. 460.

[9] Crim. Law, I, § 967; Crim. Pro., I, § 673; *ante*, § 132. "One who is put out of the protection or aid of the law." Bouv. Law Dict. And see Drew *v.* Drew, 37 Me. 389; Walker

known. Therefore, in Alabama, counties having been made liable for persons killed by outlaws, the court, looking at the condition of the state at the time when the act was passed, deemed it to refer to lawless and disorderly persons roaming about in disguise and habitually committing violence and outrage.[1] Now,—

§ 242b. Consequences.— The consequences of this sort of interpretation are that, to the extent to which it furnishes the rule, the law is made, as it should be,[2] one system; while, at the same time, the real intent of the legislature is carried out. And the doubts concerning the meanings of statutes are diminished to their smallest possible proportions. For thus an enactment of to-day has the benefit of judicial renderings extending back through centuries of past litigation.

II. Grammatical Construction.

§ 243. In general.— However desirable a correct use of the English language may be, the courts have no jurisdiction to enforce it on the legislature. Therefore, as already seen,[3] when the legislative meaning is plain, the exact grammatical construction and propriety of language may be disregarded, even in a penal statute. For example,—

"*And*" — "*Or*." — The conjunction "and" will be read as "or," and "or" as "and," when the sense obviously so requires;[4] and this, in plain cases, even in criminal statutes against the accused.[5] So,—

v. Thelluson, 1 Dowl. (N. S.) 578; *v.* Stauss, 24 Wis. 394, 406; Townsend Loukes *v.* Holbeach, 4 Bing. 419; Aldridge *v.* Buller, 2 M. & W. 412; Wharton Peerage, 12 Cl. & F. 295; Rex *v.* Yandell, 4 T. R. 521; Macrae *v.* Hyndman, 6 Cl. & F. 212.

[1] Dale *v.* Gunter, 46 Ala. 118, 137.

[2] *Ante*, § 113*b et seq.*

[3] *Ante*, §§ 78–81, 93, 212.

[4] *Ante*, § 81; S. *v.* Mitchell, 5 Ired. 350; Hall's Case, Cro. Eliz. 307; Creswick *v.* Rooksby, 2 Bulst. 47; Waterhouse *v.* Keen, 4 B. & C. 200. 6 D. & R. 257; Dwar. Stat. (2d ed.) 682; Smith, Stat. & Const. Law, 732; Barker *v.* Esty, 19 Vt. 131; Winterfield *v.* Read, 10 C. B. (N. S.) 308; Fowler *v.* Padget, 7 T. R. 509; Com. *v.* Griffin, 105 Mass. 185; Sparrow *v.* Davidson College, 77 N. C. 35; P. *v.* Sweetser, 1 Dak. 308; Rigoney *v.* Neiman, 73 Pa. St. 330; Green *v.* Wood, 7 Q. B. 178.

[5] S. *v.* McCoy, 2 Speers, 711; S. *v.* Miles, 2 Nott & McC. 1; Foster *v.* Com., 8 Watts & S. 77; Rolland *v.* Com., 82 Pa. St. 306, [22 Am. R. 758;] S. *v.* Smith, 46 Iowa, 670; S. *v.* Brandt, 41 Iowa, 593. *Contra*, S. *v.* Kearney, 1 Hawks, 53. So it has been said, by way of *dictum*, that "and" in a penal

"*On*" — "*Or.*" — To correct an obviously clerical error,[1] "on" may be read as "or," even in the strict construction of a penal statute.[2] And,—

"*Such*," — when evidently it does not refer to any preceding matter, may be disregarded.[3] Again,—

Misnomer.— A misnomer,— for example, in the name of a person or corporation,— which can be corrected by other parts of the statute, will be corrected in the interpretation;[4] for the court will look into the entire enactment, and compare part with part.[5]

III. Provisions in the Alternative.

§ 244. In general.— Provisions in the alternative are common in legislation; and the rule is, that whatever is within any one of the disjunctively connected clauses is within the statute. Thus,—

Alternative offenses.— If, as is common in legislation, a statute makes it punishable to do a particular thing specified, "or" another thing, "or" another, one commits the offense who does any one of the things,[6] or any two, or more, or all of them. And the indictment may charge him with any one,[7] or with any large number, at the election of the pleader; employing, if the allegation is of more than one, the conjunction "and" where "or" occurs in the statute.[8] "The rule," it was once observed, "is undoubtedly limited in its application to cases where the offenses created in a statute are not repug-

statute can never be construed to mean "or." U. S. *v.* Ten Cases of Shawls, 2 Paine, 162.

[1] *Ante*, § 79.

[2] Tollett *v.* Thomas, Law Rep. 6 Q. B. 514, 518.

[3] S. *v.* Beasley, 5 Mo. 91.

[4] Blanchard *v.* Sprague, 3 Sumner, 279.

[5] *Ante*, §§ 82, 86.

[6] Com. *v.* Loring, 8 Pick. 370; S. *v.* Layman, 8 Blackf. 330; S. *v.* Miles, 2 Nott & McC. 1; S. *v.* Kearney, 1 Hawks, 53; Com. *v.* Clapp, 5 Pick. 41; Com. *v.* Burns, 4 J. J. Mar. 177; Davenport *v.* Com., 1 Leigh, 588; Rex *v.* Baylis, Cas. temp. Hardw. 291; Rex *v.* Dixon, Russ. & Ry. 53; S. *v.* Murphy, 6 Ala. 845; Carrico *v.* S., 11 Mo. 579; S. *v.* Fidler, 7 Humph. 502; S. *v.* Hull, 21 Me. 84. See Crim. Pro., I, §§ 436, 586–588.

[7] Rex *v.* Franks, 2 Leach, 644; S. *v.* Laney, 4 Rich. 193.

[8] Angel *v.* Com., 2 Va. Cas. 231; S. *v.* Murphy, 6 Ala. 845; Mooney *v.* S., 8 Ala. 328; McElhaney *v.* S., 24 Ala. 71; S. *v.* Price, 6 Halst. 208, 215. But see, *contra*, Miller *v.* S., 5 How. (Miss.) 250. See also Washburn *v.* McInroy, 7 Johns. 134.

nant."[1] And, whatever be the form of the allegation, the proofs need sustain only so much of it as constitutes a complete offense.[2]

IV. General Words Following Particular.

§ 245. Enumeration weakening.— When specific and general terms in a statute are mingled, the meaning of the whole is in various circumstances less broad than if the general were employed alone. Or, in the words of Lord Bacon, "As exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated."[3] The more common form of this constitutes what has been termed the "celebrated rule,"[4] that,—

Doctrine defined.— Where particular words of a statute are followed by general,— as if, after the enumeration of classes of persons or things, it is added, "and *all others*," — the general words are restricted in meaning to objects of the like kind with those specified.[5] For example,—

"*Other person*" — (*Sabbath-breaking*).— The statute of 29 Car. 2, ch. 7, § 1, provided "that no tradesman, artificer, workman, laborer, or *other person* whatsoever" shall exercise his ordinary calling on the Lord's day. Thereupon the words "other person" were held not to include a farmer, who is not a person of like denomination with those specifically mentioned; for, as Bayley, J., said, if all persons were meant, there was no need of the specific enumeration.[6] Again,—

[1] S. *v.* Woodward, 25 Vt. 616. See Crim. Pro., I, §§ 489–492.

[2] Crim. Pro., I, § 586; U. S. *v.* Millard, 13 Blatch. 534.

[3] 1 Story, Const., § 448; Page *v.* Allen, 58 Pa. St. 338, [98 Am. D. 272].

[4] Smith, Con. 172.

[5] Dwar. Stat. (2d ed.) 621; Rex *v.* Gillbrass, 7 Car. & P. 444; Rex *v.* Garratt, 6 Car. & P. 369; Rex *v.* Harris, 7 Car. & P. 446; S. *v.* Burrows, 11 Ire. 477; S. *v.* Sumner, 10 Vt. 587, [33 Am. D. 219;] Reg *v.* St. George, 9 Car. & P. 483; Brooks *v.* Cook, 44 Mich. 617, [38 Am. R. 282;] S. *v.* Stoller, 38 Iowa, 321; P. *v.* New York, etc. Ry. Co., 84 N. Y. 565; *In re* Hermance, 71 N. Y. 481; McDade *v.* P., 29 Mich. 50; 1 East, P. C. 187, 188. And see Bush *v.* S., 18 Ala. 415; Monck *v.* Hilton, 2 Ex. D. 268; [Amos *v.* S., 73 Ala. 498; S. *v.* Bryant, 90 Mo. 534, 2 S. W. R. 836; S. *v.* Schuchman, 133 Mo. 111, 33 S. W. R. 55; D. C. *v.* Reuter, 15 D. C. App. 237; Ambler *v.* Whipple, 139 Ill. 311, 28 N. E. R. 841; Wilson *v.* Sanitary Dist., 133 Ill. 443, 27 N. E. R. 203; U. S. *v.* Crawford, 6 Mackey (D. C.), 319. The rule, however, does not apply when *all* the terms used are alike general. Higler *v.* P., 44 Mich. 299, 6 N. W. R. 664.]

[6] Reg. *v.* Whitnash, 7 B. & C. 596; Smith, Con. 172.

"*Other craft.*"—The words of another statute were "wherry, lighter, or *other craft.*" And the term "craft" was held not to include a steam-tug; because, though a steam-tug is a craft, it is not one of the same character as a wherry or a lighter.[1] Still,—

§ 246. Limit of doctrine.—This rule does not require the entire rejection of general terms.[2] And its object is, not to defeat, but to ascertain and carry out, the legislative intent.[3] Therefore, where the courts can see that its application would lead to results contrary to the real meaning of the law maker, they will not give it effect.[4] Especially in this country, whatever may be the true limit of the rule in England, general words will be construed, even as against defendants in penal statutes, more broadly than the specific, where such appears clearly to have been the meaning of the legislature.[5]

Further of doctrine.—Such being the doctrine in general terms, and such its limits, the application of it in particular instances must depend largely on the discretion of the judges. Often this rule will be complicated with others, and the others will help the way out where the leadings of this one alone might seem obscure. Thus,—

Dog, in malicious mischief.—A statute in Texas made it an offense to "wilfully and maliciously kill, maim, beat or wound any horse, cattle, goat, sheep or swine, or wilfully injure or destroy any *other property* of another." And the malicious killing of another's dog was held not to be within the act. Said Wheeler, J.: "Dogs are not mentioned in the statute; nor do

[1] Reg. *v.* Reed, 23 Law Times Rep. 156, 28 Eng. L. & Eq. 133.

[2] S. *v.* Williams, 2 Strob. 474; Monck *v.* Hilton, 2 Ex. D. 268.

[3] *Ante*, §§ 70, 82.

[4] Woodworth *v.* S., 26 Ohio St. 196, 198; S. *v.* Williams, *supra*. And see Wright *v.* Pearson, Law R. 4 Q. B. 582.

[5] Ib.; Foster *v.* Blount, 18 Ala. 687. See also as to this, and for further views and illustrations, S. *v.* Holman, 3 McCord, 306; Shropshire *v.* Glasscock, 4 Mo. 536, [31 Am. D. 189;] Boynton *v.* Curle, 4 Mo. 599; Com. *v.* Wyman, 8 Met. 247; Com. *v.* Percavil, 4 Leigh, 686; Vicaro *v.* Com., 5 Dana, 504; S. *v.* Williams, 2 Strob. 474; U. S. *v.* Pearce, 2 McLean, 14; Calder *v.* Deliesseline, Harper, 186; Eubanks *v.* S., 5 Mo. 450; S. *v.* Wilson, Cheves, 163; Rex *v.* Norris, Russ. & Ry. 69; Rex *v.* Parker, 1 Leach, 320, note; Riley *v.* S., 9 Humph. 646; S. *v.* Cooper, 5 Day, 250; Rex *v.* Blick, 4 Car. & P. 377; S. *v.* Edmund, 4 Dev. 340; Com. *v.* Wyatt, 6 Rand. 694; Reg. *v.* Oldham, 14 Eng. L. & Eq. 568, 2 Den. C. C. 472; S. *v.* Moseley, 14 Ala. 390; Rex *v.* Coates, 6 Car. & P. 394; Jenning's Case, 2 Lewin, 130; Elmsly's Case, 2 Lewin, 126; U. S. *v.* Briggs, 9 How. (U. S.) 351; Crow *v.* S., 6 Tex. 334.

they come within either class or description of the animals which are mentioned. They are not regarded by the law as being of the same intrinsic value, as property, as the animals enumerated in the statute; and cannot, we think, be brought within the prohibition under the general expression 'any other property' by intendment."[1] Indeed, as dogs are not property of which larceny could be committed at the common law,[2] the doctrine of this decision is, in a certain sense, an illustration of the other doctrine, that statutes are to be construed in harmony with the common law.[3] But, even as thus viewed, the question is one on which judicial opinion appears to be divided.[4]

True foundation of doctrine.— Plainly the true foundation of the doctrine under consideration is the necessity, already mentioned,[5] of the legislature's making use of words in different meanings; or, as expressed by Chase, C. J., "the poverty of language often compels the employment of terms in quite different significations."[6] And to ascertain the sense meant, we look into the subject and the connection.[7] In this way, as already seen,[8] general words may be rendered as specific, and specific as general. So,—

§ 246a. Inferior not include superior.— Analogous to the rule under consideration is another, namely, that, in the language of Dwarris,[9] "a statute which treats of things or persons of an inferior rank cannot, by any general words, be extended to those of a superior.[10] Thus, an old statute treating of 'abbots, priors, hospitallers, etc.,'[11] and a later act speaking of 'deans, prebendaries, parsons, vicars, and others having spiritual promotion,' have been respectively held not to extend to bishops;

[1] S. *v.* Marshall, 13 Tex. 55.

[2] Crim. Law, II, § 773.

[3] *Ante*, §§ 114, 119, 139, 141, 155.

[4] Crim. Law, II, § 985, note. A Wisconsin statute, relating to the management of houses of correction, gave the supervisors of Milwaukee county power to remove officers "for incompetency, improper conduct, or other cause satisfactory to the board." And the words "other cause" were construed to mean other kindred cause. S. *v.* McGarry, 21 Wis. 496.

[5] *Ante*, § 92*d*.

[6] Texas *v.* White, 7 Wall. 700, 720

[7] *Ante*, §§ 93, 98*a*, 102, 111.

[8] *Ante*, § 102.

[9] Dwar. Stat. (2d ed.) 656.

[10] Affirmed in Woodworth *v.* Paine, Breese, 294. And see East Oakland *v.* Skinner, 94 U. S. 255; Campbell *v.* Paris, etc. R. R. Co., 71 Ill. 611; Ellis *v.* Murray, 28 Miss. 129.

[11] Westm. 2, ch. 41.

abbots and deans being the highest persons named, and bishops being of a still higher order."[1]

§ 246b. Further of reasons.—The constructions explained in this sub-title accord with the ordinary workings of the human mind. A writer who enumerates certain things, adding a general clause, mentions, as of course, the highest things, and some of each class, within those which he had in contemplation. Any person can, by experiment, ascertain that his own mind will commonly work so. We reasonably assume, therefore, in construing his language, that he did not intend to include things higher than any mentioned, or of a class outside of those specified. Yet the mind does not necessarily, in every instance, move in this way. And when the court can discern that the mind of the maker of a statute moved otherwise, it should not apply to his work this rule of interpretation.

V Meanings Overlying One Another.

§ 246c. Doctrine in principle.—Both because words have no absolutely fixed and uniform meanings,[2] and because in the necessary structure of language they overlie one another in significance,—as well as because, in our law, its several provisions habitually overlie one another,[3]—it follows that, where a statute employs several terms in combination, the proper import of each one of which embraces something of what is expressed in others, each term should be given in the construction its full meaning, thereby creating partial, yet harmless, repetitions. So the question is in just principle. In authority,—

[1] Canterbury's Case, 2 Co. 46. And see Wilb. Stat. Law, 183, 184. The last-named author adds: "The dean of St. Paul's was not included in the words 'great men or noblemen or noblewomen,' which occur in the act 37 Hen. 8, ch. 12; because, by the order of those words, 'great men must mean persons superior in certain respects to noblemen and noblewomen.' Warden of St. Paul's *v.* The Dean, 4 Price, 65, 79 (citing, also, in this connection, Ailesbury *v.* Pattison, 1 Doug. 28, 30). In later cases it has been held that an act imposing duties upon 'copper, brass, pewter, tin, and all other metals not enumerated,' did not apply to gold and silver,' Casher *v.* Holmes, 2 B. & Ad. 592, and that the words 'wherry, lighter, vessel, barge, or other craft,' did not include a brig, Blanford *v.* Morrison, 15 Q. B. 724, or a steam tug, Reed *v.* Ingham, 3 Ellis & B. 889. See, however, Tisdell *v.* Combe, 7 A. & E. 788."

[2] *Ante*, § 92*d*.

[3] *Ante*, §§ 143, 160, 162, 163*d*–164, 170–172.

§ 247. Old doctrine — ("Sheep or ewe," etc.). — It is a doctrine of the older books that, when a statute enumerates several things and the words are so broad in meaning as to overlie one another, the less specific will be narrowed in the interpretation to prevent this consequence. For example, if, where this doctrine prevails, a statute makes specially punishable the stealing of "a sheep or a ewe," an indictment describing the animal as a sheep is not supported by proof of stealing a ewe.[1] But —

Modern English doctrine. — This doctrine is entirely overturned in England, and the rule of reason established in its place.[2] Thus,—

"*Sheep or ewe,*" *etc.* — The words of 7 and 8 Geo. 4, ch. 29, § 25, against larceny, were "ram, ewe, sheep, or lamb." And on an indictment for stealing a sheep, the majority of the judges, as early as 1838, held that, though the proof failed to show the sex of the stolen animal, the conviction was right, because, notwithstanding this overlying of meaning, "the word sheep in the statute was a generic term, including ram, ewe, and wether, and the two former words might be rejected."[3] And where, in a later case, on a like indictment upon the same statute, employing the word "sheep," the animal stolen was proved to have been a lamb, the majority of the judges sustained the conviction.[4] This doctrine has been since followed as settled.[5]

[1] Rex *v.* Puddifoot, 1 Moody, 247; Rex *v.* Birket, 4 Car. & P. 216; S. *v.* Tootle, 2 Harring. (Del.) 541; Rex *v.* Loom, 1 Moody, 160. For the same general doctrine, see also Rex *v.* Cook, 1 Leach, 105, 2 East, P. C. 616; S. *v.* Plunket, 2 Stew. 11; Bush *v.* S., 18 Ala. 415; Rex *v.* Beaney, Russ. & Ry. 416. See also Rex *v.* Gillbraes, 7 Car. & P. 444; Rex *v.* Paty, 2 East, P. C. 1074, 1 Leach, 72, 2 W. Bl. 721; Rex *v.* Moyle, 2 East, P. C. 1076; S. *v.* McLain, 2 Brev. 443.

[2] Reg. *v.* McCulley, 2 Moody, 34; s. c. *nom.* McCulley's Case, 2 Lewin, 272; Reg. *v.* Spicer, 1 Den. C. C. 82, 1 Car. & K. 699. And see S. *v.* Godet, 7 Ire. 210; *post*, § 326; Crim. Law, II, §§ 332, 347, 348; Crim. Pro., I, § 620.

[3] Reg. *v.* McCulley, *supra*.

[4] Reg. *v.* Spicer, *supra*.

[5] Reg. *v.* Aldridge, 4 Cox, C. C. 143.

Foal — Filly. — Not inconsistently, it is believed, with the old doctrine, foals and fillies were, in 1822, held to be included in the words "horse, gelding or mare," of the English statute 2 and 3 Edw. 6, ch. 33. Rex *v.* Welland, Russ. & Ry. 494.

So, **Pig.** — Under the statutory words "hog, sheep or goat," a pig four or five months old may be described in an indictment for larceny as a "hog." Lavender *v.* S., 60 Ala. 60; Washington *v.* S., 58 Ala. 355.

§ 248. **With us,**— the earlier English doctrine has been sometimes followed; as, in —

Texas — It appears to have become established in Texas by numerous decisions.[1] For example, under a statute providing a special punishment "if any person shall steal any horse, gelding, mare, colt, ass, or mule," an indictment charging the larceny of a "horse" was held not to be supported where the proof showed the animal stolen to have been a "gelding." Said Lindsay, J.: "The term is used in the statute upon which this indictment was founded distinctively from the word horse, and a conviction for the theft of a horse, upon the proof of taking feloniously a gelding, would be as incongruous as that of stealing a mule or an ass upon a similar indictment."[2]

Delaware — ("*Sheep*").— In Delaware, the statute not being in the form we are considering, proof of stealing a ram was held to sustain an indictment charging the larceny of a "sheep;" yet, it is perceived, the present question could not in this case arise.[3]

Other states.— How the question stands in the other states generally the author will not attempt to decide; except that, in most of them, it appears not to be settled.[4]

VI. The Express Mention of One Thing Implying the Exclusion of Another.

§ 249. **Maxim.**— The doctrine of this sub-title is embodied in the maxim, that the express mention of one thing excludes all others,— *Expressio unius est exclusio alterius.*[5] Thus,—

[1] Brisco *v.* S., 4 Tex. Ap. 219, 221, N. C. 539; S. *v.* Hill, 79 N. C. 656; S. *v.* Dunnavant, 3 Brev. 9, [5 Am. D. 530;] S. *v.* McLain, 2 Brev. 443; Fein *v.* Territory, 1 Wyom. 376; P. *v.* Soto, 49 Cal. 67; Gabriel *v.* S., 40 Ala. 357; Stollenwerk *v.* S., 55 Ala. 142; Watson *v.* S., 55 Ala. 150; Shubrick *v.* S., 2 S. C. 21; Toledo, etc. Ry. Co., 50 Ill. 184.

[2] Jordt *v.* S., 31 Tex. 571, 572, [98 Am. D. 550.]

[3] S. *v.* Tootle, 2 Harring. (Del.) 541.

[4] Consult Crim. Pro., I, § 620; American cases cited to last section; Wiley *v.* S., 3 Coldw. 362; S. *v.* Royster, 65 [30 Am. R. 162;] Valesco *v.* S., 9 Tex. Ap. 76; Persons *v.* S., 3 Tex. Ap. 240; Keesee *v.* S., 1 Tex. Ap. 298; Gholston *v.* S., 33 Tex. 342; Banks *v.* S., 28 Tex. 644; Dalton *v.* S., 4 Tex. Ap. 333; Lunsford *v.* S., 1 Tex. Ap. 448, [28 Am. R. 414;] Swindel *v.* S., 32 Tex. 102; Pigg *v.* S., 43 Tex. 108.

[5] Broom, Leg. Max. (2d ed.) 505, 515; Co. Lit. 210*a;* Watkins *v.* Wassell, 20 Ark. 410; Feldman *v.* Morrison, 1 Bradw. 460; Howell *v.* Stewart, 54 Mo. 400; Scovern *v.* S., 6 Ohio St. 288, 291.

Express remedy excluding implied.— Though, as we have seen,[1] the mere establishing of a new statutory right carries with it by implication a remedy, yet, if the statute creating the right provides a remedy, our maxim applies, and the statutory method excludes all others.[2] So,—

Express mention of effect.— Where a statute expressly defines what its effect shall be, other effects are by implication excluded.[3] Again,—

Limiting authorized act.— If the legislature declares that a thing before lawful may be done, and adds that this shall not be construed to permit the doing of some other thing embraced in the general provision, the result will be an implied prohibition of such other thing, though it was before lawful.[4] On the other hand,—

Remedy for existing right.— A statute which merely prescribes a new remedy for an existing right is cumulative only, and a party may follow either it or the antecedent law at his election, unless by direct words or necessary implication it takes away the prior remedy.[5] And —

§ 249a. **Limits of doctrine.**— Special caution is required not to carry the main doctrine of this sub-title too far. For example, the omission of a thing from a statute is not equivalent to the insertion of its opposite; as, if it enumerates provisions not to be affected by it, all unenumerated provisions on like subjects are not therefore repealed.[6] And an act forbidding the wife to

[1] *Ante*, § 137.

[2] Thurston *v.* Prentiss, 1 Mich. 193; S. *v.* Loftin, 2 Dev. & Bat. 31; Smith *v.* Lockwood, 13 Barb. 209; Conwell *v.* Hagerstown Canal, 2 Ind. 588; S. *v.* Corwin, 4 Mo. 609; Rex *v.* Douse, 1 Ld. Raym. 672; Dudley *v.* Mayhew, 3 Comst. 9; Almy *v.* Harris, 5 Johns. 175; Lang *v.* Scott, 1 Blackf. 405, [12 Am. D. 257;] Bailey *v.* Bryan, 3 Jones (N. C.), 357, [67 Am. D. 246;] Camden *v.* Allen, 2 Dutcher, 398; Victory *v.* Fitzpatrick, 8 Ind. 281; McCormack *v.* Terre Haute, etc. R. R. Co., 9 Ind. 283; Ham *v.* Steamboat Hamburg, 2 Iowa, 460; *post*, § 250. And see U. S. *v.* Dickey, Morris, 412; P. *v.* Stevens, 13 Wend. 341; [Monterey *v.* Abbott, 77 Cal. 541.]

[3] Perkins *v.* Thornburgh, 10 Cal. 189; Pursell *v.* New York Life Ins. etc. Co., 42 N. Y. Super. 383; Watkins *v.* Wassell, 20 Ark. 410.

[4] S. *v.* Eskridge, 1 Swan (Tenn.), 413.

[5] Coxe *v.* Robbins, 4 Halst. 384; Almy *v.* Harris, 5 Johns. 175; Colden *v.* Eldred, 15 Johns. 220; Farmers' Turnpike *v.* Coventry, 10 Johns. 389; Bearcamp River Co. *v.* Woodman, 2 Greenl. 404; Fryeberg Canal *v.* Frye, 5 Greenl. 38; Baltimore *v.* Howard, 6 Har. & J. 383; Booker *v.* McRoberts, 1 Call, 243.

[6] Burnham *v.* Onderdonk, 41 N. Y. 425

give evidence for her husband in criminal cases does not authorize her doing it in civil cases.[1] Likewise a provision that shop-books shall not be evidence after a year does not make them such within the year.[2] We shall see more of this under the next sub-title; as to —.

VII. How Statutory and Common-law Remedies Mingle.

§ 249b. Already.— The discussions of this volume have already brought to view some of the doctrines pertaining to this sub-title. But,—

Here.— In this connection, we shall somewhat extend our vision, and endeavor to gain a more connected and complete comprehension of the entire topic.

§ 250. Creating offense and prescribing procedure.— Where the same statute which creates an offense prescribes also the penalty, mode of procedure, or anything else of the sort, only what the statute thus ordains is permissible.[3] But,—

Affirming common-law offense.— Where the offense which a statute creates is such also at the common law, and the statute and common law are not repugnant, all new provisions thus legislatively ordained are cumulative, and the procedure may conform to either law.[4] Again,—

Creating offense without providing procedure or punishment. Where a statute forbids a thing of a public nature[5] before lawful, but provides no penalty, the indictment is at the common

[1] Barbat *v.* Allen, 7 Exch. 609.

[2] Pitman *v.* Maddox, 2 Salk. 690.

[3] *Ante*, § 249, and cases there cited; P. *v.* Craycroft, 2 Cal. 243, [56 Am. D. 331;] Attorney-General *v.* Radloff, 10 Exch. 84, 23 Law J. (N. S.) Exch. 240, 18 Jur. 555, 26 Eng. L. & Eq. 413; Renwick *v.* Morris, 7 Hill (N. Y.), 575; Rex *v.* Ivyes, 2 Show. 468; Reg. *v.* Dye, 11 Mod. 174; Com. *v.* Swift Run Gap Turnpike, 2 Va. Cas. 361; McElhiney *v.* Com., 22 Pa. St. 365; S. *v.* Meyer, 1 Speers, 305; S. *v.* Helgen, 1 Speers, 310; Barden *v.* Crocker, 10 Pick. 383; Rex *v.* Hemmings, 3 Salk. 187; Anonymous, 3 Salk. 189, 2 Ld. Raym. 991; Rex *v.* Gluff, 12 Mod. 104; Rex *v.* Hurst, 11 Mod. 140; Rex *v.* Marriot, 4 Mod. 144; s. c. *nom.* Rex *v.* Marriott, 11 Mod. 140, note; Hartley *v.* Hooker, Cowp. 523; Crofton's Case, 1 Mod. 34; Rex *v.* Buck, 1 Stra. 679; Rex *v.* Savage, 1 Ld. Raym. 347; S. *v.* Maze, 6 Humph. 17; Rex *v.* Wright, 1 Bur. 543; Sudbury Meadows *v.* Middlesex Canal, 23 Pick. 36; Dodge *v.* Essex, 3 Met. 380; Henniker *v.* Contoocook Valley R. R. Co., 9 Fost. (N. H.) 146.

[4] *Ante*, §§ 163*d*, 164, 166, 167, 173; Crittenden *v.* Wilson, 5 Cow. 165, [15 Am. D. 462;] P. *v.* Craycroft, 2 Cal. 243, [56 Am. D. 331;] Rex *v.* Dixon, 10 Mod. 335; Gooch *v.* Stephenson, 13 Me. 371.

[5] Crim. Law, I, §§ 237, 238.

law,[1] and the common-law punishment follows.[2] Or, if such a statute prescribes no mode of prosecution, the common-law indictment lies.[3] In like manner,—

§ 250a. Private statutory interest.— Where a statute creates a private interest, but is silent as to the remedy, any person within the benefit conferred, or injured by the prohibited wrong, may sue.[4] Or, as otherwise expressed, "when any statute requires an act to be done for the benefit of another, or to forbear the doing of an act which may be to his injury, though no action be given in express terms by that statute, for the omission or commission, the general rule of law in all such cases is that the party injured shall have an action."[5] But a new statutory remedy for an existing right does not take away the former remedy, and either may be pursued.[6] So, as in the case of a criminal statute,[7] where the act which confers a civil right prescribes the remedy, it only is permissible.[8] Or, if a

[1] Rex *v.* Robinson, 2 Bur. 799, 803; Rex *v.* Smith, 2 Doug. 441; Rex *v.* Harris, 4 T. R. 202.

[2] *Ante*, § 138; Reg. *v.* Price, 11 A. & E. 727; Reg. *v.* Walker, Law R. 10 Q. B. 355, 13 Cox, C. C. 94.

[3] Colburn *v.* Swett, 1 Met. 232; Elder *v.* Bemis, 2 Met. 599; S. *v.* Meyer, 1 Speers, 305; S. *v.* Helgen, 1 Speers, 310; and the cases in the last two notes.

[4] *Ante*, §§ 134, 138, 144; Crim. Law, I, §§ 287, 288; Ewer *v.* Jones, 2 Ld. Raym. 934, 937; Privilege of Priests, 12 Co. 100; Arundel *v.* Duckett, 20 Md. 468; Shepherd *v.* Hills, 11 Exch. 55, 67; Hightower *v.* Fitzpatrick, 42 Ala. 597; Dudley *v.* Mayhew, 3 Comst. 9. And see Steamship Co. *v.* Joliffe, 2 Wall. 450.

[5] Ashby *v.* White, 14 How. St. Tr. 695, 785; Pickering *v.* James, Law R. 8 C. P. 489; Hitchins *v.* Kilkenny, etc. Ry. Co., 9 C. B. 536; The Waverly, 7 Bis. 465.

[6] Coxe *v.* Robbins, 4 Halst. 384; Almy *v.* Harris, 5 Johns. 175; Colden *v.* Eldred, 15 Johns. 220; Farmers' Turnpike *v.* Coventry, 10 Johns. 389; Bearcamp River Co. *v.* Woodman, 2 Greenl. 404; Fryeburgh Canal *v.* Frye, 5 Greenl. 38; Baltimore *v.* Howard, 6 Har. & J. 383; Booker *v.* McRoberts, 1 Call, 243; P. *v.* Craycroft, 2 Cal. 243, [56 Am. D. 331;] Adams *v.* Richardson, 43 N. H. 212; Bruce *v.* Delaware & Hudson Canal, 19 Barb. 371; Sharp *v.* Warren, 6 Price, 131.

[7] *Ante*, § 250.

[8] Stevens *v.* Evans, 2 Bur. 1152, 1157; S. *v.* Stewart, 26 Ohio St. 216; Lang *v.* Scott, 1 Blackf. 405, [12 Am. D. 257;] Rochester *v.* Bridges, 1 B. & Ad. 847, 859; Ward *v.* Severance, 7 Cal. 126; Roberts *v.* Landecker, 9 Cal. 262; Thurston *v.* Prentiss, 1 Mich. 193; Almy *v.* Harris, 5 Johns. 175; Renwick *v.* Morris, 7 Hill (N. Y.), 575; Fuller *v.* Edings, 11 Rich. 239; Butler *v.* S., 6 Ind. 165; Victory *v.* Fitzpatrick, 8 Ind. 281; Cole *v.* Muscatine, 14 Iowa, 296; Hazen *v.* Essex, 12 Cush. 475; Camden *v.* Allen, 2 Dutcher, 398; Weller *v.* Weyand, 2 Grant (Pa.), 103; Brown *v.* White Deer, 27 Pa. St. 109; Babb *v.* Mackey, 10 Wis. 371; Wolverhampton New Waterworks *v.* Hawkesford, 6 C. B. (N. S.) 336, 356; Stevens *v.* Jeacocke, 11 Q. B. 731; Marshall *v.* Nicholls, 18 Q. B. 882;

statute authorizes the doing of a thing which was before unlawful, and prescribes the remedy for the injured party, it only can be pursued;[1] or, if it provides for a part of the injury, its rule prevails as to the part, while the common-law remedy is available for the rest.[2]

§ 250b. Civil and criminal or penal.— As private and public wrongs and redress are separate and concurrent,[3] provisions for the procedure as to the one have no relation to the same as to the other. So that, for example, if a statute creates a new offense and imposes a penalty, the remedy by injunction is nevertheless, in a proper case, available.[4] So also, in a proper case, not as of course in every one, an action at common law may be maintained by the private party in such circumstances.[5]

§ 250c. Indictment — is the common, yet not the only, form for prosecuting crimes.[6] When, therefore, a statute creates a crime, whether it fixes the punishment or not, an indictment will lie against the violator,[7] unless it provides some other form of procedure.[8] So,—

§ 250d. Penal action.— Though a penal action is not properly criminal,[9] if a statute provides a penalty for a wrong of a public nature,[10] to be recovered by action,[11] the plaintiff should be not the informer, though he is to receive a part of the pen-

St. Pancras *v.* Batterbury, 2 C. B. (N. S.) 477; Bassett *v.* Carleton, 32 Me. 553, [54 Am. D. 605.]

[1] Henniker *v.* Contoocook Valley R. R. Co., 9 Fost. (N. H.) 146; Best *v.* Gholson, 89 Ill. 465; *In re* Washington Park, 52 N. Y. 131; *In re* Townsend, 4 Hun, 31; McKinney *v.* Monongahela Nav. Co., 14 Pa. St. 65, [53 Am. D. 517;] Sudbury Meadows *v.* Middlesex Canal, 23 Pick. 36; Dodge *v.* Essex, 3 Met. 380.

[2] Troy *v.* Cheshire R. R. Co., 3 Fost. (N. H.) 83, [55 Am. D. 177.]

[3] Crim. Law, I, § 264 *et seq.*

[4] Cooper *v.* Whittingham, 15 Ch. D. 501.

[5] Hayes *v.* Porter, 23 Me. 371; Couch *v.* Steel, 3 Ellis & B. 402; Atkinson *v.* Newcastle, etc. Waterworks, 2 Ex. D. 441.

[6] Crim. Pro., I, § 130 *et seq.*

[7] *Ante*, § 250; 2 Hale, P. C. 171; 2 Hawk. P. C., ch. 25, § 4; Rex *v.* Wright, 1 Bur. 543, 544; Reg. *v.* Buchanan, 8 Q. B. 883; S. *v.* Pate, Busbee, 244; Blackwell *v.* Old Colony R. R. Co., 122 Mass. 1; U. S. *v.* Ebner, 4 Bis. 117; Burnet *v.* Davidson, 10 Ire. 94. See S. *v.* Carr, 6 Oreg. 133.

[8] Rex *v.* Wright, *supra;* Rex *v.* Marriot, 4 Mod. 144.

[9] Crim. Law, I, § 32; Webster *v.* P., 14 Ill. 365; Canfield *v.* Mitchell, 43 Conn. 169.

[10] See Ordway *v.* Central National Bank, 47 Md. 217, [28 Am. R. 455;] Gilmore *v.* Dawson, 64 Mo. 310.

[11] 2 Hawk. P. C., ch. 25, § 4. See Carle *v.* P., 12 Ill. 285.

alty, but the state.[1] Yet it is common, by express provision, to allow *qui tam* actions, in which an informer sues in his own name for a penalty, as well on behalf of himself as the state.[2] But even then, if the private person has not commenced such action, the state may sue.[3] While his action is pending, no other person can maintain a suit.[4] Now,—

§ 251. Complications less obvious.— While the doctrines of this sub-title are thus far plain, both in reason and authority, there may be complications of facts the legal consequences whereof are less obvious. Thus,—

Different date or different part of statute.— Plainly, if a statute of to-day creates an offense, and, prescribing no remedy, leaves it to be proceeded against under the common law, a statute of to-morrow defining the procedure will be cumulative, the same as if the offense had been originally at the common law.[5] Then, will it make a difference should the statutes be simultaneously enacted? There are cases which hold not, and that, if one section of an act creates an offense, and another prescribes the remedy, the remedy is cumulative.[6] And a much-esteemed book lays down the doctrine that, "where an offense is not so at the common law, but made an offense by act of parliament, an indictment will lie where there is a substantive prohibitory clause in such act of parliament, though there be afterwards a particular provision and a particular remedy given."[7] Within this doctrine, if by one clause of a statute an offense is created "and a penalty is annexed to it by a separate and subsequent clause," a violation of it need not be pursued by a suit for the penalty, but an indictment will lie "on

[1] Rex *v.* Hymen, 7 T. R. 536; Smith *v.* Look, 108 Mass. 139, 141; Caroon *v.* Rogers, 6 Jones (N. C.), 240. Under the Missouri statute, see Hudson *v.* St. Louis, etc. Ry. Co., 53 Mo. 525; Fickle *v.* St. Louis, etc. Ry. Co., 54 Mo. 219; Seaton *v.* Chicago, etc. R. R. Co., 55 Mo. 416.

[2] Smith *v.* Look, *supra;* Wheeler *v.* Goulding, 13 Gray, 539; Moore *v.* Jones, 23 Vt. 739; Chicago, etc. R. R. Co. *v.* Howard, 38 Ill. 414; Megargell *v.* Hazelton Coal Co., 8 Watts & S. 342.

[3] S. *v.* Bishop, 7 Conn. 181; Com. *v.* Howard, 13 Mass. 221, 222.

[4] Dozier *v.* Williams, 47 Miss. 605.

[5] 1 Russ. Crimes (3d Eng. ed.), 50.

[6] Attorney-General *v.* White, 2 Comyns, 433, 436. But see Crofton's Case, 1 Vent. 63, 1 Mod. 34.

[7] 1 Saund., Wms. ed. (6th) 135, note. And see Lichfield *v.* Simpson, 8 Q. B. 65; Collinson *v.* Newcastle, etc. Ry. Co., 1 Car. & K. 546; Rochdale Canal *v.* King, 14 Q. B. 122.

the prior clause, on the ground of its being a misdemeanor."[1] Now, to take another step in the argument, can it make a difference that the prohibition and remedy are in different clauses or sections? If we make the natural answer that it cannot,[2] we come to a doctrine directly contrary to what we have seen to be established.[3] The logical course would be to deny that provisions enacted at the same date have, in this class of cases, the same effect as if established at different dates. But the English decisions appear to have gone too far otherwise to admit of reconciliation by logic; so the distinction in England seems to be that, where the same section both creates the offense and affixes the consequence, only the statutory direction can be followed;[4] but, where the offense is created in one section and penalties are prescribed in a subsequent section, the subsequent one is cumulative, and the common-law method may be followed.[5] But,—

§ 252. With us,— this particular distinction has probably not been very much considered. And it is doubtful whether anything relating to it can be set down as established in American law. Said a learned Massachusetts judge: "The distinction to be taken is, where a statute does not vest a right in a person, but only prohibits the doing of some act under a penalty; in such a case the party violating the statute is liable to the penalty only; but, where a right of property is vested in consequence of the statute, it is to be vindicated by the common law unless the statute confines the remedy to the penalty."[6] Should we apply this distinction in the criminal law, it might possibly subject to indictment one who violated a statute creating a crime and prescribing a summary procedure, without words negativing any other procedure; though this consequence does not seem to be inevitable.[7] A statute making a thing a public

[1] Ashurst, J., in Rex *v.* Harris, 4 T. R. 202, 205. See also 1 Russ. Crimes (3d Eng. ed.), 49 *et seq.*; *ante*, §§ 134, 136, 138.

[2] *Ante*, §§ 63, 65, 66.

[3] *Ante*, §§ 250, 250*a*.

[4] Attorney-General *v.* Radloff, 10 Exch. 84, 23 Law J. (N. S.) Exch. 240, 18 Jur. 555, 26 Eng. L. & Eq. 413.

[5] Reg. *v.* Buchanan, 8 Q. B. 883, 15 Law J. (N. S.) Q. B. 227, 10 Jur. 736; 1 Russ. Crimes (3d Eng. ed.), 50, 51.

[6] Putnam, J., in Barden *v.* Crooker, 10 Pick. 383, 389.

[7] And see, to this point, S. *v.* Thompson, 2 Strob. 12, which is, however, consistent with the English distinction as stated in the last section. And to the point of the text is Crofton's Case, 1 Mod. 34, which has per-

nuisance, and in the same section directing how it shall be punished, doubtless leaves it subject to the common-law abatement.[1]

§ 253. In conclusion of this topic.— Under the present unsatisfactory condition of the authorities, true wisdom would seem to indicate that, in each individual instance, special regard be paid to those considerations which point to the actual legislative intent. The practitioner, obliged to adapt his course nicely to the shades of distinction taken by the courts heretofore, will consult the cases carefully as to points presenting special difficulties. But judges, seeking the truth more in the line of legal reason than of precise authority, will consider whether, looking at the whole law, the new remedy for the new offense was intended by the legislature to supersede the common-law remedies, which attach as of course to all offenses.

VIII. Mandatory and Directory Statutes.

§ 254. Mandatory, defined.— A statute is called mandatory when, if not all its provisions are complied with according to their terms, the thing done is, as to it, void.

In general.— Most statutes are mandatory;[2] and, for example, their terms must be all and strictly pursued to render proceedings under them good, or rights claimed under them valid.[3] Even,—

Agreements contrary to statute.— As we have seen,[4] agreements in contravention of a statute or its policy are, in general, void.[5] And —

Thing done contrary, etc.— Penalty.— The same rule applies to a thing done contrary to a statute; it is commonly void. Or, if the enactment merely imposes a penalty or a forfeiture, this is usually, not always, equivalent to a prohibition.[6]

haps been overruled. See also People *v.* Stevens, 13 Wend. 341; Renwick *v.* Morris, 7 Hill (N. Y.), 575.

[1] See Renwick *v.* Morris, 7 Hill (N. Y.), 575; Rex *v.* Gregory, 2 Nev. & M. 478, 5 B. & Ad. 555.

[2] Koch *v.* Bridges, 45 Miss. 247.

[3] *Ante*, § 119; Fitzpatrick *v.* Turner, 14 Fla. 382; Hammons *v.* S., 8 Tex. 272; District Township, etc. *v.* Dubuque, 7 Iowa, 262; Corbett *v.* Bradley, 7 Nev. 106; Logwood *v.* Huntsville, Minor, 23; Crawford *v.* S., Minor. 148; Hale *v.* Burton, Dudley (Ga.). 105; Fitch *v.* Kirkland, 22 Wend. 132.

[4] *Ante*, § 138*a*.

[5] Peck *v.* Burr, 6 Seld. 294; Miller *v.* Post, 1 Allen, 434; Hathaway *v.* Moran, 44 Me. 67. As to marriage see 1 Bishop, Mar., Div. & S., §§ 287–291; Parton *v.* Hervey, 1 Gray, 119; Illinois Land & Loan Co. *v.* Bonner, 75 Ill. 315.

[6] Hallet *v.* Novion, 14 Johns. 273,

§ 255. Directory, defined.— A statute is termed directory when a part or all of its provisions operate merely as advice or direction to the official or other person who is to do something pointed out, leaving the act or omission not destructive of the legality of what is done in disregard of the direction.

What directory and what mandatory.—It is difficult, on the authorities, to lay down exact rules for determining when a statutory provision should be construed as directory, and when as mandatory.[1] In reason, we may say that the interpretation will be adopted which will best subserve justice and the true legislative intent; but so indefinite a rule can be of little practical avail. Let us look at some recognized distinctions. Thus,—

Not of substance.— Whatever, in a statute, is not of the substance of its provisions will,[2] when not in the nature of a grant of rights to parties or the public,[3] be construed as directory. And,—

Time and manner of official acts.— Generally, when no rights will be impaired, provisions, with no negative words or implications, concerning the time and manner, and more especially the time, in which official persons shall perform designated acts, are directory.[4] Of this sort, for example, is the require-

290; Mitchell *v.* Smith, 1 Binn. 110, [2 Am. D. 417;] Williams *v.* Tappan, 3 Fost. (N. H.) 385, 391; Lewis *v.* Welch, 14 N. H. 294; Louisville *v.* Roupe, 6 B. Monr. 591; Tabb *v.* Baird, 3 Call, 475; Sellers *v.* Dugan, 18 Ohio, 489; Griffith *v.* Wells, 3 Denio, 226; Bancroft *v.* Dumas, 21 Vt. 456; Skelton *v.* Bliss, 7 Ind. 77; [Cusick's Appeal, 136 Pa. St. 459, 20 Atl. R. 574, 10 L. R. A. 228.]

[1] Bladen *v.* Philadelphia, 60 Pa. St. 464.

[2] Norwegian Street, 81 Pa. St. 349; Wendel *v.* Durbin, 26 Wis. 390; S. *v.* Lean, 9 Wis. 279; Hurford *v.* Omaha, 4 Neb. 336; Howard *v.* Bodington, 2 P. D. 203, 210, 211; Rex *v.* Loxdale, 1 Bur. 445; [Jackson Co. *v.* Derrick, 23 S. R. 193, 117 Ala. 348; Gallup *v.* Smith, 12 L. R. A. 353, 59 Conn. 354, 22 Atl. R. 334.]

[3] *Ante*, § 112; S. *v.* Lean, *supra;* P. *v.* New York, 11 Abb. Pr. 114; Wendel *v.* Durbin, *supra;* [Kennedy *v.* Oregon R. R. Co., 18 Utah, 325, 54 Pac. R. 988; S. *v.* Jersey City, 57 N. J. L. 293, 26 L. R. A. 281, 30 Atl. R. 531; Pensacola *v.* Lehmann, 57 Fed. R. 324; McLeod *v.* Scott, 26 Pac. R. 1061, 21 Oreg. 94; Brokaw *v.* Com., 6 L. R. A. 161, 130 Ill. 482, 22 N. E. R. 596; Kohn *v.* Hinshaw, 17 Oreg. 308, 20 Pac. R. 629; Bowen *v.* Minnesota, 47 Minn. 115, 49 N. W. R. 683; P. *v.* Buffalo, 21 N. Y. Sup. 598.

[4] Pond *v.* Negus, 3 Mass. 230, [3 Am. D. 131;] Rex *v.* Leicester, 7 B. & C. 6; Rex *v.* Denbyshire, 4 East, 142; Reg. *v.* Rochester, 7 Ellis & B. 910; Reg. *v.* Ingall, 2 Q. B. D. 199; P. *v.* Allen, 6 Wend. 486; P. *v.* Peck, 11 Wend. 604, [27 Am. D. 104;] Marchant *v.* Langworthy, 6 Hill (N. Y.), 646; Hooker *v.* Young, 5 Cow. 269; *Ex parte* Heath, 3 Hill (N. Y.), 42; Colt

ment that the court which sentences a prisoner to the state prison "shall so limit the time of sentence that it will expire between the months of March and November." A sentence in disregard of it is not void.[1] And largely the statutes relating to the time and manner of summoning and bringing in jurors are of this class.[2] The same is true of those providing for other steps in a judicial cause.[3] But a provision of this or any other sort which, though in the nature of a command to an officer or court, confers rights on parties, is generally or always mandatory.[4] A familiar illustration of this kind of stat-

v. Eves, 12 Conn. 243; Wan-kon-chaw-neek-kaw *v.* U. S., Morris, 332, 335; Walker *v.* Chapman, 22 Ala. 116; P. *v.* Cook, 14 Barb. 259; S. *v.* Click, 2 Ala. 26; McGuffie *v.* S., 17 Ga. 497; Hart *v.* Plum, 14 Cal. 148; P. *v.* Lake, 33 Cal. 487; Wheeler *v.* Chicago, 24 Ill. 105, [76 Am. D. 736;] St. Louis County Court *v.* Sparks, 10 Mo. 117, [45 Am. D. 355;] Blimm *v.* Com., 7 Bush, 320; Torrey *v.* Millbury, 21 Pick. 64; Parchman *v.* S., 2 Tex. Ap. 228, [28 Am. R. 435;] Lackawana Iron, etc. Co. *v.* Little Wolf, 38 Wis. 152; Rex *v.* Sparrow, 2 Stra. 1123; S. *v.* Camden, 10 Vroom, 620; Lee *v.* S., 49 Ala. 43; Limestone *v.* Rather, 48 Ala. 433; Ryan *v.* Vanlandingham, 7 Ind. 416; Merrill *v.* S., 46 Ala. 82; Boykin *v.* S., 50 Miss. 375; Wright *v.* Sperry, 21 Wis. 331; McRoberts *v.* Winant, 15 Abb. Pr. (N. S.) 210; Le Feuvre *v.* Miller, 8 Ellis & B. 321. And see, besides the other cases cited to this section, Striker *v.* Kelly, 7 Hill (N. Y.), 9; Wiggin *v.* New York, 9 Paige, 16; McBee *v.* Hoke, 2 Speers, 138; S. *v.* Hill, 2 Speers, 150; Eustis *v.* Kidder, 26 Me. 97; Rex *v.* Page, 12 Mod. 123; Rex *v.* Ingram, 1 Ld. Raym. 215; Steele *v.* S., 1 Tex. 142; Dyches *v.* S., 24 Tex. 266; P. *v.* Weller, 11 Cal. 49, [70 Am. D. 750; Thomas *v.* Chapin, 116 Mo. 396, 22 S. W. R. 785; Sacramento *v.* Dillman, 102 Cal. 107, 36 Pac. R. 385; Lancaster Co. *v.* Lancaster, 160 Pa. St. 411, 28 Atl. R. 854; Erhardt *v.* Schroeder, 155 U. S. 124, 39 L. ed. 94; Korb *v.* Mitchell, 3 Ohio Dec. 267.]

[1] Miller *v.* Finkle, 1 Par. Cr. 374. And see, for a like principle as to the sentence, Brightwell *v.* S., 41 Ga. 482.

[2] S. *v.* Pitts, 58 Mo. 556; S. *v.* Gillick, 7 Iowa, 287; S. *v.* Smith, 67 Me. 328; S. *v.* Carney, 20 Iowa, 82. See S. *v.* Maddox, 1 Lea, 671.

[3] Dawson *v.* P., 25 N. Y. 399; S. *v.* Jolly, 7 Iowa, 15; S. *v.* Axt, 6 Iowa, 511; Friar *v.* S., 3 How. (Miss.) 422; Zantzinger *v.* Ribble, 36 Md. 32; Ottillie *v.* Waechter, 33 Wis. 252; Body *v.* Jewsen, 33 Wis. 402; Com. *v.* Edwards, 4 Gray, 1; Crofoot *v.* P., 19 Mich. 254; S. *v.* Baker, 8 Nev. 141; S. *v.* Scott, 1 Bailey, 294; S. *v.* Baker, 9 Rich. Eq. 521; Territory *v.* Anderson, 1 Wy. 20; Charter *v.* Greame, 13 Q. B. 216; Clark *v.* Com., 29 Pa. St. 129.

[4] *Ex parte* Jordan, 94 U. S. 248; P. *v.* Livingston, 68 N. Y. 114; Stacey *v.* S., 3 Tex. Ap. 121; Satterwhite *v.* S., 3 Tex. Ap. 428; Wendel *v.* Durbin, 26 Wis. 390; Newman *v.* S., 6 Bax. 164; French *v.* Edwards, 13 Wall. 506; Donlin *v.* Hettinger, 57 Ill. 348; Blake *v.* Sherman, 12 Minn. 420; P. *v.* Erie, 1 Buf. 517; Howard *v.* Bodington, 2 P. D. 203; Vaux *v.* Vollans, 4 B. & Ad. 525. See S. *v.* Cooper, 45 Mo. 64; Long *v.* S., 4 Tex. Ap. 81.

ute is one giving the prevailing party costs; they cannot be withheld at the discretion of the judge.[1] Further to illustrate,—

Time of executing sentence.— If a statute directs within how many days, after judgment, the prisoner in a capital case shall be executed, the court may still order him executed at a different time.[2] Again,—

Eight-hours law.— The act of congress, termed the "Eight-hours law," which provided that eight hours should constitute a day's work for all laborers, workmen and mechanics employed by or on behalf of the government of the United States, was held to be a direction to the agents of the government, and not a contract between it and a class of its employees. By agreement, a day's work might still be more or less than eight hours.[3]

Non-official person.— A provision for a thing to be done by a non-official person may be directory, equally as where the doer is an officer.[4]

Bonds and other instruments.— Where a statute requires duties, less in amount than two hundred dollars, to be paid in cash, a bond for such less amount is valid.[5] And in other cases bonds, deeds and other instruments, not following a statutory form, may be good,[6] though they are not so always. So may an affidavit, not in statutory form, be good.[7]

In part directory.— The reader perceives, from these illustrations, that a directory statute is not necessarily, while yet it may be, such in full; it is oftener directory only in part.[8] For

[1] First National Bank *v.* Prescott, 27 Wis. 616.

[2] Seaborn *v.* S., 20 Ala. 15; Rex *v.* Wyatt, Russ. & Ry. 230. See, on this subject, Reg. *v.* Hartnett, Jebb, 302; Reg. *v.* Hogg, 2 Moody & R. 380; Miller *v.* S., 3 Ohio St. 475. [If a sentence is not, for any reason, executed at the proper time, the court may order the execution and fix the time therefor. *Ex parte* Bell, 56 Miss. 282; *Ex parte* Cross, 146 U. S. 271, 36 L. ed. 969.]

[3] U. S. *v.* Martin, 94 U. S. 400.

[4] Field *v.* Gooding, 106 Mass. 310; Bainbridge *v.* S., 30 Ohio St. 264; American Bank *v.* Cooper, 54 Me. 438.

[5] U. S. *v.* Linn, Crabbe, 307.

[6] Rex *v.* Lyon, Russ. & Ry. 255; Rex *v.* Randall, Russ. & Ry. 195.

[7] S. *v.* Dayton, 3 Zab. 49, [53 Am. D. 270. Statutory provisions as to the giving of a bond before entering upon the duties of the office are directory. U. S. *v.* Eaton, 169 U. S. 331, 42 L. ed. 767.]

[8] Woodward *v.* Sarsons, Law Rep. 10 C. P. 733, 746; Reg. *v.* Fordham, 11 A. & E. 73; Rex *v.* Norwich, 1 B. & Ad. 310; Free Press Assoc. *v.* Nichols, 45 Vt. 7.

example, it may be directory as to the time, and mandatory as to the thing itself.[1]

§ 255a. Legislative intent — (Negative words). — Negative or other words indicating a legislative intent may, and often do, cause a statute to be construed as mandatory, which otherwise would be held directory.[2] For example,—

§ 256. Peremptory language. — As expressed by Dwarris, "where affirmative words are peremptory, as that 'the forms of proceedings set forth in the schedule annexed shall be used on all occasions,' Lord Kenyon observed, 'I cannot say that these words are merely directory;' and a material variance from the form prescribed was in that case held fatal, the justices not having pursued the authority of the statute."[3] And it has been laid down that statutes imposing a duty, and giving the means for its performance, are mandatory.[4] Moreover,—

Franchise. — "It has frequently been held that, where a power or franchise is created by statute which fixes or prescribes the mode of its exercise, it must be exercised in the mode pointed out by the act, and no other."[5] But a provision, that the officers of a corporation shall be elected annually, does not take away its incidental power to choose them after the election day has, by accident, passed by without an election.[6]

Liability of officer. — The omission of an officer to perform an act enjoined by statute may, though the statute is construed as directory, render him liable at the suit of a party injured by the neglect.[7]

[1] S. *v.* Harris, 17 Ohio St. 608; S. *v.* Lean, 9 Wis. 279.

[2] Liverpool Borough Bank *v.* Turner, 2 De G., F. & J. 502; Howard *v.* Bodington, 2 P. D. 203, 211; Bladen *v.* Philadelphia, 60 Pa. St. 464; Hurford *v.* Omaha, 4 Neb. 336; S. *v.* Smith, 67 Me. 328; Pearse *v.* Morrice, 2 A. & E. 84, 96; Reg. *v.* Fordham, 11 A. & E. 73; Rex *v.* Newcomb, 4 T. R. 368; Bowman *v.* Blyth, 7 Ellis & B. 47; P. *v.* Allen, 6 Wend. 486; Williams *v.* Swansea Canal Nav. Co., Law Rep. 3 Ex. 158. [Here, as everywhere else, the question is one of legislative intent. U. S. *v.* Thoman, 156 U. S. 353, 39 L. ed. 450; Suburban Co. *v.* Boston, 153 Mass. 200, 10 L. R. A. 497, 26 N. E. R. 447; Hall *v.* Schoenecke, 128 Mo. 661, 31 S. W. R. 97.]

[3] Dwar. Stat. (2d ed.) 610; Davison *v.* Gill, 1 East, 64. And see Rex *v.* Loxdale, 1 Bur. 445. See S. *v.* Foster, 61 Mo. 549.

[4] Veazie *v.* China, 50 Me. 518; Milford *v.* Orono, 50 Me. 529; S. *v.* Garber, 7 Neb. 14; Wendel *v.* Durbin, 26 Wis. 390.

[5] Smith, Stat. & Const. Law, § 677.

[6] S. *v.* Fairbury, 51 Ill. 149, referring to 2 Kent, Com. 295; Coles *v.* Allison, 23 Ill. 437; [S. *v.* So. Kingston, 18 R. I. 258, 27 Atl. R. 599, 22 L. R. A. 65.]

[7] Brown *v.* Lester, 13 Sm. & M. 392.

Constitution.— A constitutional provision may, like a statutory one, be interpreted as only directory.[1]

Caution.— It is well to be cautious not to carry the principle of holding a statute to be merely directory too far.[2]

IX. Concluding Suggestions and Views.

§ 256a. In general.— There are a few principles of statutory interpretation, sometimes relied on, not embraced in the foregoing series of chapters. But they are all either of a doubtful nature, or of little or no practical importance. They lie collected before the writer at the present time. Yet after a somewhat careful consideration of the subject, he has deemed it best that these elucidations shall here close.[3]

[1] *Ante*, §§ 36*a*, 37; Washington *v.* Page, 4 Cal. 388.

[2] See Smith, Stat. & Const. Law, §§ 670–681; Dwar. Stat. (2d ed.), §§ 608–612; Stayton *v.* Hulings, 7 Ind. 144; Webster *v.* French, 12 Ill. 302.

[3] [If there be difficulty in interpreting the qualifying words of a sentence, the rule is to apply them to such other words or phrase as shall immediately precede them therein, rather than to those more remote. Gaither *v.* Green, 40 La. An. 362, 4 S. R. 210.]

BOOK III.

SPECIAL INTERPRETATIONS PERTAINING TO THE CRIMINAL LAW.

CHAPTER XXVI.

STATUTES OF LIMITATIONS OF CRIMINAL PROSECUTIONS.

§ 257. At common law — (In England). — There is no rule of the common law limiting the time within which a criminal prosecution must be commenced.[1] Nor, in England, have there ever been any general statutes of limitations of criminal causes.[2] "So that," says Chitty,[3] "instances have frequently occurred in which parties have been convicted and punished many years after the crime had been forgotten,"[4] — a practice, however, not always tolerated by the courts.[5] The prosecution of some forms of high treason was early — by 7 and 8 Will. 3, ch. 3, § 5 — limited to three years; and there are statutes of limitations for poaching,[6] and for a few other specific offenses.[7] For penal actions also there are statutes of limitations.[8] In contrast to this lack of English legislation,—

[1] Dover *v.* Maestaer, 5 Esp. 92; Hyde *v.* Partridge, 3 Salk. 227, 228.

[2] Reg. *v.* Hull, 2 Fost. & F. 16.

[3] 1 Chit. Crim. Law, 160.

[4] 2 Hale, P. C. 158; Burn, Just., Indictment, III. Lieut.-Col. Wall was tried, convicted and executed for a murder committed twenty years before. 4 Bl. Com. (15th ed.) 305, note 2.

[5] In Reg. *v.* Robins, 1 Cox, C. C. 114, A. D. 1844, which was an odious prosecution for bestiality, it appeared that the prosecuting witness had not complained to a magistrate for nearly two years after the fact was alleged to have transpired, though he said he had mentioned it otherwise. No explanation of the delay could be given, and Alderson, B., refused to submit the question of guilt to the jury and ordered an acquittal. And see P. *v.* Lohman, 2 Barb. 216.

[6] Reg. *v.* Parker, Leigh & C. 459, 9 Cox, C. C. 475; Reg. *v.* Brooks, 1 Den. C. C. 217; Reg. *v.* Hull, *supra*.

[7] Archb. Crim. Pl. & Ev. (19th ed.) 79; Reg. *v.* Thompson, 16 Q. B. 832.

[8] 31 Eliz., ch. 5, § 5, followed by some others; Dyer *v.* Best, Law R. 1 Ex. 152; Cobbett *v.* Warner, 1 H. & N. 388; Maugham *v.* Walker, Peake, 163; Attorney-General *v.* Hall, 11 Price, 760.

§ 258. With us.— In most of our states there are statutes variously limiting the times for commencing the several sorts of criminal prosecution. And there are, as in England, statutes of limitations for penal actions,[1] the same as for others of the civil class. The limiting statutes are not in uniform words, but the interpretations of most of them are well defined.

§ 258a. Criminal and civil, contrasted —(Constitutional). The rules for interpreting civil statutes of limitations are not in all particulars applicable to criminal. Especially are not those by which the constitutional validity of these statutes is tested. What flows from this distinction will appear as we proceed.

§ 259. Strict or liberal.— Whether the construction of a civil statute of limitations is to be strict or liberal,— a question on which there is no absolute harmony of opinion,[2] — that of a criminal one is plainly, in principle, to be liberal; because it is a provision in favor of the accused, and we have seen that this sort of provision is to receive a highly liberal construction.[3] And such is the doctrine — at least, the better doctrine — of the courts.[4] Thus,—

Computation of time — ("*Two years*").— There being different methods of reckoning time, by one of which a given period will be a day longer than by another,[5] the Texas court, applying the rule of a liberal rendering in favor of defendants, held that where the statutory period was two years, and an offense was committed on the first day of January, 1855, an

[1] S. *v.* Rundlett, 33 N. H. 70; Raymond *v.* U. S., 14 Blatch. 51; Adams *v.* Woods, 2 Cranch, 336; Stimpson *v.* Pond, 2 Curt. C. C. 502; Parsons *v.* Hunter, 2 Sumner, 419; Walker *v.* Chapman, 22 Ala. 116; [Roe *v.* Board of Com'rs of Elk Co., 1 Kan. Ap. 219, 40 Pac. R. 1082; Weisenborn *v.* P., 53 Ill. Ap. 32; Borough of Wallingford *v.* Hall, 64 Conn. 426, 30 Atl. R. 47; Com. *v.* Equitable Life Assurance Society, 100 Ky. 341, 38 S. W. R. 491; Merrill *v.* Board of Com'rs of Ness Co., 7 Kan. Ap. 717, 52 Pac. R. 109.]

[2] Tolson *v.* Kaye, 3 Brod. & B. 217, 222; Pellatt *v.* Ferrars, 2 B. & P. 542, 547; Curlewis *v.* Mornington, 7 Ellis & B. 283, 292–294; Hart's Appeal, 32 Conn. 520; Bedell *v.* Janney, 4 Gilman, 193; Forster *v.* Cumberland Valley R. R. Co., 23 Pa. St. 371; Garland *v.* Scott, 15 La. An. 143; Elder *v.* Bradley, 2 Sneed, 247; Gautier *v.* Franklin, 1 Tex. 732; Bell *v.* Morrison, 1 Pet. 351, 360; Willison *v.* Watkins, 3 Pet. 43, 54; McCluny *v.* Silliman, 3 Pet. 270, 278, 279.

[3] *Ante*, §§ 196, 199.

[4] P. *v.* Lord, 12 Hun, 282; White *v.* S., 4 Tex. Ap. 488; [Peterson *v.* Currier, 62 Ill. Ap. 163; S. *v.* Wheeler, 23 Nev. 143, 44 Pac. R. 430.]

[5] *Ante*, §§ 105–111.

indictment on the first day of January, 1857, was too late,[1] — a result contrary to what would have followed the other method of computation.[2] Still,—

§ 260. Analogous offenses.— The interpretation is not made so liberal as to protect from prosecution offenses merely analogous to those specified in the statute. It extends only to those within its words.[3] For example,—

Conspiracies.— An enactment limiting the time for proceeding against an offense named does not include, by construction, a conspiracy to commit the offense.[4] And it is not otherwise though the limitation is in an exception of the statute. Thus, in North Carolina, "in all trespasses and other misdemeanors, except the offenses of perjury, forgery, malicious mischief, and *deceit*, the prosecution shall commence within two years after the commission;" and a conspiracy to cheat and defraud was held not to fall within the exception. "This is a distinct offense from that of cheating or deceiving."[5] On the like principle of construction,—

"*Penalty.*"— Where, in South Carolina, it was provided that in every case of "penalty, fine, or forfeiture" incurred, "no information, action, or prosecution shall be commenced or carried on against the offender, for and in respect to such fine, penalty, or forfeiture, unless within six months," the word "penalty" was held to refer only to a fine or forfeiture of

[1] S. *v.* Asbury, 26 Tex. 82. See S. *v.* Mason, 66 N. C. 636; P. *v.* New York Central P. R. Co., 28 Barb. 284; *ante*, § 218; [Peterson *v.* Georgia R. R. etc. Co., 97 Ga. 798, 25 S. E. R. 370.]

[2] Smith *v.* Cassity, 9 B. Monr. 192. [48 Am. D. 420;] Owen *v.* Slatter, 26 Ala. 547, [62 Am. D. 745.] In Presbrey *v.* Williams, 15 Mass. 193, a civil case, the computation was as in the text. And see McGraw *v.* Walker, 2 Hilton, 404; Elder *v.* Bradley, 2 Sneed, 247; [Savage *v.* S., 18 Fla. 970.]

[3] See *post*, § 261*d*.

[4] Reg. *v.* Thompson, 16 Q. B. 832, 4 Eng. L. & Eq. 287. This case is not very strong to the proposition in the text, but it seems sufficiently to sustain it. See also U. S. *v.* Hirsch, 100 U. S. 33.

[5] S. *v.* Christianbury, Busbee, 46, 47. [Nor is assault with intent to commit an offense included in the bar against that offense. Moore *v.* S., 20 Tex. Ap. 275; Fuecher *v.* S., 33 Tex. Cr. R. 22, 24 S. W. R. 292. But in North Carolina the statutory bar against deceit was held to include seduction under promise of marriage. S. *v.* Crowell, 116 N. C. 1052; 21 S. E. R. 502; Shepler *v.* S., 114 Ind. 194, 16 N. E. R. 521. Though an offense punishable by imprisonment in the state penitentiary may be visited with a lighter punishment, it is none the less a felony, and the statute of limitations for felonies applies. S. *v.* Reeves, 97 Mo. 668, 10 S. W. R. 841, 10 Am. St. R. 349.]

money; and so this statute does not bar the prosecution for an offense the punishment whereof is corporal,— as, for instance, imprisonment or death,— or, as to the imprisonment, where it is fine and imprisonment.[1]

§ 260a. When statute begins to run.— All statutes of limitations, criminal and civil, begin to run only when there is a matured right of action or prosecution,[2] and there are in existence the needful parties.[3] Hence,—

In homicide.— Although the offense of felonious homicide is, by the better opinion, committed by the blow which results in death,[4] yet, as there can be no prosecution for it until the death has taken place, the statute of limitations does not begin to run against it till then.[5] Again,—

In polygamy.— Where the offense of polygamy consists of marrying a second time, the former husband or wife being alive,[6] the statute of limitations begins to run against it from the time of such second marriage.[7] But obviously where it is made a crime analogous to polygamy for parties to cohabit under a polygamous marriage,[8] the statute does not begin to run to-day against a cohabitation which will take place a year hence.[9] So,—

In nuisance.— While the statute will run against the erection of a nuisance from the day when it is erected,[10] the offense of its continuance is not thus barred.[11]

[1] S. *v.* Taylor, 2 McCord, 483; S. *v.* Thomas, 8 Rich. 295; S. *v.* Free, 2 Hill (S. C.), 628; S. *v.* Fields, 2 Bailey, 554. And see Tobacco-pipe Makers *v.* Loder, 16 Q. B. 763.

[2] Helps *v.* Winterbottom, 2 B. & Ad. 431; Reynolds *v.* Doyle, 2 Scott, N. R. 45 1 Man. & G. 753; Montgomery *v.* Hernandez, 12 Wheat. 129; Fenton *v.* Emblers, 1 W. Bl. 353, 354; Harris *v.* Osbourn, 2 Cromp. & M. 629; Phillips *v.* Broadley, 9 Q. B. 744; Mardis *v.* Shackleford, 4 Ala. 493; Roberts *v.* Armstrong, 1 Bush, 263, [89 Am. D. 624; Ryan *v.* Caldwell (Ky.), 50 S. W. R. 966; Hocutt *v.* Wilmington, etc. R. R. Co., 124 N. C. 214, 32 S. E. R. 681; Poe *v.* Dixon, 60 Ohio St. 124, 54 N. E. R. 86, 71 Am. St. R. 713.]

[3] Metcalf *v.* Grover, 55 Miss. 145, 147; Murray *v.* East India Co., 5 B. & Ald. 204, 213; Douglas *v.* Forrest, 4 Bing. 686; Johnson *v.* Wren, 3 Stew. 172; Clark *v.* Hardiman, 2 Leigh, 347; Hobart *v.* Connecticut Turnpike, 15 Conn. 145.

[4] Crim. Law, I, §§ 113–115 and note; Crim. Pro., I, §§ 50–52.

[5] S. *v.* Taylor, 31 La. An. 851; Reynolds *v.* S., 1 Kelly, 222.

[6] *Post*, §§ 586–588.

[7] Gise *v* Com., 8 Pa. St. 428; Com. *v.* McNerny, 10 Phila. 206; Scoggins *v.* S., 32 Ark. 205.

[8] *Post*, § 588; Finney *v.* S., 8 Head, 544.

[9] Com. *v.* Grise, 11 Phila. 655; S. *v.* Sloan, 55 Iowa, 217.

[10] Henline *v.* P., 81 Ill. 269.

[11] Nashville, etc. R. R. Co. *v.* S., 1 Bax. 55; [S. *v.* Long, 94 N. C. 896; Peck *v.*

§ 261. Commencement of prosecution.— By some of the statutes the indictment must be found, and by others the prosecution commenced, within the statutory period. For example, the words of 9 Geo. 4, ch. 69, § 4, as to poaching, are: "The prosecution . . . shall be commenced within twelve calendar months after the commission of such offense." And Pollock, C. B., ruled in a jury case that the issuing of the warrant of arrest does not constitute a commencement of prosecution.[1] This is a negative holding; and in the same negative way it is laid down that the finding of an indictment is not essential to the commencement of prosecution, but it may have been begun by steps before.[2] In a case at the assizes the same learned judge deemed the warrant of commitment to show, in the particular instance, "the commencement of the prosecution. The first proceeding was to take the party before the magistrate, and he grants his warrant of commitment."[3] And from a subsequent case before all the English judges it may perhaps be inferred that, if there is a regular information or complaint in writing before a magistrate, and thereupon he issues his warrant, and the proceedings go on in the usual way, the prosecution is commenced by the complaint and warrant; but this was not said, and the point decided was that, where evidence of the warrant only was produced, not enough was shown to take away the statutory bar.[4] Undoubtedly this question will de-

Michigan City, 149 Ind. 670, 49 N. E. R. 800; Cohen *v.* Bellenout (Va.), 32 S. E. R. 455. As to commencement of the statute in seduction under promise of marriage, see P. *v.* Nelson, 153 N. Y. 90, 46 N. E. R. 1040, 60 Am. St. R. 592. Embezzlement of ward's funds, Colvin *v.* S., 127 Ind. 403, 26 N. E. R. 888. Embezzlement by county officer, S. *v.* Mason, 108 Ind. 48, 8 N. E. R. 716. Conspiracy, Ochs *v.* P., 124 Ill. 399, 16 N. E. R. 662; U. S. *v.* Owen, 32 Fed. R. 534; P. *v.* Willis, 52 N. Y. S. 808, 23 Misc. R. 568.]

[1] Reg. *v.* Hull, 2 Fost. & F. 16.

[2] Reg. *v.* Brooks, 1 Den. C. C. 217, 2 Car. & K. 402, 2 Cox, C. C. 436.

[3] Reg. *v.* Austin, 1 Car. & K. 621.

[4] Reg. *v.* Parker, Leigh & C. 459, 9 Cox, C. C. 475. And see Reg. *v.* Casbolt, 21 Law Times (N. S.), 263; Rex *v.* Phillips, Russ. & Ry. 369. The case of Rex *v.* Willace, 1 East, P. C. 186, is as follows: "Stat. 8 and 9 Will. 3, ch. 26, § 9, provides that no prosecution shall be made for any offense against that act, unless such *prosecution be commenced* within three months next after such offense committed. In Willace's Case, who was indicted for high treason in coloring a piece of base coin resembling a shilling with materials producing the color of silver, the evidence was that on the 5th May, 1797, search was made in the prisoner's lodgings in consequence of information, and upon the party's entering the room the prisoner immediately ran away. There was found in his room a quan-

pend in part on the terms of the individual statute and the forms of procedure special to the particular locality In civil causes, with us, a suit is generally deemed to be begun when papers for the purpose are filed in court,[1] or the needful process is in good faith made out and delivered to an officer to be served.[2] In some states and circumstances, perhaps generally, not even a delivery of the process to the officer or a filing of papers is necessary;[3] while in others these,[4] or even a service of process[5] will be required. Within this doctrine, it is be-

tity of base money, such as described in the indictment, some in earlier, some in more advanced stages of the process. The prisoner was apprehended the same evening and lodged in Durham jail. He was afterwards carried before a magistrate, and by warrant dated 8th May was committed to jail, charged on oath 'with suspicion of high treason in *counterfeiting* the current money of this kingdom, viz. shillings,' etc. The assizes at Durham were holden on the 8th of August, so that more than three months had elapsed between the commission of the offense and the preferring of the indictment. But the judges, at a conference, unanimously held that the information and proceeding before the magistrate was the commencement of the prosecution within the meaning of the act, and that the variance between the manner of laying the offense in the indictment and charging it in the commitment made no difference." The Alabama statute provides that, within the meaning of the act, a prosecution may be commenced "by the issue of a warrant or by binding over the offender." Foster *v.* S., 88 Ala. 425; [Giles *v.* S., 88 Ala. 230, 7 S. R. 271; Benson *v.* S., 91 Ala. 86, 8 S. R. 873; Clayton *v.* S. (Ala.), 26 S. R. 118.]

[1] Bacon *v.* Gardner, 23 Miss. 60; Dilworth *v.* Mayfield, 36 Miss. 40; Wright *v.* Pratt, 17 Mo. 43; Sharp *v.* Maguire, 19 Cal. 577; Pimental *v.* San Francisco, 21 Cal. 351; Kinney *v.* Lee, 10 Tex. 155; Bank of United States *v.* Lyles, 10 Gill & J. 326; Guild *v.* Hale, 15 Mass. 455; Ontario Bank *v.* Rathbun, 19 Wend. 291; [Huysman *v.* Evening Star Newspaper Co., 12 Ap. D. C. 586; City of Belton *v.* Sterling (Tex. Civ. Ap.), 50 S. W. R. 1027; Johnson *v.* Davidson, 162 Ill. 232, 44 N. E. R. 499.]

[2] Evans *v.* Galloway, 20 Ind. 479; State Bank *v.* Bates, 5 Eng. 120; State Bank *v.* Cason, 10 Eng. 479; Johnson *v.* Farwell, 7 Greenl. 370, [22 Am. D. 203;] Hail *v.* Spencer, 1 R. I. 17; Davis *v.* Duffie, 18 Abb. Pr. 360; [Chapman *v.* Goodrich, 55 Vt. 354; Flournoy *v.* Lyon, 70 Ala. 308; U. S. *v.* American Lumber Co., 80 Fed. R. 809; Lambert *v.* Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. R. 431; Collins *v.* Manville, 170 Ill. 614, 48 N. E. R. 914.]

[3] Updike *v.* Ten Broeck, 3 Vroom, 105; Bunker *v.* Shed, 8 Met. 150; Jewett *v.* Greene, 8 Greenl. 447; Gardner *v.* Webber, 17 Pick. 407, 412; Mason *v.* Cheney, 47 N. H. 24; Burdick *v.* Green, 18 Johns. 14; Jones *v.* Jincey, 9 Grat. 708. See Robinson *v.* Burleigh, 5 N. H. 225; Graves *v.* Ticknor, 6 N. H. 537; Garland *v.* Chattle, 12 Johns. 430; Collins *v.* Montemy, 3 Bradw. 182; [Lacey *v.* Newcomb, 95 Iowa, 287, 63 N. W. R. 704.]

[4] Baskins *v.* Wilson, 6 Cow. 471.

[5] Taylor *v.* Taylor, 3 A. K. Mar. 18; [Demple *v.* Hofman (Kan. Ap.), 57 Pac. R. 284.]

lieved to be the general understanding in our tribunals that a criminal prosecution is begun when a complaint is made to a magistrate who issues his warrant of arrest.[1] Still, on the other hand, there is American authority for saying that the word "prosecution," in a statute limiting criminal causes, is an equivalent for indictment; so that only on the finding of an indictment will the running of the statute be stayed.[2] A presentment by the grand jury has been held to be[3] and not to be[4] a commencement,— a question varying with the case, the statute, and the practice of the court.[5]

§ 261a. Continuing to run after beginning.— After any sort of statute of limitations has attached to a case,— has begun to run,— it, as a general rule, and in the absence of statutory terms otherwise providing, continues its effect, though something intervenes which, if existing before,[6] would have prevented its attaching;[7] as, for example, though for a time there is no party to sue or be sued,[8] or the suit is forbidden,[9] or the

[1] S. *v.* Howard, 15 Rich. 274; S. *v.* May, 1 Brev. 160; Newell *v.* S., 2 Conn. 38; S. *v.* Groome, 10 Iowa, 308; Ross *v.* S., 55 Ala. 177; S. *v.* Gibbs, 1 Root, 171; Reg. *v.* Lennox, 34 U. C. Q. B. 28; S. *v.* Miller, 11 Humph. 505; P. *v.* Clark, 33 Mich. 112, 120; [S. *v.* Erving, 19 Wash. 435, 53 Pac. R. 717; *In re* Clyne, 52 Kan. 441, 35 Pac. R. 26; P. *v.* Clement, 72 Mich. 116, 40 N. W. R. 190; *In re* Griffith, 35 Kan. 377, 11 Pac. R. 174.]

[2] Com. *v.* Haas, 57 Pa. St. 443; [P. *v.* Ayhens, 85 Cal. 86, 24 Pac. R. 635; Anderson *v.* S., 20 Fla. 881; Broughn *v.* S., 44 Neb. 889, 62 N. W. R. 1094; *Ex parte* Lacey, 6 Okl. 4, 37 Pac. R. 1095; City of Pilot Grove *v.* McCormick, 56 Mo. Ap. 530; *In re* Griffith, 35 Kan. 377, 11 Pac. R. 174.]

[3] S. *v.* Cox, 6 Ire. 440; [S. *v.* Kiefer (Ind.), 44 Atl. R. 1043.]

[4] U. S. *v.* Slacum, 1 Cranch, C. C. 485.

[5] **"Pending."**— As to what is a "prosecution pending," see S. *v.* Arlin, 39 N. H. 179; Reg. *v.* Martin, 8 Q. B. D. 54; Schoeppe *v.* Com., 65 Pa. St. 51.

[6] *Ante*, § 260a.

[7] Coventry *v.* Atherton, 9 Ohio, 34; Cotterell *v.* Dutton, 4 Taunt. 826; Stevenson *v.* McReary, 12 Sm. & M. 9, 58, [51 Am. D. 102;] Wynn *v.* Lee, 5 Ga. 217; Halsey *v.* Beach, 1 Penning. 122; Ruff *v.* Bull, 7 Har. & J. 14, [16 Am. D. 290;] Pendergrast *v.* Foley, 8 Ga. 1; Smith *v.* Newby, 13 Mo. 159; Dillard *v.* Philson, 5 Strob. 213; [Asbury *v.* Fair, 111 N. C. 251, 16 S. E. R. 467; Bowles *v.* Smith (Tex. Civ. Ap.), 34 S. W. R. 381; Makepeace *v.* Bronnenberg, 146 Ind. 243, 45 N. E. R. 336; Grady *v.* Wilson, 115 N. C. 344, 20 S. E. R. 518, 44 Am. St. R. 461; Campbell *v.* McFadden, 9 Tex. Civ. Ap. 379, 31 S. W. R. 436; Voight *v.* Raby, 90 Va. 799, 20 S. E. R. 824; Lloyd *v.* Lloyd's Adm'r (Ky.), 46 S. W. R. 485.]

[8] Rhodes *v.* Smethurst, 6 M. & W. 351, 4 M. & W. 42; Byrd *v.* Byrd, 28 Miss. 144; Brown *v.* Merrick, 16 Ark. 612; Tynan *v.* Walker, 35 Cal. 634, [95 Am. D. 152;] Baker *v.* Brown, 18 Ill. 91.

[9] Houpt *v.* Shields, 3 Port. 247; Jordan *v.* Jordan, Dudley (Ga.), 182; [Mc-

person to be sued is dead,[1]— consequences provided against by the express terms of many of our statutes. Yet, even to this rule the unwritten law has exceptions, which enter into and qualify the statute. Thus,—

Creditor becoming executor, etc.— If the creditor of a deceased person is made his executor or administrator, this act of the law, rendering a suit for the debt impossible, since one cannot sue himself, yet not extinguishing it, suspends the running of the limitations statute.[2] Again,—

Rebellion — War.—The mere temporary closing of the courts, in consequence of disturbances from rebellion or war, does not necessarily, or does not in all circumstances, suspend the running of the statute.[3] But those hostilities do, which, by rendering unlawful or impossible the litigation in bar whereof the statute is invoked,[4] constitute the overwhelming necessity[5] to which all laws must yield.[6]

Clure *v.* Melton, 34 S. C. 377, 13 S. E. R. 615, 13 L. R. A. 723.]

[1] Stewart *v.* Spedden, 5 Md. 433; Hayman *v.* Keally, 3 Cranch, C. C. 325; Johnson *v.* Wren, 3 Stew. 172; Conant *v.* Hitt, 12 Vt. 285; [Oates *v.* Beckworth, 112 Ala. 356, 20 S. R. 399; Shumate *v.* Snyder, 140 Mo. 77, 41 S. W. R. 781; McAuliff *v.* Parker, 10 Wash. 141, 38 Pac. R. 744; Ackerman *v.* Hilpert (Iowa), 79 N. W. R. 90; Stauffer *v.* British, etc. Co. (Miss.), 25 S. R. 299; Copeland *v.* Collins, 122 N. C. 619, 30 S. E. R. 315.]

[2] Seagram *v.* Knight, Law R. 2 Ch. Ap. 628, 632; Spencer *v.* Spencer, 4 Md. Ch. 456; Brown *v.* Stewart, 4 Md. Ch. 368. See Munroe *v.* Holmes, 13 Allen, 109.

[3] Prideaux *v.* Webber, 1 Lev. 31; Hall *v.* Wybourn, 2 Salk. 420. And see Hepburn's Case, 3 Bland, 95. But see observations in Hanger *v.* Abbott, 6 Wall. 532, 541; U. S. *v.* Wiley, 11 Wall. 508, 513; Marks *v.* Borum, 1 Bax. 87, [25 Am. R. 764;] Kilpatrick *v.* Brashear, 10 Heisk. 372, 375.

[4] See, for the principle, Bishop, Con., §§ 577–609.

[5] *Ante*, § 24, and places there referred to.

[6] Hanger *v.* Abbott, U. S. *v.* Wiley, and other cases *supra;* The Protector, 9 Wall. 687; Harrison *v.* Henderson, 7 Heisk. 315; Neely *v.* Luster, 7 Heisk. 354; Braum *v.* Sauerwein, 10 Wall. 218; Levy *v.* Stewart, 11 Wall. 244; Stewart *v.* Kahn, 11 Wall. 493; Coleman *v.* Holmes, 44 Ala. 124, [4 Am. R. 121;] O'Neal *v.* Boone, 53 Ill. 35; Mixer *v.* Sibley, 53 Ill. 61; Sierra *v.* U. S., 9 Ct. of Cl. 224; The Protector, 12 Wall. 700; Adger *v.* Alston, 15 Wall. 555; Ross *v.* Jones, 22 Wall. 576; Gooding *v.* Varn, Chase, 286; Eddins *v.* Graddy, 28 Ark. 500; Randolph *v.* Ward, 29 Ark. 238; Hall *v.* Denckla, 28 Ark. 506; Bell *v.* Hanks, 55 Ga. 274; Selden *v.* Preston, 11 Bush, 191; McMerty *v.* Morrison, 62 Mo. 140; Pitzer *v.* Burns, 7 W. Va. 63; Sleght *v.* Kane, 1 Johns. Cas. 76. And see Shand *v.* Gage, 9 S. C. 187; Johnston *v.* Wilson, 29 Grat. 379; Zacharie *v.* Godfrey, 50 Ill. 186, [99 Am. D. 506;] Delancey *v.* McKeen, 1 Wash. C. C. 354.

§ 261b. Exceptions.— Besides the exceptions thus engrafted by the unwritten law on the statute, there are generally in our states others, as already intimated, incorporated into its terms. For example,—

"*Beyond seas.*" — The statutes of some of the states, following[1] mainly the early English ones,[2] except out of their operation persons "beyond the seas."[3] In the absence of this statutory exception this fact itself will not work the exemption.[4] The English courts gave to the expression its obvious meaning; so that, for example, Ireland, both before and after the union, was adjudged to be,[5] and Scotland not to be,[6] "beyond the seas." In 1833 this construction was somewhat changed by the statute of 3 and 4 Will. 4, ch. 27, § 19, which declared that, within its provisions and the limitations act of 21 Jac. 1, ch. 16 § 7, "no part of the United Kingdom, etc., shall be deemed to be beyond seas."[7] This statute of Will. 4, adopted long after the Revolution, has, of course, no effect with us; but some of our American courts, overlooking it, and overlooking the English decisions pronounced in its absence, have held that the words "beyond the seas" mean simply out of the limits of the state.[8] And, in one way or another, a large proportion of our

[1] Vans *v.* Higginson, 10 Mass. 29; Hall *v.* Little, 14 Mass. 203.

[2] Hall *v.* Wybank, 3 Mod. 311; Beven *v.* Clapham, 1 Lev. 143; Rochtschilt *v.* Leibman, 2 Stra. 836; Swayn *v.* Stephens, Cro. Car. 245; Parry *v.* Jackson, 4 T. R. 516.

[3] *Post*, § 595.

[4] Hall *v.* Wybourn, 2 Salk. 420; s. c. *nom.* Hall *v.* Wyborn, 1 Show. 98; Anonymous, Comb. 190; Swayne *v.* Stevens, W. Jones, 252.

[5] Nightingale *v.* Adams, Holt, 426; Anonymous, 1 Show. 91; Gaskin *v.* Gaskin, Cowp. 657, 658; Lane *v.* Bennett, 1 M. & W. 70.

[6] King *v.* Walker, 1 W. Bl. 286. And see Lane *v.* Bennett, *supra*, at pp. 74–76.

[7] And see Chandler *v.* Vilett, 2 Saund. 120 and notes; Ruckmaboye *v.* Mottichund, 8 Moore, P. C. 4.

[8] For example, in Bank of Alexandria *v.* Dyer, 14 Pet. 141, 145, Taney, C. J., delivering the unanimous opinion of the supreme court of the United States, said: "The question presented by these pleadings is the construction of that clause in the Maryland act of limitations which exempts from the operation of the act all persons who are 'beyond the seas,' at the time cause of action accrues, and continues the exemption until they shall return. The words 'beyond the seas,' in this law, are manifestly borrowed from the English statute of limitation of James 1, ch. 21 [21 James 1, ch. 16]; and it has always been held that they ought not to be interpreted according to their literal meaning, but ought to be construed as equivalent to the words 'without the jurisdiction of the state.' According to this interpretation, a person residing in any

tribunals have reached this conclusion.[1] Other of our courts deny this construction, and hold that, at least, another state of the Union is not "beyond the seas."[2] It is difficult to find any other reason than the blunder just mentioned for adjudging that a man who steps across an invisible line into an adjoining state has, by the one step, taken where there is not a drop either of salt water or fresh, transported himself "beyond the seas." "Even," to quote from Lord Abinger, C. B., if the court were "quite satisfied" that the legislature meant so, it "could not supply the defect."[3]

§ 261c. Concealment.—On general principles, want of knowledge of an offense, or the defendant's concealing it,[4] or mere ignorance of a civil right,[5] is no answer to the statutory bar.

other state of the Union was 'beyond the seas' within the meaning of this act of assembly, and therefore exempted from its operation until he should come within the limits of Maryland." For a review of the decisions of the supreme court of the United States on this question, see Davie *v.* Briggs, 97 U. S. 628, 637.

[1] Murray *v.* Baker, 3 Wheat. 541; Forbe *v.* Foot, 2 McCord, 331; Shelby *v.* Guy, 11 Wheat. 361; Pancoast *v.* Addison, 1 Har. & J. 350, [2 Am. D. 520;] Wakefield *v.* Smart, 3 Eng. 488; Denham *v.* Holeman, 26 Ga. 182, [71 Am. D. 198;] Stephenson *v.* Wait, 8 Blackf. 508; Galusha *v.* Cobleigh, 13 N. H. 79; Richardson *v.* Richardson, 6 Ohio, 125, [25 Am. D. 745.]

[2] S. *v.* Harris, 71 N. C. 174; Mason *v.* Johnson, 24 Ill. 159, [76 Am. D. 740;] Marvin *v.* Bates, 13 Mo. 217; Fackler *v.* Fackler, 14 Mo. 431; Keeton *v.* Keeton, 20 Mo. 530; Gonder *v.* Estabrook, 33 Pa. St. 374. There are statutes the special terms of which are so. Hall *v.* Little, 14 Mass. 203, 204.

State statutes in national courts. Though the supreme court of the United States has interpreted the expression "beyond seas" as an equivalent for "out of the state," still, where the question is upon a state statute which has received the other construction from the state tribunal (*ante*, §§ 35*b*, 115; Amory *v.* Lawrence, 3 Clif. 523), it will follow the latter. So it did in passing upon the North Carolina statute, on the ground "that the fixed and received construction by the state courts of local statutes of limitation furnishes rules of decision for this court, so far as such construction and statutes do not conflict with the constitution of the United States." Davie *v.* Briggs, 97 U. S. 628, 637.

[3] Lane *v.* Bennett, *supra*, at p. 78. And see Wilson *v.* Appleton, 17 Mass. 180, 181.

[4] U. S. *v.* White, 5 Cranch, C. C. 38; [S. *v.* Pierre, 49 La. An. 1159, 22 S. R. 373; S. *v.* Wren, 48 La. An. 803, 19 S. R. 745.]

[5] Campbell *v.* Long, 20 Iowa, 382; Abell *v.* Harris, 11 Gill & J. 367; Davis *v.* Cotten, 2 Jones Eq. 430; Bossard *v.* White, 9 Rich. Eq. 483; Leonard *v.* Pitney, 5 Wend. 30; [Townsend *v.* Eichelberger, 51 Ohio St. 212, 38 N. E. R. 207; Gore *v.* Murphy, 18 Mont. 342, 45 Pac. R. 217; School Dist. of Sedalia *v.* Deweese, 98 Fed. R. 602, Meyer Bros. Drug Co. *v.* Fry (Tex. Civ. Ap.), 48 S. W. R. 752.

But by the terms of some of our statutes, matters of this sort will postpone the limitation of a criminal prosecution.[1]

"*Fleeing from justice*"— has the like statutory effect in some of the states and under the United States jurisdiction.[2]

§ 261d. To what offenses.— There are decisions, not requiring special consideration, as to what offenses are within the varying terms of our limitations statutes.[3] Now —

Offenses within one another.— In those cases in which a conviction for a minor offense may be had on an indictment for a major, the same as in any other, the particular one for which the verdict is found must not be barred by the statute.[4]

§ 262. Shifting the proceedings — Valid — Erroneous.— It is plain that the beginning of a prosecution for one offense will not intercept the running of the statute against another.[5] On the other hand, if the issuing of a warrant is the commencement of a prosecution,[6] the successive steps afterward required by the law are merely a continuance of it, so that the running

[1] Jones *v.* S., 14 Ind. 120; Randolph *v.* S., 14 Ind. 282; Free *v.* S., 13 Ind. 324; Robinson *v.* S., 57 Ind. 113; Ulmer *v.* S., 14 Ind. 52; [S. *v.* Hinton, 49 La. An. 1354, 22 S. R. 617.]

[2] S. *v.* Washburn, 43 Mo. 240; U. S. *v.* O'Brian, 3 Dill. 381; U. S. *v.* Smith, 4 Day, 121; R. S. of U. S., § 1045; [P. *v.* McCausey, 65 Mich. 72, 31 N. W. R. 770; U. S. *v.* Hewecker, 79 Fed. R. 59; Coleman *v.* Terr., 5 Okl. 201, 47 Pac. R. 1079; Gray *v.* Fifield, 59 N. H. 131; Blackburn *v.* Blackburn (Mich.), 83 N. W. R. 835; Payne *v.* Bowdrie (Ga.), 36 S. E. R. 89; Porter *v.* U. S., 91 Fed. R. 494; Howgate *v.* U. S., 7 Ap. D. C. 217; Whitcomb *v.* Keator, 59 Wis. 609, 18 N. W. R. 469; Streep *v.* U. S., 160 U. S. 128, 16 S. Ct. 244, 44 L. ed. 365; Lay *v.* S., 42 Ark. 105; S. *v.* Harvell, 89 Mo. 588, 1 S. W. R. 887; Blackman *v.* Com., 124 Pa. St. 578, 17 Atl. R. 194.]

[3] S. *v.* Enos, Kirby, 21; Anschicks *v.* S., 6 Tex. Ap. 524; U. S. *v.* Hirsch, 100 U. S. 33; S. *v.* King, 29 La. An. 704; Lamkin *v.* P., 94 Ill. 501; U. S. *v.* Irvine, 98 U. S. 450; White *v.* S., 4 Tex. Ap. 488; Laurent *v.* Bermier, 1 Kan. 428; S. *v.* Elrod, 12 Rich. 662; S. *v.* Abellanado, 18 La. An. 141; S. *v.* Markham, 15 La. An. 498; Com. *v.* East Boston Ferry Co,, 13 Allen, 589; U. S. *v.* Fehrenback, 2 Woods, 175; S. *v.* J. P., 1 Tyler, 288; S. *v.* Hunkins, 48 N. H. 557; P. *v.* Haun, 44 Cal. 96; U. S. *v.* Norton, 91 U. S. 566; Com. *v.* Edwards, 9 Dana, 447; [S. *v.* Heller, 76 Wis. 517, 45 N. W. R. 307; P. *v.* Clement, 72 Mich. 116, 40 N. W. R. 190. Imprisonment in state penitentiary does not suspend the running of the statute. *In re* Griffith, 35 Kan. 377, 11 Pac. R. 174; Carr *v.* S., 36 Tex. Cr. R. 390, 37 S. W. R. 426.]

[4] White *v.* S., 4 Tex. Ap. 488; Turley *v.* S., 3 Heisk. 11 (overruling Carden *v.* S., 3 Head, 267); Nelson *v.* S., 17 Fla. 195; Heward *v.* S., 13 Sm. & M. 261; Riggs *v.* S., 30 Miss. 635; [P. *v.* Picetti, 124 Cal. 361, 57 Pac. R. 156; S. *v.* Bell, 48 La. An. 735, 19 S. R. 671; S. *v.* Diskin, 35 La. An. 46; P. *v.* Burt, 51 Mich. 199, 16 N W. R. 378.]

[5] Smith *v.* S., 62 Ala. 29; Buckalew *v.* S., 62 Ala. 334, [34 Am. R. 22; Jackson *v.* S., 106 Ala. 136, 17 S. R. 349.]

[6] *Ante*, § 261.

of the statute will be stopped.[1] But if one of such steps proves to be erroneous, and is therefore taken again, is the result different? In Alabama, the written law expressly providing that "a prosecution may be commenced, within the meaning of this chapter, by the issue of a warrant, or by binding over the offender," one thus proceeded against was indicted, the indictment was quashed as erroneous, and then a fresh indictment was found, while still he remained in custody. And this was held to be such a continuous proceeding as prevented the statute of limitations from re-attaching to the case.[2] In North Carolina this doctrine was carried to a point less obviously just in principle. By the statute, "in all trespasses and other misdemeanors, except the offenses of perjury, forgery, malicious mischief, and deceit, the prosecution shall commence within two years after the commission of the said trespasses and misdemeanors, and not after," etc.[3] And, without reference to the original complaint and warrant, or order of commitment, if such there were, the court held that, where there is an indictment within the statutory period, then it is abated on a plea of misnomer, then another is found against the defendant by his right name after the statutory period has elapsed, this is sufficient. Said the learned chief justice: "The first bill was found within two years after the commission of the offense; the second bill was a continuation and a part of the same proceeding, according to a well-settled principle."[4] There is ap-

[1] Tully *v.* Com., 13 Bush, 142.

[2] Foster *v.* S., 38 Ala. 425. See S. *v.* Kreps, 8 Ala. 951; Smith *v.* S., *supra;* S. *v.* Hazard, 8 R. I. 273; S. *v.* Cason, 28 La. An. 40; Lay *v.* S., 42 Ark. 105; Smith *v.* S., 79 Ala. 21; White *v.* S., 103 Ala. 72, 16 S. R. 63. But on removal of cause from justice court to circuit court, the statute may not be suspended. Bube *v.* S., 76 Ala. 73; Martin *v.* S., 79 Ala. 267.

[3] R. S., ch. 35, § 8. The statute is not given in the report.

[4] S. *v.* Hailey, 6 Jones (N. C.), 42, 43, referring to S. *v.* Johnson, 5 Jones (N. C.), 221; S. *v.* Haney, 2 Dev. & Bat. 390; S. *v.* Tisdale, 2 Dev. & Bat. 159; S. *v.* Hashaw, 2 Car. Law Repos. 251. The principle is more fully stated in S. *v.* Johnson, *supra*, where it is held that if an indictment is found, and afterward another one for the same cause, the legal effect is simply to add a new count to the first, and the two constitute one case. Whether this is so in the other states we need not inquire; since, if it is, it does not follow that the new indictment is a part of a proceeding already quashed. If it is such part, it is quashed also. It may be further observed of S. *v.* Hailey, that the point stated in the text was not necessary to the decision, since the statute contained a saving within which the case clearly fell. Still in an Eng-

parently more or less authority quite opposite to this doctrine, to the effect that proceedings declared erroneous or null will not interrupt the running of the statute.[1] But that they may is expressly enacted in some of the states.[2]

§ 263. Past and future.— As every crime is a wrong committed against the power which makes the laws,[3] and as therefore a statute limiting the period for prosecution is a declaration in the nature of grace to the offender,[4] such a statute, if in general terms, should in reason be applied by the courts to past offenses,[5] the same as to future ones. This results also from the doctrine[6] that the statute is to be interpreted liberally in favor of the accused. Even a civil statute of limitations, not within these special reasons, is by a part of our courts held, in the language of a learned Vermont judge, to "operate upon an antecedent as well as subsequent cause of action, unless by its terms it is restrained to the latter;"[7] though some of the other tribunals maintain the contrary.[8] In matter of

lish case at the assizes, the learned judge had so much doubt on the point as to reserve it, though it came to nothing, for the prisoner was acquitted on the merits. Rex *v.* Kilminster, 7 Car. & P. 228. And it may be that some other judges will take the same view as did those of the North Carolina tribunal. See also S. *v.* Duclos, 35 Mo. 237; [Reg. *v.* West, 18 Cox, C. C. 675.]

[1] S. *v.* Curtis, 30 La. An. 1166; S. *v.* Morrison, 31 La. An. 211; [S. *v.* Precovara, 49 La. An. 593, 21 S. R. 724.]

[2] S. *v.* Duclos, 35 Mo. 237; S. *v.* Primm, 61 Mo. 166; [Stafford *v.* S., 59 Ark. 413, 27 S. W. R. 495; Swalley *v.* P., 116 Ill. 247, 4 N. E. R. 879; S. *v.* Child, 44 Kan. 420, 24 Pac. R. 952; Louisville, etc. R. R. Co. *v.* Com., 4 Ky. Law R. 627. See *In re* Crandall, 59 Kan. 671, 54 Pac. R. 686.]

[3] Crim. Law, I, § 32.

[4] Lamkin *v.* P., 94 Ill. 501; P. *v.* Lord, 12 Hun, 282; [Com. *v.* Duffy, 96 Pa. St. 506.]

[5] See *ante*, §§ 83–85*a*.

[6] *Ante*, § 259.

[7] Cardell *v.* Carpenter, 42 Vt. 284, 236, Wilson, J.; Pritchard *v.* Spencer, 2 Ind. 486; Sleeth *v.* Murphy, Morris, 321, [41 Am. D. 232;] Walker *v.* Bank of Mississippi, 2 Eng. 500; Phares *v.* Walters, 6 Iowa, 106; Root *v.* Bradley, 1 Kan. 437; Marston *v.* Seabury, 2 Penning. 435; Brewster *v.* Brewster, 32 Barb. 428; [Fish *v.* Genett (Ky.), 56 S. W. R. 813; Morris *v.* Tripp (Iowa), 82 N. W. R. 610; Stoddard *v.* Owings, 42 S. C. 88, 20 S. E. R. 25; Merchants' Nat. Bank *v.* Braithwaite, 7 N. D. 358, 75 N. W. R. 244, 66 Am. R. 653; Gutterman *v.* Wishon, 21 Mont. 458, 54 Pac. R. 566; Southgate *v.* Frier (Okl.), 57 Pac. R. 841.]

[8] Hull *v.* Minor, 2 Root, 223; Moore *v.* McLendon, 5 Eng. 512; Calvert *v.* Lowell, 5 Eng. 147; Central Bank *v.* Solomon, 20 Ga. 408; Thompson *v.* Alexander, 11 Ill. 54; Ashbrook *v.* Quarles, 15 B. Monr. 20; Whitworth *v.* Ferguson, 18 La. An. 602; Deal *v.* Patterson, 12 La. An. 728; Stine *v.* Bennett, 13 Minn. 153; Carothers *v.* Hurley, 41 Miss. 71; Paddleford *v.* Dunn, 14 Mo. 517; Weber *v.* Manning, 4 Mo. 229; Dickson *v.* Chicago, etc. R. R. Co., 77 Ill. 331; [Fayette

authority it has been held that, *prima facie*, criminal statutes of limitations do[1] and do not[2] include past offenses.

§ 264. How take advantage of statute.— One relying on a statute of limitations need not plead it in bar.[3] The prosecuting power is required affirmatively to show an offense within the period of limitations.[4]

§ 264a. Pertaining to remedy — (Time and place of trial). In general, statutes of limitation, whether civil or criminal, are regarded as pertaining, not to the right, but to the remedy.[5] And, as with other remedies,[6] those which prevail at the time and place of the trial furnish the rule for the suit.[7] Our written constitutions have created exceptions to this doctrine, but they are not numerous. The chief exception is in the civil department; namely,—

ville Bld. & Loan Ass'n *v.* Bowlin, 63 Ark. 573, 39 S. W. R. 1046; Gilbert *v.* Ackerman, 159 N. Y. 118, 53 N. E. R. 753, 45 L. R. A. 118; McKenzie *v.* A. P. Cook Co., 113 Mich. 452, 71 N. W. R. 868; Seattle *v.* De Wolfe, 17 Wash. 349, 49 Pac. R. 553; Nichols *v.* Norfolk, etc. R. R. Co., 120 N. C. 495, 26 S. E. R. 646.]

[1] U. S. *v.* Ballard, 3 McLean, 469; P. *v.* Roe, 5 Park. Cr. 231; [S. *v.* Miller, 4 N. J. L. 252; Com. *v.* Duffy, 96 Pa. St. 506.]

[2] Martin *v.* S., 24 Tex. 61.

[3] Crim. Pro., I, § 799. *Query* whether this is not otherwise in New York. P. *v.* Roe, 5 Park. Cr. 231; [and Colorado, Packer *v.* P. (Colo.), 57 Pac. R. 1087.]

[4] U. S. *v.* Smith, 4 Day, 121; Buckner *v.* S., 56 Ind. 207; Hurt *v.* S., 55 Ala. 214; Rex *v.* Phillips, Russ. & Ry. 369; White *v.* S., 4 Tex. Ap. 488; Gore *v.* S., 58 Ala. 391. See Com. *v.* Ruffner, 28 Pa. St. 259; [Warrall *v.* S., 27 Fla. 362, 8 S. R. 748; Weinert *v.* S., 35 Fla. 229, 17 S. R. 570; P. *v.* Lidenborn, 52 N. Y. S. 101, 28 Misc. R. 426; S. *v.* Anderson, 51 La. An. 1181, 25 S. R. 990; S. *v.* Schuermann, 70 Mo. Ap. 518.]

[5] Waltermire *v.* Westover, 4 Kern. 16, 20; Meek *v.* Meek, 45 Iowa, 294; Pratt *v.* Huggins, 29 Barb. 277; Cook *v.* Kendall, 13 Minn. 324; Edwards *v.* McCaddon, 20 Iowa, 520; Cox *v.* Berry, 13 Ga. 306; [S. *v.* Bell, 48 La. An. 735, 19 S. R. 671.]

[6] *Ante*, §§ 175, 176.

[7] Flowers *v.* Foreman, 23 How. (U. S.) 132; Hendricks *v.* Comstock, 12 Ind. 238, [74 Am. D. 205;] Walworth *v.* Routh, 14 La. An. 205; Gasaway *v.* Hopkins, 1 Head, 583; Sampson *v.* Sampson, 63 Me. 328; Patterson *v.* Gaines, 6 How. (U. S.) 550; Winston *v.* McCormick, 1 Ind. 56; Manchester *v.* Doddridge, 3 Ind. 360; Cook *v.* Kendall, 13 Minn. 324; Martin *v.* Martin, 35 Ala. 560; Howell *v.* Howell, 15 Wis. 55; [Underwood *v.* Patrick, 94 Fed. R. 468, 46 C. C. A. 330; Holley *v.* Coffee (Ala.), 26 S. R. 239; Van Santfoord *v.* Roethler (Oreg.), 57 Pac. R. 628; Obear *v.* First Nat. Bank, 97 Ga. 587, 25 S. E. R. 335; Brunswick Terminal Co. *v.* Nat. Bank of Baltimore, 88 Fed. R. 607. But several states have adopted statutes providing a different rule in certain classes of cases. John Shillitto Co. *v.* Richardson (Ky.), 42 S. W. R. 847; Robinson *v.* Moore, 76 Miss. 89, 23 S. R. 931.]

§ 265. Vested rights.— When the time for bringing a civil action has expired, the rights of the parties are ordinarily deemed to have vested, and the legislature cannot then take away what is thus vested by removing the statutory bar.[1] Again,—

Construction of statute.— Though, in general, and by the better opinion, a statute of limitations should be applied to past transactions,[2] the same as to future ones, the complete running of a limitations statute creates a wide difference between cases which are barred by it, even where no rights are vested, and those which are not. Therefore, in reason, a new statute of limitations should not be construed as intended to apply to any case already barred under an old one, unless express words in it require. And so are the few authorities which we have.[3] Within the principle involved in this proposition it was held that,—

Judgment lien.— Though the legislature is not forbidden to alter the limitation period of an existing judgment lien, yet, the power being an extraordinary one, the intent to exercise it will not be inferred from any doubtful expression.[4] So, in the criminal law,—

Authorizing criminal prosecution after bar.— Assuming the legislative power to authorize criminal prosecutions for offenses against which the statute of limitations has fully run, the exercise of the power would be a step in legislation so out of the usual course that it should not be inferred from words equally applicable to past offenses not barred. And for this also we have judicial authority.[5] A different question arises as to the —

[1] Pleasants *v.* Rohrer, 17 Wis. 577, 579; Sprecker *v.* Wakeley, 11 Wis. 432; Fears *v.* Sykes, 35 Miss. 633; Sims *v.* Canfield, 2 Ala. 555; Newcombe *v.* Leavitt, 22 Ala. 631; Winburn *v.* Cochran, 9 Tex. 123; McKinney *v.* Springer, 8 Blackf. 506; Piatt *v.* Vattier, 1 McLean, 146; Stipp *v.* Brown, 2 Ind. 647; Hill *v.* Kricke, 11 Wis. 442; Knox *v.* Cleveland, 13 Wis. 245; Parish *v.* Eager, 15 Wis. 532. And see Cassity *v.* Storms, 1 Bush, 452; *ante*, §§ 85*a*, 177*a*, 178; [Kipp *v.* Johnson, 31 Minn. 360, 17 N. W. R. 957; Gibbs *v.* Chicago Title & Trust Co., 79 Ill. Ap. 22; Eingartner *v.* Ill. Steel Co., 103 Wis. 378, 79 N. W. R. 433.]

[2] *Ante*, § 268.

[3] Thompson *v.* Read, 41 Iowa, 48; Pitman *v.* Bump, 5 Oreg. 17; Thompson *v.* S., 54 Miss. 740; [Walker *v.* Burgess, 44 W. Va. 399, 30 S. E. R. 99, 67 Am. St. R. 775.]

[4] Miller *v.* Com., 5 Watts & S. 438; [Warner *v.* Bartle, 56 N. Y. S. 585.]

[5] Thompson *v.* S., 54 Miss. 740; S. *v.* Sneed, 25 Tex. Supp. 66.

§ 266. Right to authorize prosecution of barred offense — (Ex post facto law).— However ungracious it may be for the legislature to withdraw from persons accused of crime the protection of a limitations statute which has once attached, there is no room to question its power unless some clause of the constitution can be pointed to forbidding.[1] The doctrine of vested rights, which concerns property alone,[2] is not applicable; there is no such thing as a right vested in one to go unwhipped of criminal justice. The only question, therefore, is whether such a provision is *ex post facto*.[3] No other express constitutional clause than the one forbidding *ex post facto* laws has ever been distinctly suggested as applicable to the case. On this question it may be observed, first, that such a statute is not within any of the recognized legal definitions of an *ex post facto* law;[4] secondly, that it is not within what we may term the lay-meaning of the words *ex post facto* — after the fact. The punishment which it renders possible, by forbidding the defense of lapse of time, is exactly what the law provided when "the fact" transpired. No bending of language, no supplying of implied meanings, can, in natural reason, work out the contrary conclusion. And lastly, such a statute, however inexpedient or oppressive it commonly would be deemed, is not within the mischiefs at which the constitutional inhibition of *ex post facto* laws is directed. Natural justice and a fundamental principle of the criminal law alike forbid the infliction of punishment where there could be no conscious guilt.[5] And the extent of the conscious guilt should be and is the measure of the punishment. To protect, as far as may be, this principle from the violence of inconsiderate or turbulent legislation, the inhibition of *ex post facto* laws secures men against being punished beyond what it was possible for their conscious guilt to have been when the "fact" occurred. But a statute removing a limitations bar is wholly outside of this sort of consideration. And it is immaterial to the argument what other considerations, or how forcible, there may be against it. The running of the old

[1] *Ante*, §§ 39*a*-41, 91*a*; Calder *v.* Bull, 3 Dall. 386, 399; Minge *v.* Gilmour, 1 Car. Law Repos. 34; Albee *v.* May, 2 Paine, 74; Beach *v.* Woodhull, Pet. C. C. 2.

[2] 2 Bishop, Mar. Women, § 32; 1 Bishop, Mar., Div. & S., §§ 667, 693.

[3] *Ante*, §§ 85, 176, 180, 184, 185; Crim. Law, I, § 279.

[4] Crim. Law, I, §§ 279–284.

[5] Crim. Law, I, §§ 205, 286–291.

statute had taken from the courts the right to proceed against the offender, leaving the violated law without its former remedy; but it had not obliterated the fact that the law forbade the act when it was done, or removed from the doer's mind his original consciousness of guilt. Simply the remedy had lapsed. And it has been adjudged, and never questioned, that, in circumstances precisely analogous, this sort of lapse can be repaired by a subsequent statute providing for a prosecution.[1] Looking for judicial utterances to the point in terms, we find them to be few and both ways. In a Texas opinion, laying down the excellent rule that in the absence of express words a statute will not be construed as intended to revive criminal prosecutions already barred by a statute of limitations,[2] the following *dictum* occurs: "The state, having neglected to prosecute within the time prescribed for its own action, lost the right to prosecute the suit. To give an act of the legislature, passed after such loss, the effect of reviving the right of action in the state, would give it an operation *ex post facto*, which we cannot suppose the legislature intended."[3] In New Jersey the exact question arose, and the supreme court decided by a divided bench that the reversal of the statutory bar was good.[4] Then the court of appeals reversed the decision, also by a divided bench.[5] Again,—

§ 267. Legislation connected with the secession war.— We have also on this question what may be deemed congressional opinions. In 1869 it was provided by congress:[6] "That the time for finding indictments in the courts of the United States in the late rebel states for offenses cognizable by said courts, and which may have been committed since said states went into rebellion, be, and hereby is, extended for the period of two years, from and after [the time when] said states are or may

[1] *Ante*, § 180. And see S. *v.* Shumpert, 1 S. C. 85.

[2] *Ante*, § 265.

[3] S. *v.* Sneed, 25 Tex. Supp. 66.

[4] S. *v.* Moore, 13 Vroom, 208.

[5] Moore *v.* S., 14 Vroom, 203, [39 Am. R. 558.] It does not seem to me clear that the statute in question required to be construed as intended to apply to cases against which the limitations law had already fully run.

[6] For a very able presentation of the side of the question favoring the legislative right, with many citations of authorities, see, in the "Globe," the speech of Hon. William Lawrence, of Ohio, delivered January 4, 1867.

be restored to representation in congress: Provided, however, that the provisions hereof shall not apply to treason or other political offenses."[1] There is some other legislation, national and state, which it might be well to consider in connection with this; but lapse of time is fast rendering it unimportant.[2]

[1] Act of March 3, 1869, 15 Stat. at Large, 340, ch. 148. And see Act of June 11, 1864, 13 Stat. at Large, 123, ch. 118; R. S. of U. S., § 1043.

[2] See *ante*, § 261*a*; U. S. *v.* Wiley, 11 Wall. 508; Stewart *v.* Kahn, 11 Wall. 493; Brian *v.* Banks, 38 Ga. 300; Bernstein *v.* Humes, 60 Ala. 582, [31 Am. R. 52;] Hart *v.* Bostwick, 14 Fla. 162; Spencer *v.* McBride, 14 Fla. 403; Huffman *v.* Alderson, 9 W. Va. 616; Oliver *v.* Perry, Phillips (N. C.), 581.

CHAPTER XXVII.

THE MEANINGS OF PARTICULAR WORDS AND PHRASES IN THE CRIMINAL LAW.

§ 268–270. Introduction.
271–275. The person acting.
276–305. The time and place.
306–318. The thing done.
319–347. Objects acted on and instrumentalities.
347*a*–350. The proceedings.

§ 268. Elsewhere.— We have already seen something of the immense variety in the meanings of words.[1] And a leading purpose of some of the foregoing chapters was to render palpable the effects of their combinations in sentences and with reference to diverse subjects.

Here — we are to bring under review various words and phrases technically employed in statutes, in pleadings, and other writings on the criminal law. The elucidations will include the common with the statutory law; because, as we have seen,[2] common-law terms employed in a statute have their common-law meanings; and because it is the purpose of this chapter to avoid, as far as may be, by the completeness of its discussions, the necessity of explanations and repetitions of like things in the remaining part of the volume, and in "Criminal Law," and "Criminal Procedure." Now,—

§ 269. Of these technical words and phrases.— While, on the one hand, man needs a language capable of conveying ideas in infinite variety of shade and form, practical necessity requires also, on the other hand, that in some circumstances he be able to render the meanings exact and unquestionable. Such precision is specially essential in the law. And because the decisions of the courts on the significance of words, as on other questions, are authoritative precedents for future causes, the result has come about, that various words and phrases are to be rendered, whether in the statutory or in the unwritten law, by legal meanings,

[1] *Ante*, § 92*d*.

[2] *Ante*, § 96.

broader, narrower, or otherwise differing from their popular ones. After these legal meanings we are inquiring in the present chapter. Not to introduce into it every word and phrase which the criminal law has defined, but only so much of this matter as the author's division of the entire subject renders most appropriate here, leaving other like matter for other places in this series of volumes,—

§ 270. How chapter divided.— We shall consider the terms to denote: I. The person acting; II. The time and place; III. The thing done; IV. The objects acted upon and the instrumentalities; V. The proceedings.

I. The Person Acting.

§ 271. Agent — Servant — Clerk, etc.—These words are as familiar in the civil department of the law as in the criminal. And their respective meanings depend, in some degree, on the subject[1] to which they are applied and the connection[2] in which they stand. For example,—

Agency falsely assumed.—In civil jurisprudence, one who has done what is contrary to the duty of an agent cannot justify himself by showing that, in fact, he was not an agent, but only acting as such without authority.[3] Yet, in the criminal law, a person to be punishable for a wrong committed contrary to his duty as agent must, it appears generally to be holden, be such in fact.[4] Again,—

The one instance only — (Embezzlement).— While in civil jurisprudence it is of no consequence as to the agent's responsibility that he acted or was authorized in the one instance only, there are authorities which seem to make it otherwise in

[1] *Ante*, §§ 98*a*, 102, 103.

[2] *Ante*, §§ 92*a*, 93, 95*a*, 102; S. *v.* Bancroft, 22 Kan. 170; [S. *v.* Costin, 89 N. C. 511; Anderson's Law Dictionary, 42, 937, 187.]

[3] Story, Agency, 320; Osgood *v.* Nichols, 5 Gray, 420; Walrath *v.* Redfield, 18 N. Y. 457; Leader *v.* Moxon, 3 W. Bl. 924; Hardacre *v.* Stewart, 5 Esp. 103; Schedda *v.* Sawyer, 4 McLean, 181; Ellas *v.* Lockwood, Clarke, 311; Farrell *v.* Campbell, 3 Ben. 8; [Hodgson *v.* Raphael, 105 Ga. 480, 30 S. E. R. 416; McCormick *v.* Seeberger, 73 Ill. Ap. 87; Mendenhall *v.* Stewart, 18 Ind. Ap. 262, 47 N. E. R. 47; Learn *v.* Upstill, 52 Neb. 271, 72 N. W. R. 213.]

[4] Rex *v.* Thorley, 1 Moody, 343. See Reg. *v.* Foulkes, Law R. 2 C. C. 150, 13 Cox, C. C. 63; Morse *v.* S., 6 Conn. 9; Crim. Law, II, §§ 363, 364; [Brady *v.* S., 21 Tex. Ap. 659, 1 S. W. R. 462; S. *v.* Smith, 57 Kan. 567, 47 Pac. R. 535.]

criminal. According to some of the cases, he must, in embezzlement, be an agent generally, not merely employed specially to do a single act in the particular matter;[1] though he need not devote his whole time or any considerable part of it to his employer, or be regularly or constantly in his service.[2] But the better modern doctrine discards this distinction and applies the rule of our civil jurisprudence to the criminal.[3] On the whole,—

Elsewhere.— Because of these and other differences, real or supposed, the plan of this series of volumes is not to extend this discussion here, but to explain these several terms in connection with the respective topics to which they relate.[4]

[1] Rex *v.* Freeman, 5 Car. & P. 534; Rex *v.* Haydon, 7 Car. & P. 445; Rex *v.* Nettleton, 1 Moody, 259; Reg. *v.* Smith, 1 Car. & K. 423. And see Rex *v.* Smith, Russ. & Ry. 516; Rex *v.* Beacall, 1 Car. & P. 310; Reg. *v.* Gibbs, Dears. 445, 24 Law J. (N. S.) M. C. 62, 1 Jur. (N. S.) 118, 29 Eng. L. & Eq. 538.

[2] Rex *v.* Spencer, Russ. & Ry. 299; Rex *v.* Hughes, 1 Moody, 370; Reg. *v.* Batty, 2 Moody, 257; Rex *v.* Carr, Russ. & Ry. 198; Rex *v.* Leech, 3 Stark. 70.

[3] Crim. Law, I, §§ 461, 464; II, § 346; [S. *v.* Barter, 58 N. H. 604; Foster *v.* S. (Del.), 43 Atl. R. 265.]

[4] See more particularly, under the title Embezzlement, Crim. Law, II, §§ 331–351. And see Reg. *v.* Atkinson, 2 Moody, 278; Rex *v.* Hartley, Russ. & Ry. 139; Rex *v.* Squire, 2 Stark. 349; Reg. *v.* Atkinson, Car. & M. 525; Rex *v.* Beacall, 1 Car. & P. 310; Rex *v.* Prince, 2 Car. & P. 517; Rex *v.* Snowley, 4 Car. & P. 390; Rex *v.* Pearson, 4 Car. & P. 572; Rex *v.* Salisbury, 5 Car. & P. 155; Reg. *v.* Townsend, Car. & M. 178; Reg. *v.* Hunt, 8 Car. & P. 642; Reg. *v.* White, 8 Car. & P. 742; Reg. *v.* Wilson, 9 Car. & P. 27; Reg. *v.* Welch, 2 Car. & K. 296; Reg. *v.* Townsend, 2 Car. & K. 168; Rex *v.* Rees, 6 Car. & P. 606; Reg. *v.* Masters, 1 Den. C. C. 332, 2 Car. & K. 930, Temp. & M. 1, 18 Law J. (N. S.) M. C. 2; Reg. *v.* Miller, 2 Moody, 249; Rex *v.* Mellish, Russ. & Ry. 80; Rex *v.* Burton, 1 Moody, 237; Budd *v.* S., 3 Humph. 483, [39 Am. D. 189;] Com. *v.* Wyman, 8 Met. 247; Reg. *v.* Watts, 1 Eng. L. & Eq. 558, 2 Den. C. C. 14; S. *v.* Hart, 4 Ire. 246; S. *v.* Chandler, 2 Strob. 266; Reg. *v.* Jones, Car. & M. 611; Rex *v.* Tyers, Russ. & Ry. 402; Reg. *v.* Masters, 3 New Ses. Cas. 326, 12 Jur. 942; Reg. *v.* Sheppard, 9 Car. & P. 121; Walker *v.* Com., 8 Leigh, 743; Rex *v.* Jackson, 1 Moody, 119; Com. *v.* Stearns, 2 Met. 343; Reg. *v.* Lovell, 2 Moody & R. 236; Brooks *v.* S., 30 Ala. 513; Reg. *v.* Gibson, 8 Cox, C. C. 436; Reg. *v.* Hall, 13 Cox, C. C. 49; Reg. *v.* Barnes, 8 Cox, C. C. 129; Reg. *v.* Marsh, 3 Fost. & F. 523; Reg. *v.* Thorpe, Dears. & B. 562, 8 Cox, C. C. 29; Reg. *v.* Bayley, Dears. & B. 121; s. c. *nom.* Reg. *v.* Bailey, 7 Cox, C. C. 179; Reg. *v.* Cosser, 13 Cox, C. C. 187; [Reg. *v.* Harris, 17 Cox, C. C. 656; Reg. *v.* Coley, 16 Cox, C. C. 226; Reg. *v.* Parsons, 16 Cox, C. C. 498; Reg. *v.* Bowerman, 17 Cox, C. C. 151; Reg. *v.* Cronmire, 16 Cox, C. C. 42; Reg. *v.* Bredein, 15 Cox, C. C. 412; Reg. *v.* Smallman, 18 Cox, C. C. 451; S. *v.* Keith (N. C.), 36 S. E. R. 169; S. *v.* Ezzard, 40 S. C. 312, 18 S. E. R. 1025; S. *v.* Hubbard, 58 Kan. 797, 51 Pac. R. 905, 39 L. R. A. 860; George *v.* P., 167 Ill. 417, 47 N. E. R. 741.]

§ 271a. **Officer — Public officer.** — The meanings of the terms "officer," "public officer," and the like, are also in a degree variable. And they are somewhat considered in other connections.[1] A surveyor or supervisor of roads has been held to be,[2] and not to be,[3] an officer, within the contemplation of differing statutes. A letter-carrier has been adjudged, in Scotland, to be a public officer.[4] Under particular statutes, the assistant clerk of a court,[5] a treasurer, a deputy treasurer,[6] a prosecuting attorney,[7] a policeman,[8] a collector of taxes,[9] and an overseer of the poor,[10] have been held to be, and a town agent for the sale of intoxicating liquors[11] and a county auditor[12] not to be, officers or public officers.[13]

[1] *Ante*, §§ 216, 223; Crim. Law, I, §§ 464, 465; II, §§ 349, 350; [Anderson's Law Dictionary, 728.]

[2] Woodworth *v.* S., 26 Ohio St. 196.

[3] S. *v.* Putnam, 35 Iowa, 561.

[4] Case of Smith, Syme, 185.

[5] S. *v.* Newton, 28 La. An. 65.

[6] Crim. Law, II, § 349 and note; S. *v.* Brandt, 41 Iowa, 593; P. *v.* McKinney, 10 Mich. 54; Com. *v.* Morrisey, 86 Pa. St. 416.

[7] S. *v.* Henning, 33 Ind. 189.

[8] Sanner *v.* S., 2 Tex. Ap. 458; [Brown *v.* Russell, 166 Mass. 14, 43 N. E. R. 1005, 55 Am. St. R. 357, 32 L. R. A. 253.]

[9] Crim. Law, II, § 349; S. *v.* Walton, 62 Me. 106.

[10] S. *v.* Hawkins, 77 N. C. 194.

[11] S. *v.* Weeks, 67 Me. 60.

[12] S. *v.* Newton, 26 Ohio St. 265.

[13] And see Com. *v.* Binns, 17 S. & R. 219; Rainey *v.* S., 8 Tex. Ap. 62, 34 Am. R. 736; Gordon *v.* S., 2 Tex. Ap. 154; Kavanaugh *v.* S., 41 Ala. 399; Lockett *v.* S., 61 Ga. 44; Com. *v.* Smith, 111 Mass. 407.

[The following have been held to be officers or public officers: Deputy sheriffs, S. *v.* Bus, 135 Mo. 325, 36 S. W. R. 636. Rapid transit commissioners, Sun Printing, etc. Ass'n *v.* Mayor of New York, 40 N. Y. S. 607, 8 Ap. Div. 230, affirmed in 152 N. Y. 257, 46 N. E. R. 499, 37 L. R. A. 388. Treasurer of state university, Spalding *v.* P., 172 Ill. 40, 49 N. E. R. 993. Clerk of board of county commissioners, Cooper *v.* S., 101 Ga. 783, 29 S. E. R. 22. Notary public, Stokes *v.* Acklen (Tenn. Ch. Ap.), 46 S. W. R. 316; Stirneman *v.* Smith, 100 Fed. R. 600. Fire marshal, P. *v.* Scannel, 49 N. Y. S. 1096, 22 Misc. R. 298. Member of county board of education, S. *v.* Thompson, 122 N. C. 493, 29 S. E. R. 720. Members of board of legal examiners, S. *v.* Hocker, 39 Fla. 477, 22 S. R. 721, 63 Am. St. R. 174. Ordinary of a county, Groves *v.* S., 76 Ga. 308. Members of board of construction for university buildings, McCornick *v.* Pratt, 8 Utah, 294, 30 Pac. R. 1091, 17 L. R. A. 243. Justice of the peace, Crump *v.* S., 23 Tex. Ap. 315, 5 S. W. R. 182. Drainage commissioner, S. *v.* Wells, 112 Ind. 237, 13 N. E. R. 722. Deputy food commissioner, S. *v.* Cornell (Neb.), 83 N. W. R. 72. Members of the board of equalization, Nalle *v.* City of Austin (Tex. Civ. Ap.), 56 S. W. R. 954. Police judge, Montgomery *v.* S., 107 Ala. 372, 18 S. R. 157.

The following have been held not to be officers or public officers: Trustee of state agricultural college, S. *v.* Hewitt, 3 S. D. 187, 52 N. W. R. 875, 44 Am. St. R. 788. Watchman in federal building, Doyle *v.* Raleigh, 89 N. C. 133, 45 Am. R. 677. Keeper of capitol, Cherry

§ 272. **Aider — Abettor.**— These words are not much used in the modern law,[1] but are common in the old books. Their meanings are not precise and unvarying, like principal,[2] accessory,[3] and the like. Ordinarily an aider is one who assists at the fact, and does not include an accessory whether before or after.[4] Hale says that, "in some acts of parliament, *aiders*, being joined with procurers, counselors, and abettors, are intended of those that are aiding to the fact; but, in other acts of parliament, where the word *aiders* is joined with maintainers and comforters, it is intended of those that are aiders *ex post facto* to their persons."[5] In like manner, while the term abettor commonly denotes one who instigates or encourages the doer at the fact, it may not improperly be applied to the accessory before.[6]

§ 273. **Distiller — Rectifier.**— A "distiller" is "one whose occupation is to extract spirit by evaporation and condensation."[7] A "rectifier" is a person who, by then running the spirit through charcoal, by passing it again through the still to raise the proof, or by mixing it with anything else, purifies it and prepares it for sale.[8] Therefore one who thus passes the spirit through the still a second time was held not to be within

v. Burns, 124 N. C. 761, 33 S. E. R. 136. Pound-keeper, Wilcox *v.* Hemming, 58 Wis. 114, 15 N. W. R. 435, 46 Am. R. 625. Lister of taxes, Rowell *v.* Horton, 58 Vt. 1, 3 Atl. R. 906. Clerk of superior court, S. *v.* Connelly, 104 N. C. 469, 10 S. E. R. 469. Treasurer of board of pharmacy commissioners, S. *v.* Spalding, 102 Iowa, 639, 72 N. W. R. 288. Committeeman of political party's central committee, Attorney-General *v.* Drohan, 169 Mass. 534, 48 N. E. R. 279, 61 Am. St. R. 301. Supervising architect, S. *v.* Broome, 61 N. J. L. 115, 38 Atl. R. 841. Fireman, S. *v.* Jennings, 57 Ohio St. 415, 49 N. E. R. 404, 63 Am. St. R. 723. Engineer and lamp trimmer employed by city council, S. *v.* Anderson, 57 Ohio St. 429, 49 N. E. R. 406. Commissioners under refunding act, Travelers' Ins. Co. *v.* Township of Oswego, 59 Fed. R. 58, 7 C. C. A. 669.]

[1] See P. *v.* Newberry, 20 Cal. 439; [P. *v.* Gallagher (Cal.), 33 Pac. R. 890; Amos *v.* S., 83 Ala. 1, 3 S. R. 749, 3 Am. St. R. 682; Woolweaver *v.* S., 50 Ohio St. 277, 34 N. E. R. 852, 40 Am. St. R. 667; Anderson's Law Dict. 455.]

[2] Crim. Law, I, §§ 604, 648, 675, 676.

[3] Crim. Law, I, §§ 604, 663, 803.

[4] 1 East, P. C. 160; 1 Russ. Crimes (3d Eng. ed.), 26.

[5] 1 Hale, P. C. 376.

[6] 2 Hawk. P. C. (Curw. ed.), ch. 29, § 11, p. 440.

[7] Webster, Unabridged Dict.; [Anderson's Law Dictionary, 366.]

[8] Quantity of Distilled Spirits, 3 Ben. 70; U. S. *v.* Tenbroek, 2 Wheat. 248, Pet. C. C. 180. [See also U. S. *v.* One Hundred and Thirty-two Packages of Spirituous Liquors, 65 Fed. R. 980; Michel *v.* Nunn, 101 Fed. R. 423; Anderson's Law Dictionary, 365.]

the United States statute of July 24, 1813, imposing a duty on all stills employed in distilling spirits from domestic and foreign materials; though, in coming to this conclusion, the court laid some stress on the word "materials," supposed to mean something other than spirit itself, and on considerations drawn from the probable intent of the law-makers, arising out of the whole enactment.[1]

§ 274. **Negro — Mulatto.**[2] — A negro is a black man descended from the Southern African races. The word does not ordinarily include a mulatto;[3] but it would seem to in some of the states.[4] A mulatto is "a person that is the offspring of a negress by a white man, or of a white woman by a negro;" and the child of a white woman by a mulatto father is not a mulatto.[5] Yet by local usage in South Carolina this word generally signifies "a person of mixed white, or European and negro descent, in whatever proportions the blood may be mixed;" though there must be such a proportion of black blood as to be visible.[6] The same appears also to be its meaning in Arkansas.[7]

Person of color — White.— The term "person of color," employed in a statute, was held in North Carolina to mean one descended from a negro within the fourth degree inclusive, though an ancestor in the intervening generation was white.[8] In Connecticut it was adjudged to denote, "not only all persons descended wholly from African ancestors, and therefore of pure and unmixed African blood, but those who have descended in part only from such ancestors and have a distinct, visible admixture of African blood,"— all, in short, "having and disclosing visibly the peculiar and distinctive color of the

[1] U. S. *v.* Tenbroek, *supra.*

[2] See 1 Bishop, Mar., Div. & S., § 683. [See Anderson's Law Dictionary.]

[3] Felix *v.* S., 18 Ala. 720; Dick *v.* S., 30 Miss. 631; Frasher *v.* S., 3 Tex. Ap. 263, 280, [30 Am. R. 131.] And see Heath *v.* S., 34 Ala. 250; Ivey *v.* Hardy, 2 Port. 548.

[4] McPherson *v.* Com., 28 Grat. 939; S. *v.* Chavers, 5 Jones (N. C.), 11; [Linton *v.* S., 88 Ala. 216, 7 S. R. 261.]

[5] Thurman *v.* S., 18 Ala. 276; Medway *v.* Natick, 7 Mass. 88.

[6] S. *v.* Davis, 2 Bailey, 558; S. *v.* Hayes, 1 Bailey, 275, 276. And see Johnson *v.* Boon, 1 Speers, 268. See Dean *v.* Com., 4 Grat. 541.

[7] Daniel *v.* Guy, 19 Ark. 121, 133, 134. [In Virginia the term "negro" includes all persons who have one-fourth or more of negro blood. Jones *v.* Com., 80 Va. 638; Scott *v.* Raub, 88 Va. 721, 14 S. E. R. 178.]

[8] S. *v.* Dempsey, 9 Ire. 384. See also S. *v.* Melton, Busbee, 49; S. *v.* Chavers, 5 Jones (N. C.), 11; P. *v.* Hall, 4 Cal. 399; Gentry *v.* McMinnis, 3 Dana, 382.

African race."[1] It is difficult to see how this term can be so extended by interpretation as to include any whom the law designates as white; and some of our courts hold all persons to be white in whom the white blood predominates.[2] In Michigan the decision of the majority was that all are white "in whom white blood so far preponderates that they have less than one-fourth of African blood," but those having a fourth or more of African blood are not white. Martin, C. J., dissenting, deemed that a preponderance of white blood makes a white man.[3] To prevent one's being white, the dark mixture need not be of negro blood. Our North American Indians[4] and the Mongolian natives of China[5] have been held not to be white.

§ 275. Other terms,[6]— indicating the person acting, are better explained in connection with the particular subject.

II. The Time and Place.

§ 276. Day-time — Night-time — (Burglary).— It is sometimes material, on a question of crime or its degree, that the wrongful act was committed in the night. Thus, an attempted felony in a dwelling-house, carried to the extent of breaking into it, is, when done in the night, a common-law felony called burglary; but, when done in the day, it is only, like other attempts to commit felony, a misdemeanor.[7] On the other hand, special consequences occasionally follow the doing of a thing in the day.[8] In very ancient times, the night, within this distinction, was deemed to commence with the setting and end with the rising of the sun; but, for a long period, the common-law rule has been, and it is now, that those portions of the morning and evening wherein, though the sun is below the horizon, suf-

[1] Johnson *v.* Norwich, 29 Conn. 407, 408. And see S. *v.* Davis, *supra;* White *v.* Tax Collector, 3 Rich. 136; Pauska *v.* Daus, 31 Tex. 67, 74.

[2] 1 Bishop, Mar., Div. & S., § 683; Gray *v.* S., 4 Ohio, 353; Williams *v.* School District, Wright, 578; Jeffries *v.* Ankeny, 11 Ohio, 372; Thacker *v.* Hawk, 11 Ohio, 376; Lane *v.* Baker, 12 Ohio, 237.

[3] P. *v.* Dean, 14 Mich. 406. And see Walker *v.* Brockway, 1 Mich. N. P. 57. To the like effect is Bailey *v.* Fiske, 34 Me. 77. See also Gentry *v.* McMinnis, 3 Dana, 382.

[4] Walker *v.* Brockway, *supra;* S. *v.* Melton, Busbee, 49; Bailey *v.* Fiske, *supra.*

[5] *In re* Ah Yup, 5 Saw. 155.

[6] ["Emigrant," see Varner *v.* S. (Ga.), 36 S. E. R. 93.]

[7] Crim. Law, I, §§ 342, 559, 772; II, §§ 90, 101; 1 Hale, P. C. 549, 550.

[8] Crim. Law, II, § 102; 1 Hale, P. C. 550, 551; 4 Bl. Com. 224.

ficient of his light is above for the features of a man to be reasonably discerned, are day.[1] Light from the moon is not to be taken into the account;[2] therefore it is not always day when one's face may be seen.[3] There is no middle space between day and night; but, where one begins, the other ends.[4] The obvious propriety of furnishing, to person and property, a special protection in periods of darkness and repose, has led to the introduction of the distinction between night and day into many statutes; in construing which, the courts follow the common-law rule as to when each begins and ends.[5] But the difficulties of applying this rule — as, for instance, in determining how much of the light whereby we discern objects comes from the moon — are so considerable, that it has been latterly, in England,[6] and in some of our states,[7] modified and made more exact by statutes, which have fixed an hour for night, in law, to begin and close.

§ 277. Dwelling-house, house, and castle, with their connected buildings:

Terms distinguished — (Dwelling-house — Mansion-house — House — Messuage — Castle). — The words "dwelling-house" and "mansion-house" are identical in legal writings, but "house" is not quite the same.[8] In a deed or will, the latter is equivalent to "messuage;"[9] and it will pass the land, "an acre or more,"[10]

[1] 3 Inst. 63; 1 Hale, P. C. 550; 2 East, P. C. 509; 1 Hawk. P. C. (Curw. ed.), p. 130, § 2; Rex *v.* Tandy, 1 Car. & P. 297; Com. *v.* Chevalier, 7 Dane Abr. 134; P. *v.* Griffin, 19 Cal. 578.

[2] 1 Hale, P. C. 551; 4 Bl. Com. 224; Bac. Abr., Burglary, D.; Thomas *v.* S., 5 How. (Miss.) 20; [S. *v.* McKnight, 111 N. C. 690, 16 S. E. R. 319.]

[3] Thomas *v.* S., 5 How. (Miss.) 20; S. *v.* Bancroft, 10 N. H. 105, 107; 3 Inst. 63.

[4] S. *v.* Bancroft, 10 N. H. 105, 107; Rex *v.* Tandy, 1 Car. & P. 297.

[5] *Ante*, § 242; Crim. Law, II, § 118; Trull *v.* Wilson, 9 Mass. 154; Rex *v.* Kemp, 1 Leach, 232.

[6] 1 Vict., ch. 86, § 4, is suspended by 24 and 25 Vict., ch. 96, § 1. By the latter, the night, under the larceny act, which includes burglary, begins at nine in the evening and ends at six in the morning. Under the game laws, night begins one hour after sunset and ends one hour before sunrise. 1 Deac. Crim. Law, 509; Archb. Crim. Pl. & Ev. (19th Eng. ed.) 990; 9 Geo. 4, ch. 69, § 12. And see Reg. *v.* Polly, 1 Car. & K. 77.

[7] Com. *v.* Williams, 2 Cush. 582; [S. *v.* Gray, 23 Neb. 301, 46 Pac. R. 801.]

[8] Com. *v.* Pennock, 3 S. & R. 199; [Marmet Co. *v.* Archibald, 37 W. Va. 778, 17 S. E. R. 300.]

[9] Clements *v.* Collins, 2 T. R. 498, 502. And see 1 Chit. Gen. Pract. 167; [Anderson's Law Dict.;] Burrill, Law Dict., and Bouv. Law Dict., House; Danvers *v.* Wellington, Hardres, 173.

[10] Co. Lit. 5b.

under and around it, with the minor buildings;[1] but in criminal law it has never been understood as extending to the soil. "Dwelling-house" or "mansion-house" is the proper word in an indictment for common-law burglary, nor will "house" suffice as a substitute.[2] The latter is of meaning somewhat larger than the others,[3] though the difference is not quite definable;[4] it is the proper word in indictments at the common law for arson.[5] The term "castle" is often, but not necessarily,[6] employed to indicate the habitation wherein one may exercise certain special rights of self-defense.[7] Thus, to break into the *dwelling-house* of another in the night, with intent to commit a felony therein, is burglary; maliciously to burn, in the day or night, another's *house*, is arson; and no officer or private person is permitted, except under special circumstances, to break open a man's *castle*. Still,—

Meanings variable — (In burglary and larceny). — As already seen,[8] the meanings of these terms may vary with the subject and their connection with other words;[9] but, in general, they are stable in the criminal law. For example, in statutes against larceny from the dwelling-house, the term "dwelling-house" has the same signification as in burglary.[10]

§ 278. Dwelling-house, defined. — A dwelling-house is the apartment, building or cluster of buildings in which a man with his family resides. To explain,—

Cluster of buildings — (How indictment in burglary). — One need not so construct his habitation that all its rooms will be

[1] Clements *v.* Collins, 2 T. R. 498; Shep. Touch. 90, 94; Rogers *v.* Smith, 4 Pa. St. 93; Bennet *v.* Bittle, 4 Rawle, 339, 342. See Steele *v.* Midland Ry. Co., Law R. 1 Ch. Ap. 275; Marson *v.* London, etc. Ry. Co., Law R. 6 Eq. 101. This word may have the like meaning in a statute. Steele *v.* Midland Ry. Co., *supra*, at p. 278.

[2] Crim. Pro., II, § 135; 1 Hale, P. C. 550, 567; 1 Hawk. P. C. (Curw. ed.), p. 133, § 16; 3 Chit. Crim. Law (1st ed.), 1095, 1101; 1 Gab. Crim. Law, 79.

[3] Crim. Pro., II, § 34.

[4] S. *v.* Sutcliffe, 4 Strob. 372. And see an article in 13 Law R. 157; Daniel *v.* Coulsting, 7 Man. & G. 122; *ante*, § 213. But see Surman *v.* Darley, 14 M. & W. 181; Com. *v.* Posey, 4 Call, 109, [2 Am. D. 560;] Powell *v.* Price, 4 C. B. 105.

[5] Crim. Pro., II, § 34; 1 Hale, P. C. 567; 3 Chit. Crim. Law (1st ed.), 1126; Com. *v.* Posey, 4 Call, 109.

[6] S. *v.* Zellers, 2 Halst. 220.

[7] Crim. Law, I, § 858; II, § 707; Crim. Pro., I, §§ 195, 196.

[8] *Ante*, § 242*a*, and last paragraph.

[9] McHole *v.* Davies, 1 Q. B. D. 59; Steele *v.* Midland Ry. Co., Law R. 1 Ch. Ap. 275; Com. *v.* Buzzell, 16 Pick. 153, 161.

[10] 2 East, P. C. 633, 644; 2 Deac. Crim. Law, 768.

under one roof; therefore the word "dwelling-house" embraces the entire congregation of buildings, main and auxiliary, used for abode. It includes, says Hale, the privy, "barn, stable, cow-houses, dairy-houses, if they are parcel of the messuage, though they are not under the same roof, or joining contiguous to it."[1] And the indictment for a burglary in any one of them may lay it as committed in the mansion-house.[2] But —

§ 279. Habitation essential to dwelling-house. — Not even the main structure is a dwelling-house, though built for one, unless it is what the law terms inhabited.[3] And a dwelling-house may cease to be such without undergoing any change as a building.[4] If, for example, the furniture is removed and it is temporarily abandoned to a carpenter for repairs, no one sleeping in it;[5] or, if the former tenant has left, and it is waiting for another, a servant of the owner merely sleeping in it to protect some articles of furniture,[6] its character as a dwelling-house is suspended. Nor is a building a dwelling-house, though finished and furnished for abode and used for taking meals and other purposes, unless the occupier or some one of his family or servants sleeps in it.[7] Sleeping is not alone suffi-

[1] 1 Hale, P. C. 558.

[2] Crim. Pro., II, §§ 135, 136 (and see § 34); 1 Hale, P. C. 557; 2 East, P. C. 512; 3 Chit. Crim. Law (1st ed.), 1095; Fletcher *v.* S., 78 Tenn. (10 Lea), 333.

[3] Rex *v.* Harris, 2 Leach, 701; 2 East, P. C. 498; Rex *v.* Thompson, 2 Leach, 771, 2 East, P. C. 498; S. *v.* Warren, 33 Me. 30; Com. *v.* Barney, 10 Cush. 478. Compare with *ante*, § 242*a*. [An indictment for setting fire to "a dwelling-house, a person being therein," under section 2, chapter 97, 24 and 25 Victoria, is sustained by proof that prisoner who set fire to the house was therein at the time. Reg. *v.* Pardoe, 17 Cox, C. C. 715; Ashton *v.* S., 68 Ga. 25.]

[4] Hooker *v.* Com., 13 Grat. 763; S. *v.* Clark, 7 Jones (N. C.), 167; Scott *v.* S., 62 Miss. 781; P. *v.* Handling, 93 Mich. 46, 52 N. W. R. 1032; Henderson *v.* S., 105 Ala. 82, 16 S. R. 931.

[5] Rex *v.* Lyons, 1 Leach, 185, 2 East, P. C. 497; Rex *v.* Fuller, 1 Leach, 186, note.

[6] Rex *v.* Davies, 2 Leach, 876; s. c. *nom.* Rex *v.* Davis, 2 East, P. C. 499; Nutbrown's Case, 2 East, P. C. 496.

[7] Rex *v.* Martin, Russ. & Ry. 196; Rex *v.* Harris, 2 Leach, 701, 2 East, P. C. 498. And see S. *v.* Warren, 33 Me. 30. Com. *v.* Brown, 3 Rawle, 207, seems directly contrary to the text. The true view is that if the owner has abandoned his dwelling-house, and removed his furniture into a new one, the latter becomes his dwelling-house after his family have taken possession of it, though no one of them has yet slept there. But, until possession taken, in such a way as would transfer the *domicile*, the new house, though furnished, cannot be deemed a dwelling-house. In *Ex parte* Vincent, 26 Ala. 145, 151, [62 Am. D. 714,] Goldthwaite, J., observed: "At the common law any

cient;[1] for, if a servant merely sleeps in a warehouse to protect goods,[2] even when it had previously been used for habitation,[3] it is not thereby constituted a dwelling-house. On the other hand, a temporary absence of occupants, who intend to return, does not take from a dwelling-house its character as such.[4] And a man may have two or more dwelling-houses;[5] and they will severally so continue, though one is used but a small part of the year, or on particular occasions, as on the holding of a fair.[6] Yet,—

Frailty of structure — (Tent, etc.— Burglary — Disorderly house).— In the law of burglary and other like offenses, "a tent or booth in a fair or market" is not a dwelling-house,[7] because of the frailty of the structure.[8] But a loft over a coach-house and stable is, when so used;[9] and such, we have seen,[10] may be a jail; and such are chambers in a college, and the

house was a dwelling or mansion, in a burglarious sense, in which any person resided or dwelt; and, with reference to the offense which could only be committed in the night, we think the true test is whether it was permanently used by the occupier, or any member of his family, as a place to sleep in."

[1] Rex *v.* Brown, 2 East, P. C. 497; Rex *v.* Turner, 6 Car. & P. 407.

[2] Rex *v.* Smith, 2 East, P. C. 497, 2 Leach, 1018, note. And see Rex *v.* Brown, 2 East, P. C. 501, 2 Leach, 1018, note. Where, besides the servants sleeping to protect property, rooms in the building were let to lodgers, it was held to be a dwelling-house. Rex *v.* Gibbons, Russ. & Ry. 442. But if a storehouse is used regularly by the owner, or some one of his family, as a sleeping apartment, though for the sole purpose of protecting the premises, it is, in North Carolina, deemed a dwelling-house. S. *v.* Outlaw, 72 N. C. 598. Yet it is not so simply because a mere watchman sleeps in it for this purpose. S. *v.* Potts, 75 N. C. 129.

[3] Rex *v.* Flannagan, Russ. & Ry. 187; Rex *v.* Davies, 2 Leach, 876; s. c. *nom.* Rex *v.* Davis, 2 East, P. C. 499; [S. *v.* Williams, 90 N. C. 724, 47 Am. R. 541.]

[4] Nutbrown's Case, Foster, 76, 2 East, P. C. 496; Vaux *v.* Brook, 4 Co. 39*b*; S. *v.* Meerchouse, 84 Mo. 344, [86 Am. D. 109; Meeks *v.* S., 102 Ga. 572, 27 S. E. R. 679; S. *v.* Williams, 40 W. Va. 268, 21 S. E. R. 721.]

[5] Vaux *v.* Brook, 4 Co. 39*b*; s. c. *nom.* Brooke's Case, 2 Leon. 83; Rex *v.* Stock, 2 Leach, 1015, Russ. & Ry. 185; Rex *v.* Westwood, Russ. & Ry. 495.

[6] Rex *v.* Smith, 1 Moody & R. 256.

[7] 1 Hale, P. C. 557.

[8] 1 Russ. Crimes (3d Eng. ed.), 798; Callahan *v.* S., 41 Tex. 43.

[Booth.— As to what is a booth, see P. *v.* Hagan, 60 Hun, 577, 14 N. Y. S. 233.]

[9] Rex *v.* Turner, 1 Leach, 305, 2 East, P. C. 492; [Holly *v.* Burke, C. A. Ir. [1897] W. N. 91; Crosson *v.* Chambers, C. A. Ir. [1897] W. N. 85.]

[10] *Ante*, § 207. [See also Howard *v.* S. (Ga.), 34 S. E. R. 330; S. *v.* Collins, 2 Idaho, 1182, 31 Pac. R. 1048; Smith *v.* S., 23 Tex. Ap. 357, 5 S. W. R. 219, 59 Am. R. 773.]

inns of court.[1] Even a tent, or a boat on a river, may be a bawdy-house.[2] So that the kind of structure may somewhat vary[3] with the nature of the offense and special terms of the statute.[4]

§ 280. Part only for abode.— If one part of a building is used for abode, it gives the character of dwelling-house to every other part to which there is an internal communication;[5] even though, according to the authorities generally, occupied by another person, for an entirely different purpose. And an indictment for an offense committed in the part not inhabited may charge it to have been done in the mansion-house of him who dwells in the other part.[6] Yet,—

Partners and one of them.— Where one of two partners hired and occupied as a dwelling-house a part of a building, and the firm had the residue on a separate lease for a warehouse, the parts being connected by an internal communication, a conviction for a burglary in the warehouse was held not to be sustainable on an indictment laying it as committed in the dwelling-house of the one partner.[7] This decision seems opposed to the above doctrine; and, in principle, its soundness may be doubted. In matter of pleading, it is hard to say that the offense could have been laid in the dwelling-house of the firm that had none; yet there seems to be authority that it could have been.[8] On the other hand, in law, the place could not be deemed a dwelling-house, except by force of the principle, not without support in legal reason, that every dwelling-house extends to the outer wall of the building in which it is located,

[1] 1 Gab. Crim. Law, 177; 1 Hale, P. C. 522, 523, 556; [Alexander *v.* Burke, C. A. Ir. [1897] W. N. 92.]

[2] Crim. Law, I, § 1085. [A canal boat, grounded and frozen fast and used as a dwelling by the captain, is not a building under New Jersey Crimes Act. S. *v.* Green, 6 N. J. Law J. 123.]

[3] *Ante*, § 277.

[4] Consult McHole *v.* Davies, 1 Q. B. D. 59; Killman *v.* S., 2 Tex. Ap. 222, [28 Am. R. 432;] S. *v.* Barr, 39 Conn. 40; S. *v.* Jake, Winst. ii, 80; S. *v.* Hall, 73 N. C. 252; [S. *v.* Weber (Mo.), 56 S. W. R. 893.]

[5] Rex *v.* Stock, 2 Leach, 1015, Russ. & Ry. 185, 2 Taunt. 339; Rex *v.* Smith, 2 East, P. C. 497. Compare with *ante*, § 242*a*; [P. *v.* Griffin, 77 Mich. 585, 43 N. W. R. 1061.]

[6] Crim. Pro., I, § 138*a*; Rex *v.* Witt, 1 Moody, 248; Rex *v.* Sefton, Russ. & Ry. 202; Rex *v.* Carrell, 1 Leach, 237; 2 East, P. C. 506; [P. *v.* Dupree, 98 Mich. 26, 56 N. W. R. 1046; S. *v.* Young (Mo.), 55 S. W. R. 82.]

[7] Rex *v.* Jenkins, Russ. & Ry. 244.

[8] Crim. Pro., II, § 137; Rex *v.* Athea, 1 Moody, 329; Quinn *v.* P., 71 N. Y. 561, 564, [27 Am. R. 87.]

and to which also there is an internal communication.[1] Indeed, this would seem to be the true doctrine.[2] But,—

No internal communication.— If there is no internal communication, the parts are to be considered as though they were distinct buildings. Then, to approach questions on which there are differences of opinion, if the occupier of a room for a purpose other than habitation does not reside within the curtilage, and according to some if he does,[3] the room is not to be regarded as a part of the dwelling-house.[4] On the other hand, it is by some opinions in law such, if occupied for whatever purpose by him who resides in the dwelling-house, and sufficiently connected, though there is no internal communication. It will be viewed as though it were an out-building.[5]

§ 281. Chimney — Shutter-box.— The chimney is, by the better opinion, a part of the dwelling-house.[6] But anything outside the building, not pertaining to the freehold, as a shutter-box, is not such.[7] And —

Fence containing door.— A door in the outward fence of the curtilage, opening into the yard only, is not a portion of the dwelling-house, the breaking whereof will be burglary; even where, when one is within the area, there is no obstruction to his entering the place of actual abode.[8]

§ 282. Summary in reason.— If, leaving these detached points, we look at this question in the right of legal reason, we have the following: The structure wherein a man and his family live, whether large or small, under one roof or many, is his dwelling-house. And the number of roofs is not to be

[1] See, as of some value on this question, Rex *v.* Ball, 1 Moody, 30; Rex *v.* Davis, Russ. & Ry. 322; Rex *v.* Bennett, Russ. & Ry. 289; Stedman *v.* Crane, 11 Met. 295; [Mitchell *v.* Com., 88 Ky. 349, 11 S. W. R. 209.]

[2] Crim. Pro., II, § 138*a*. But see Dale *v.* S., 27 Ala. 31. See Cole *v.* S., 9 Tex. 42.

[3] *Post*, § 285.

[4] Rex *v.* Egginton, 2 B. & P. 508; s. c. *nom.* Rex *v.* Egginton, 2 East, P. C. 494, 666, 2 Leach, 913; S. *v.* Toole, 29 Conn. 342, [76 Am. D. 602;] Quinn *v.* P., 71 N. Y. 561, 573.

[Cellar.— As to cellars, see Mitchell *v.* Com., 88 Ky. 349, 11 S. W. R. 209; S. *v.* Clark, 89 Mo. 43, 1 S. W. R. 332; S. *v.* Dolson (Wash.), 60 Pac. R. 658.]

[5] *Post*, §§ 283, 285; P. *v.* Snyder, 2 Park. Cr. 23; Quinn *v.* P., 11 Hun, 336; Quinn *v.* P., 71 N. Y. 561; [S. *v.* Hutchinson, 111 Mo. 257, 20 S. W. R. 34.]

[6] Rex *v.* Brice, Russ. & Ry. 450. And see 1 Hale, P. C. 552; 1 Gab. Crim. Law, 170.

[7] Rex *v.* Paine, 7 Car. & P. 135; Com. *v.* Trimmer, 1 Mass. 476; Reg. *v.* Howell, 9 Car. & P. 437.

[8] Rex *v.* Bennett, Russ. & Ry. 289; Rex *v.* Davis, Russ. & Ry. 322.

taken into the account. If under one of his roofs there are apartments of any sort not occupied by him, they are no more his place of abode than where they are under a separate roof. But if there is an internal communication from his rooms to them, and they are not the dwelling-place of any other occupant, they are, within the reasons of the law of crime, parcel of his dwelling-place; because the internal communication creates the exact hazard which would arise from a vacant room opening into the public way on the one side, and into his rooms on the other. If the apartments are used for habitation by the person occupying them, then, as they are such person's dwelling-house, they cannot be that of his neighbor.[1] Hence,—

§ 283. Doctrine of reason, defined.— In reason, whether a man's abode consists of a cluster of separate buildings, or of separate rooms under one roof, the result is the same. And it is that the abode — the dwelling-house — extends only to buildings and rooms used either directly for habitation or as auxiliary thereto;[2] with this single exception, that, where the walls of the dwelling inclose other premises connected by an internal communication with the rooms lived in, such premises, if not the abode of another person, are, though occupied by another, parts of the dwelling-house with which they connect.

§ 284. Out-buildings.— In determining what out-buildings are in law parcel of the dwelling-house, the following will be helpful: —

Used for sleeping.— All that are habitually used for sleeping are believed to be either such[3] or separate dwelling-houses,[4] according to principles already explained, however severed from the main structure by distance or otherwise.

Separated by way or another's land.— No out-building not used for sleeping is parcel of the dwelling-house, if separated by a public passage-way or road, however narrow;[5] or by in-

[1] As to this last point, upon authority, see *post*, § 287.

[2] As to this point, on authority, see *post*, §§ 285, 286.

[3] U. S. *v.* Johnson, 2 Cranch, C. C. 21; S. *v.* Wilson, 1 Hayw. 242. And consult and compare Rex *v.* Westwood, Russ. & Ry. 495; S. *v.* Sampson, 12 S. C. 567, [32 Am. R. 513;] S. *v.* Mordecai, 68 N. C. 207; S. *v.* Jenkins, 5 Jones (N. C.), 430; S. *v.* Outlaw, 72 N. C. 598; Page *v.* Com., 26 Grat. 948.

[4] Rex *v.* Turner, 1 Leach, 305; Rex *v.* Westwood, *supra*; *Ex parte* Vincent, 26 Ala. 145; [S. *v.* Jones, 106 Mo. 302, 17 S. W. R. 366.]

[5] Rex *v.* Westwood, Russ. & Ry. 495;

tervening land, occupied by another person.[1] Such *appears*, at least, to be the legal rule, and it seems reasonable; for why should a man be protected in an out-building as being parcel of his mansion, if he himself has disconnected it from the mansion in a way which gives strangers the right to pass between?

§ 285. Same inclosure.— A separate building within the same inclosure is to be regarded as a part of the dwelling-house, if reasonably near, and occupied by the same person; even though, according to the English authorities, and some of the American ones, it is used for a totally different purpose; as a warehouse, goose-house, shop, or store.[2] But where, in the latter case, a third person is the occupant, it ceases to be parcel of the dwelling-house, even though under the same roof, yet having no internal communication.[3] And Hale seems to have deemed that, to make an out-building a portion of the mansion, it must be held under the same title;[4] but this distinction has small support in principle, and it is not favored by later writers.[5] In principle, too, as we have seen,[6] a separate building, or separate room in the same building with no internal communication, used, like a store or shop, otherwise than for purposes connected with habitation, cannot be deemed parcel of the dwelling-house; and so are a part of our American adjudications.[7] Again,—

Statutory changes.— In England, since 1827, by 7 and 8 Geo. 4 (ch. 29, § 13), reaffirmed by 24 and 25 Vict. (ch. 96, § 53), for an out-building to be parcel of the dwelling-house in burglary and the like, there must, though it is within the same curti-

Com. *v.* Estabrook, 10 Pick. 293, Rex Law, 185; Pond *v.* P., 8 Mich. 150; [Wait *v.* S., 99 Ala. 164, 13 S. R. 584.]

[1] Powell *v.* Price, 4 C. B. 105. See, however, Rex *v.* Walters, 1 Moody 13.

[2] Rex *v.* Lithgo, Russ. & Ry. 357, in which case, however, the warehouse was under the same roof; Rex *v.* Chalking, Russ. & Ry. 334; Rex *v.* Clayburn, Russ. & Ry. 360; Rex *v.* Hancock, Russ. & Ry. 170; Rex *v.* Gibson, 1 Leach, 357, 2 East, P. C. 508; Rex *v.* Walters, 1 Moody, 13; P. *v.* Parker, 4 Johns. 424; 1 Deac. Crim. Law, 178, note.

[3] *Ante*, § 280; Rex *v.* Gibson, 1 Leach, 357, 2 East, P. C. 508.

[4] 1 Hale, P. C. 559.

[5] 2 East, P. C. 494; 1 Gab. Crim.

[6] *Ante*, §§ 282, 283.

[7] S. *v.* Langford, 1 Dev. 253; Armour *v.* S., 3 Humph. 379; S. *v.* Ginns, 1 Nott & McC. 583; Hollister *v.* Com., 60 Pa. St. 103. And see Com. *v.* Sanders, 5 Leigh, 751; Quinn *v.* P., 71 N. Y. 561, [27 Am. R. 87;] P. *v.* Snyder, 2 Park. Cr. 23.

lage, "be a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from the one to the other."[1] It is not clear how far this statute alters the law in cases where the two apartments are under one roof.[2] In Maine, by statute, "no warehouse, barn, or other out-house, shall be deemed a dwelling-house or part of a dwelling-house, unless the same shall be joined to or connected and occupied with, and as a part of, the dwelling-house;"[3] and there are, perhaps, like provisions in some of the other states.[4]

§ 286. No inclosure.— Under the unwritten law, to render an out-building a part of the dwelling-house there need be no common inclosure;[5] though, where there is none, the question is more difficult. It then depends mainly on proximity and use. A store twenty feet away, with no fence, was held not to be protected as part of the mansion;[6] and perhaps we may conclude as a question of authority, certainly as one of principle,[7] that no separate structure, not tributary to habitation, will be so protected, unless within an inclosure.[8] But the privy,[9] barn, carriage-house, woodshed and buildings of the like character, being in their nature serviceable in respect of abode, are to be regarded as parcel of the mansion-house, though uninclosed, if situated at a reasonable distance, and with nothing intervening.[10] The out-buildings, according to the English books, are required to be simply within the *curtilage* of the dwelling-house.[11] Now,—

Curtilage— is not a word of exact meaning. It does not exclude the idea of a wall or fence;[12] nor, on the other hand, does it

[1] So in Ireland, by 9 Geo. 4, ch. 55. Wilson, 1 Hayw. 242; S. *v.* Shaw, 31 Me. 523; Pond *v.* P., 8 Mich. 150. See 1 Gab. Crim. Law, 178.

[2] Rex *v.* Higgs, 2 Car. & K. 322; Rex *v.* Burrowes, 1 Moody, 274; Rex *v.* Turner, 6 Car. & P. 407. And see, regarding this statute, Reg. *v.* Fletcher, 2 Car. & K. 215.

[3] R. S., ch. 155, § 12.

[4] [See Michigan construction of the descriptive phrase "not adjoining to or occupied with a dwelling-house." Moore *v.* P., 47 Mich. 639, 11 N. W. R. 415; P. *v.* Calderwood, 66 Mich. 92, 33 N. W. R. 23; P. *v.* Van Dam, 107 Mich. 425, 65 N. W. R. 277.]

[5] S. *v.* Twitty, 1 Hayw. 102; S. *v.* P. *v.* Parker, 4 Johns. 424; S. *v.* Ginns, 1 Nott & McC. 583; [Draughn *v.* S., 76 Miss. 574, 25 S. R. 153.]

[6] *Ante*, § 283.

[7] And see Anonymous, J. Kel. 84.

[8] Castle's Case, 1 Hale, P. C. 558.

[9] See *ante*, § 284. And see S. *v.* Whit, 4 Jones (N. C.), 349.

[10] 1 Hawk. P. C. (Curw. ed.), p. 134, §§ 21, 22; 2 East, P. C. 492; Rex *v.* Brown, 2 East, P. C. 493; 1 Hale, P. C. 558.

[11] Com. *v.* Barney, 10 Cush. 480; P. *v.* Gedney, 10 Hun, 151.

require any sort of precise, visible bound.[1] An American court has defined it to mean "a space necessary and convenient, and habitually used for the family purposes, the carrying on of domestic employments; it includes the garden, if there be one, and need not be separated from other lands by fence."[2] There are no definable dimensions of grounds which it requires.[3] But what lies away from the dwelling-house with a public road intervening is not within the curtilage.[4]

§ 287. Separate families — Lodgers.—Where a building is occupied by separate families,[5] or where the whole of it is let to lodgers,[6] each several apartment is in law the dwelling-house of the occupying family or lodger; and the door leading thereto from the common hall is deemed its, or an, outer door.[7] But if the owner lets to lodgers some of his rooms, retaining for habitation the residue, the whole is considered in law as his dwelling-house;[8] the ownership in an indictment is, in general, laid in him;[9] and the door to a lodger's room is not an outer door for protection.[10]

§ 288. In brief, as to dwelling-house.— Such, in general, is a dwelling-house under both the written and the unwritten laws. But the nature of the particular question, or the special terms of a statute, may cause some variations.[11]

[1] Ivey *v.* S., 61 Ala. 58; [Washington *v.* S., 82 Ala. 31, 2 S. R. 356; P. *v.* Aplin, 86 Mich. 393, 49 N. W. R. 148; Anderson's Law Dictionary, 301.]

[2] S. *v.* Shaw, 31 Me. 523. And see Reg. *v.* Gilbert, 1 Car. & K. 84; P. *v.* Taylor, 2 Mich. 250; Ivey *v.* S., *supra;* Bryant *v.* S., 60 Ga. 358.

[3] Edwards *v.* Derrickson, 4 Dutcher, 39.

[4] Curkendall *v.* P., 36 Mich. 309.

[5] Stedman *v.* Crane, 11 Met. 295; Rex *v.* Bailey, 1 Moody, 23. See also Langdon *v.* Fire Department, 17 Wend. 234; Dale *v.* S., 27 Ala. 31.

[6] Rex *v.* Trapshaw, 1 Leach, 427, 2 East, P. C. 506, 780; Rex *v.* Rogers, 1 Leach, 89, 2 East, P. C. 506.

[7] Mason *v.* P., 26 N. Y. 200; P. *v.* Bush, 3 Park. Cr. 552; Lee *v.* Gansell, Lofft, 374, 382; s. c. *nom.* Lee *v.* Gansel, Cowp. 1.

[8] Rex *v.* Ball, 1 Moody, 30; Anonymous, J. Kel. 83, 84; Rex *v.* Taylor, Russ. & Ry. 418; [P. *v.* Horrigan, 68 Mich. 491, 36 N. W. R. 236.]

[9] Crim. Pro., II. § 138; Rodgers *v.* P., 26 N. Y. 360, [40 Am. R. 548;] Markham *v.* S., 25 Ga. 52. And see S. *v.* Clark, 42 Vt. 629; Rex *v.* Hawkins, 2 East, P. C. 501; Rex *v.* Picket, 2 East, P. C. 501; Rex *v.* Maynard, 2 East, P. C. 501; Rex *v.* Jones, 1 Leach, 537, 2 East, P. C. 504; S. *v.* Curtis, 4 Dev. & Bat. 222; [S. *v.* Leedy, 95 Mo. 76, 8 S. W. R. 245; S. *v.* O'Neill, 21 Oreg. 170, 27 Pac. R. 1038.]

[10] Lee *v.* Gansell, *supra.*

[11] *Ante,* § 242*a;* Page *v.* Com., 26 Grat. 943; S. *v.* Troth, 7 Vroom, 422; S. *v.* Troth, 5 Vroom, 377; *In re* Lammer, 7 Bis. 269.

§ 289. **House.**— The word "house" includes, we have seen,[1] whatever "dwelling-house" or "mansion-house" does, and something more; and it is the proper word in common-law indictments for arson. But some of the statutes against arson have "dwelling-house;"[2] therefore this term is required in indictments under them.[3] How much broader "house" is than "dwelling-house" the authorities do not define; but the former, in a statute prescribing the qualifications of voters, was held to include, as the latter would not,[4] a building entirely completed, intended for habitation, yet not actually so used.[5] A building not finished for use,[6] or not built for habitation,[7] is not in law a house; and whether it would be arson to burn one so finished before it had been slept in the books do not seem distinctly to disclose.[8] Under the statutory word "dwelling-house" it would not be;[9] and there is some authority for saying that under "house," actual occupancy is essential.[10]

Jail as house.— A prison or common jail also, we have seen,[11] is, when inhabited, both a dwelling-house and a house.[12]

Church.— A country church has been held to be a "house"

[1] *Ante*, § 277.

[2] P. *v.* Cotteral, 18 Johns. 115; Reg. *v.* Fletcher, 2 Car. & K. 215; Com. *v.* Barney, 10 Cush. 478; P. *v.* Orcutt, 1 Park. Cr. 252.

[3] Crim. Pro., II, § 34; S. *v.* Sutcliffe, 4 Strob. 372.

[4] *Ante*, § 279.

[5] Daniel *v.* Coulsting, 7 Man. & G. 122. The like meaning was given to "house" in a California statute against burglary. P. *v.* Stickman, 34 Cal. 242; [S. *v.* Dan, 18 Nev. 345, 4 Pac. R. 336; Albritton *v.* S. (Tex. Cr. R.), 26 S. W. R. 398; Grimes *v.* S., 77 Ga. 762.]

[6] Elsmore *v.* St. Briavells, 8 B. & C. 461, 2 Man. & R. 514, explained in Daniel *v.* Coulsting, 7 Man. & G. 122; Reg. *v.* England, 1 Car. & K. 533; S. *v.* McGowan, 20 Conn. 245, [52 Am. D. 336;] Surman *v.* Darley, 14 M. & W. 181. No doubt, however, such a building would pass by the word "house" in a deed or will. See *ante*, § 277. ["A house is any building or structure erected for public or private use, of whatever material constructed," the court holding a rude structure consisting of a wagon sheet stretched from poles erected in the ground, with ends barricaded by wooden boxes, to be within the statutory term. Favro *v.* S., 39 Tex. Cr. R. 452, 46 S. W. R. 932, 73 Am. St. R. 950.]

[7] Reg. *v.* England, 1 Car. & K. 533.

[8] See, however, S. *v.* McGowan, Elsmore *v.* St. Briavells, Daniel *v.* Coulsting, and Surman *v.* Darley, *supra*.

[9] Com. *v.* Barney, 10 Cush. 478; S. *v.* Wolfenberger, 20 Ind. 242.

[10] Reg. *v.* Edgell, 11 Cox, C. C. 132; [S. *v.* Williams, 12 Mo. App. 591; Bigham *v.* S., 31 Tex. Cr. R. 244, 20 S. W. R. 577.]

[11] *Ante*, §§ 207, 279.

[12] Rex *v.* Donnavan, 1 Leach, 69; s. c. *nom.* Rex *v.* Donnevan, 2 East, P. C. 1020; *ante*, § 207, note.

other than an "out-house" or a "dwelling-house," in statutory arson.[1]

Out-buildings.— The doctrine of the out-buildings, already considered,[2] has, in a general way, the same application to "house" as to "dwelling-house;" but whether there may not be minor differences the authorities do not clearly disclose. Thus, like "dwelling-house" in burglary, so "house" in arson "extends at common law, not only to the very dwelling-house but to all out-houses which are parcel thereof, though not adjoining thereto, nor under the same roof."[3] One method of determining whether or not an out-house is parcel of the dwelling-house has been held to be, to inquire whether the burning of it would endanger the main structure.[4] As to the —

Barn —(Arson).— It is arson at the common law to burn a barn containing hay and grain, even where not parcel of the mansion-house.[5] But we have no authorities for deeming the word house alone adequate, in an indictment, to describe such a barn, and it seems not to be.[6]

§ 290. Castle.— The habitation, often termed the "castle" of its occupant,[7] which he may defend from an intruder to the taking of life,[8] and which only under limitations can be broken to make an arrest,[9] is probably commensurate, or nearly so, with the dwelling-house in burglary. For example, an old case decides that a barn outside of the curtilage may be broken to serve a *fieri facias;* but, the report adds, the judges were agreed that, if it had been parcel of the mansion, it could not have

[1] Watt *v.* S., 61 Ga. 66. See Crim. Law, II, § 105; *In re* McCusker, 62 N. Y. S. 201, 47 App. Div. 111.

[2] *Ante*, § 284 *et seq.*

[3] 2 East, P. C. 1020; Hiles *v.* Shrewsbury, 3 East, 457; 4 Bl. Com. 221. And see S. *v.* Sandy, 3 Ire. 570; S. *v.* Terry, 4 Dev. & Bat. 185; S. *v.* Stewart, 6 Conn. 47; Chapman *v.* Com., 5 Whart. 427, [34 Am. D. 565;] Palmer *v.* S., 7 Coldw. 81; Curkendall *v.* P., 36 Mich. 309.

[4] Gage *v.* Shelton, 3 Rich. 242.

[5] 1 Hale, P. C. 567; Sampson *v.* Com., 5 Watts & S. 385; Rex *v.* Reader, 4 Car. & P. 245.

[6] Hiles *v.* Shrewsbury, 3 East, 457. As to a school-house, see Wallace *v.* Young, 5 T. B. Monr. 155; [S. *v.* South, 136 Mo. 673, 38 S. W. R. 716; Barnett *v.* S., 38 Ohio St. 7; S. *v.* Bedell, 65 Vt. 541, 27 Atl. R. 208.

[7] *Ante*, § 277.

[8] Crim. Law, I, § 858; II. § 707.

[9] Crim. Pro., I, §§ 194–205; 4 Bl. Com. 223; Curtis *v.* Hubbard, 1 Hill (N. Y.), 336, 4 Hill (N. Y.), 437, [40 Am. D. 292;] Semayne's Case. 5 Co. 91, Yelv. (Met. ed.) 29, 1 Smith, Lead. Cas. 39, Broom, Leg. Max. (2d ed.) 321; 1 East, P. C. 321.

been broken.[1] Though this case has been partly misunderstood by Viner[2] and some others,[3] we may infer from it,[4] from the reason of the law, and the rule in burglary having been referred to as furnishing a parallel in other particulars,[5] that the habitation is the same in both. Moreover,—

Breaking in arrest and burglary, compared.— Whatever would be a breaking in burglary — as lifting the latch of a door having no other fastening,[6] or obtaining an entrance by falsehood and craft[7] — is such also in arrest. And the same protection continues in both during a temporary absence of the occupant.[8] But there is one difference: after an entry not improperly made, the breaking in burglary may be of mere inside doors;[9] yet, to effect an arrest, an officer is then permitted, after demand and refusal, to break such doors.[10] So there are various rules as to when an officer may break into a dwelling-house, and when not, having no analogies in the law of burglary.[11]

§ 291. Other terms:—

Out-house.— This word occurs in various statutes against arson, larceny and house-breaking. It denotes a building contributory to habitation, separate from the main structure, either within or without the curtilage, and so by the common-law rules either parcel of the dwelling-house or not;[12] yet not one

[1] Penton *v.* Brown, 1 Keb. 698; s. c. *nom.* Penton *v.* Browne, 1 Sid. 186.

[2] 19 Vin. Abr. 432.

[3] Burton *v.* Wilkinson, 18 Vt. 186, 189. [46 Am. D. 145.]

[4] Haggerty *v.* Wilber, 16 Johns. 287, [8 Am. D. 321.]

[5] Lee *v.* Gansel, Cowp. 1; Curtis *v.* Hubbard, 1 Hill (N. Y.), 336, [4 Hill (N. Y.), 437, 40 Am. D. 292.]

[6] Curtis *v.* Hubbard, 1 Hill (N. Y.), 336, 4 Hill (N. Y.), 437, [40 Am. D. 292;] P. *v.* Hubbard, 24 Wend. 369, [35 Am. D. 628.]

[7] Parke *v.* Evans, Hob. 62*a*; *post*, § 312.

[8] Curtis *v.* Hubbard, 4 Hill (N. Y.), 437, [40 Am. D. 292.]

[9] Crim. Law, II, § 97; 1 Hawk. P. C. (Curw. ed.), p. 131, § 6.

[10] Crim. Pro., I, §§ 200, 201; Lee *v.* Gansel, Cowp. 1, 6, 7; Broom, Leg. Max. (2d ed.) 325; Stedman *v.* Crane, 11 Met. 295; S. *v.* Thackam, 1 Bay, 358; Hubbard *v.* Mack, 17 Johns. 127; Williams *v.* Spencer, 5 Johns. 352.

[11] See, as to these rules, De Graffenreid *v.* Mitchell, 3 McCord, 506, [15 Am. D. 648;] Walker *v.* Fox, 2 Dana, 404; Curtis *v.* Hubbard, 1 Hill (N. Y.), 336, [4 Hill (N. Y.), 437, 40 Am. D. 292;] S. *v.* Thackam, *supra;* Platt *v.* Brown, 16 Pick. 553; Keith *v.* Johnson, 1 Dana, 604, [25 Am. D. 167;] Oystead *v.* Shed, 13 Mass. 520, [7 Am. D. 172;] Ilsley *v.* Nichols, 12 Pick. 270, [22 Am. D. 425; S. *v.* Mooney, 115 N. C. 709, 20 S. E. R. 182.]

[12] S. *v.* Brooks, 4 Conn. 446; Rex *v.* North, 2 East, P. C. 1021; Reg. *v.* White, 2 Crawf. & Dix, C. C. 479; Rex *v.* Winter, Russ. & Ry. 295; Rex

not thus contributory, or one too remote.[1] A rude structure — for example, a thatched pig-sty — may be an out-house, yet it must be in some sense a complete building.[2]

Out-house where people resort.— It having been made in Alabama an offense to play at cards in any "out-house where people resort," an unoccupied storehouse, constituting one of a continuous line of buildings fronting on the street, was held to be within the statute.[3]

v. Stallion, 1 Moody, 398; Reg. *v.* Janes, 1 Car. & K. 393; s. c. *nom.* Reg. *v.* Jones, 2 Moody, 308. And see Jones *v.* Hungerford, 4 Gill & J. 402; Hiles *v.* Shrewsbury, 3 East, 457; [Sirk *v.* S., 28 Tex. Ap. 432, 13 S. W. R. 647; McHatton *v.* C., 7 Ky. Law R. 47; Price *v.* Com. (Ky.), 25 S. W. R. 1062.]

[1] Rex *v.* Haughton, 5 Car. & P. 555; Rex *v.* Parrot, 6 Car. & P. 402; Elsmore *v.* St. Briavells, 8 B. & C. 461; Anonymous, 1 Lewin, 8; Rex *v.* Ellison, 1 Moody, 336; Rex *v.* Woodward, 1 Moody, 323, 325; S. *v.* Bailey, 10 Conn. 144, overruling S. *v.* O'Brien, 2 Root, 516. Yet in S. *v.* Brooks, 4 Conn. 446, 448, 449, one of the judges, after observing that "a barn is an out-house, and not the less so because it is so remote from the mansion-house as not to be deemed parcel of it," added: "Its contiguity or remoteness enters not into the idea whether it is an out-house, but merely into the question whether it is parcel of the mansion." [A tobacco barn is not an out-house. White *v.* Com., 87 Ky. 454, 9 S. W. R. 303; Whalen *v.* Com. (Ky.), 32 S. W. R. 1095.]

[2] Reg. *v.* Jones, 2 Moody, 308; s. c. *nom.* Reg. *v.* James, 1 Car. & K. 303; Rex *v.* Ellison, 1 Moody, 336; Rex *v.* Stallion, 1 Moody, 398; Rex *v.* Parrot, 6 Car. & P. 402; [S. *v.* Roper, 88 N. C. 656; Carter *v.* S., 106 Ga. 372, 32 S. E. R. 345, 71 Am. St. R. 262.]

[3] Swallow *v.* S., 20 Ala. 30. And see Wheelock *v.* S., 15 Tex. 260; S. *v.* Norton, 19 Tex. 102, 205; [Downey *v.* S., 115 Ala. 693, 22 S. R. 479. But see Stockton *v.* S. (Tex. Cr. R.), 44 S. W. R. 509.]

Within protection of dwelling.— As to what is an out-house "within the protection" of the dwelling-house, see Bryant *v.* S., 60 Ga. 358.

Stable.— As to what is a "stable," see Rex *v.* Haughton, 5 Car. & P. 555; Reg. *v.* Colley, 2 Moody & R. 475; Orrell *v.* P., 94 Ill. 456, [34 Am. R. 241.]

Erection — Shed.— For what is an "erection," see Reg. *v.* Whittingham, 9 Car. & P. 234; McGary *v.* P., 45 N. Y. 153; [P. *v.* Richards, 108 N. Y. 137, 15 N. E. R. 371, 2 Am. St. R. 373;] "shed," "erection used in carrying on trade," Reg. *v.* Amos, Temp. & M. 422, 2 Den. C. C. 65, 15 Jur. 90, 20 Law J. (N. S.) M. C. 103, 1 Eng. L. & Eq. 592; Reg. *v.* Colley, 2 Moody & R. 475.

Cottage.— For the meaning of the word "cottage," see Rex *v.* Pattle, 1 Stra. 405.

Appurtenances.— For "appurtenances," Com. *v.* Estabrook, 10 Pick. 293; [Empire Land & Canal Co. *v.* Board, etc., 1 Colo. Ap. 205, 28 Pac. R. 482; Fond du Lac Water Co. *v.* City of Fond du Lac, 82 Wis. 322, 52 N. W. R. 439, 16 L. R. A. 581. As to when one building is appurtenant to another, see Russell *v.* S., 72 Ala. 222; S. *v.* Anderson, 24 S. C. 109; S. *v.* Johnson, 45 S. C. 83, 23 S. E. R. 619.]

Premises.— For "premises," Swan *v.* S., 11 Ala. 594; S. *v.* Black, 9 Ire. 378; Downman *v.* S., 14 Ala. 242; Brown *v.* S., 31 Ala. 353; Daly *v.* S.,

§ 292. **Building.**—The word building, in a statute, will almost always depend for its meaning in some degree on the particular subject and its connection with other words. But ordinarily it does not require an absolutely finished structure.[1] Yet if the statute specifies a building erected for a purpose named, it must be in a reasonable degree completed to be within the terms.[2] And, within limits familiar in jury trials, the question whether the structure is sufficiently complete is of fact for the jury, to be decided under instruction from the court.[3]

33 Ala. 431; Sandy *v.* S., 60 Ala. 18; *post*, §§ 878, 1011, 1060–1063.

[Smoke-house.— For "smoke-house," see Wait *v.* S., 99 Ala. 164, 13 S. R. 584: Pressly *v.* S., 111 Ala. 34, 20 S. R. 647.]

[1] Com. *v.* Squire, 1 Met. 258; Rex *v.* Worrall, 7 Car. & P. 516; Reg. *v.* Manning, Law R. 1 C. C. 338; Stevens *v.* Gourley, 7 C. B. (N. S.) 99; [Williams *v.* S., 105 Ga. 814, 32 S. E. R. 129, 70 Am. St. R. 82.]

[2] McGary *v.* P., 45 N. Y. 153, 160. Said Allen, J.: "A building is a fabric or edifice constructed for use. To erect, when used in connection with a house or church or factory, is to build; and neither can be said to be erected until they are built, completed." p. 161. And see Reg. *v.* Labadie, 32 U. C. Q. B. 429; [Blakemore *v.* Stanley, 130 Mass. 209, 33 N. E. R. 690.]

[3] Com. *v.* Squire, *supra*, p. 259; McGarry *v.* P., 2 Lans. 227. See further, as to what is a building, Rex *v.* Norris, Russ. & Ry. 69; Rex *v.* Parker, 1 Leach, 320, note, 2 East, P. C. 592; Rex *v.* Hickman, 1 Leach, 318, 2 East, P. C. 593; Langdon *v.* Fire Department, 17 Wend. 234; Orrell *v.* P., 94 Ill. 456, [34 Am. R. 241;] Com. *v.* Horrigan, 2 Allen, 159; [Clark *v.* S., 69 Wis. 203, 33 N. W. R. 436, 2 Am. St. R. 732.]

Addition.—For what is an "addition to a building," see Updyke *v.* Skillman, 3 Dutcher, 131; S. *v.* Parker, 5 Vroom, 352.

[The following have been held to be "buildings," within the term of the statute in their respective jurisdictions: Green-house, Harris *v.* De Pinna, [1898] W. N. 1682, [1899] 1 Ch. 698; mill-house, Jordan *v.* S., 142 Ind. 422, 41 N. E. R. 817; planing-mill, S. *v.* Hanly (Iowa), 81 N. W. R. 151; court-house, S. *v.* Rogers, 54 Kan. 683, 39 Pac. R. 219; Lavelle *v.* S., 136 Ind. 238, 36 N. E. R. 135; buggy-house, S. *v.* Garrison, 52 Kan. 180, 34 Pac. R. 751.

The following are not buildings: Engine-room, Kincaid *v.* P., 139 Ill. 213, 28 N. E. R. 1060; cemetery vault of stone, built wholly above ground, P. *v.* Richards, 108 N. Y. 137, 15 N. E. R. 371, 2 Am. St. R. 373.

Bank.—As to what is a bank, see U. S. *v.* Montreal Bank, 21 Fed. R. 296.

Corn-crib.—As to what is a corn-crib, and what the term includes, see S. *v.* Gibson, 97 Iowa, 416, 66 N. W. R. 742; Metz *v.* S., 46 Neb. 547, 65 N. W. R. 190; Thomas *v.* S., 116 Ala. 461, 23 S. R. 666; Wood *v.* S., 18 Fla. 967; S. *v.* Jeter, 47 S. C. 2, 24 S. E. R. 989; Bearden *v.* S., 95 Ga. 459, 20 S. E. R. 212. But a corn-crib is different from its materials, and an indictment for burning the former will not be sustained by proof of burning the latter. Mulligan *v.* S., 25 Tex. Ap. 199, 7 S. W. R. 664, 8 Am. St. R. 435.

Chicken-house.—See Gillock *v.* P., 171 Ill. 307, 49 N. E. R. 712; S. *v.* Schuchmann, 133 Mo. 111, 34 S. W. R. 842.]

§ 293. **Warehouse.**— In popular language, and by the better opinion in legal, this word signifies an apartment or building for the temporary deposit of goods.[1] Therefore a cellar wherein they are kept to be removed when wanted for sale,[2] or a railroad depot for the reception of goods and passengers,[3] is a warehouse. And that goods are sold from it does not prevent its being such.[4]

§ 294. **Storehouse.**— Of a similar meaning to warehouse is "storehouse." The word "storeroom," in an indictment, has been adjudged not to be an equivalent for either. "A storeroom is not necessarily either a storehouse or warehouse."[5] In North Carolina, "storehouse" was held to include a building wherein are kept goods to be sold at retail.[6] The Alabama court adjudged, that the upper room in a building of two rooms, one above the other, accessible only by outside steps, and used for sleeping by one of two proprietors who jointly retailed spirituous liquors in the lower room, was within the statutory prohibition of gaming at a storehouse for retailing spirituous liquors.[7]

§ 295. **Shop — Store.**— The words "shop" and "store" are not in all respects perfectly defined in adjudication; nor, it is believed, are their meanings exactly uniform in all localities. Alike in England and in our respective states, a structure or room wherein goods are kept and sold at retail is a shop,[8] but

[1] See Owen *v.* Boyle, 22 Me. 47; Allen *v.* S., 10 Ohio St. 287; Wilson *v.* S., 24 Conn. 57; [Webb *v.* Com. (Ky.), 35 S. W. R. 1038; Hunter *v.* Com. (Ky.), 48 S. W. R. 1077; S. *v.* Buechler, 57 Ohio St. 95, 48 N. E. R. 507.]

[2] Reg. *v.* Hill, 2 Moody & R. 458. See, however, Rex *v.* Godfrey, 2 East, P. C. 642, 1 Leach, 287.

[3] S. *v.* Bishop, 51 Vt. 287, 290, [31 Am. R. 690; Andrews *v.* S. (Ala.), 26 S. R. 522; S. *v.* Edwards, 109 Mo. 315, 19 S. W. R. 91; Lynch *v.* S., 89 Ala. 18, 7 S. R. 829. Freight-car used as depot and warehouse, Carter *v.* S., 106 Ga. 372, 32 S. E. R. 345, 71 Am. St. R. 262. As to railroad car, see Nicholls *v.* S., 68 Wis. 416, 32 N. W. R. 543; Hunt *v.* S., 103 Wis. 582, 79 N. W. R. 751.]

[4] Ray *v.* Com., 12 Bush, 397; Rex *v.* Godfrey, *supra*. And see further, as to what is a warehouse, Hagan *v.* S., 52 Ala. 373; Bennett *v.* S., 52 Ala. 370; S. *v.* Walker, 28 La. An. 686; S. *v.* Wilson, 47 N. H. 101.

[5] Hagar *v.* S., 35 Ohio St. 268, 270; [Benton *v.* Com., 91 Va. 782, 21 S. E. R. 495; S. *v.* Sprague, 149 Mo. 409, 50 S. W. R. 901; Jefferson *v.* S., 100 Ala. 59, 14 S. R. 627; Mason *v.* Com. (Ky.), 41 S. W. R. 305; Givens *v.* S., 40 Fla. 200, 23 S. R. 850.]

[6] S. *v.* Sandy, 3 Ire. 570. And see Ray *v.* Com., 12 Bush, 397.

[7] Johnson *v.* S., 19 Ala. 527.

[8] Barth *v.* S., 18 Conn. 432; Rex *v.* Stone, 1 Leach, 334, 2 East, P. C. 648; Reg. *v.* Sanders, 9 Car. & P. 79; Wooster *v.* S., 6 Bax. 533; Com. *v.* Annis, 15 Gray, 197; Com. *v.* Riggs, 14 Gray, 376, [77 Am. D. 333; S. *v.*

not one in which they are simply deposited.[1] A mere work-shop, like a blacksmith's shop, was by one of the English judges ruled not to be a shop, because goods were not sold from it;[2] but Lord Denman, C J., refused to follow this ruling, and held that a blacksmith's shop is a shop within the statute against breaking into shops and stealing therefrom.[3] With us, a shop for the sale of goods is often termed a store,[4] and "shop" and "store" are used almost as equivalents.[5] But they are not absolute equivalents.[6] No one, for example, would deem a blacksmith's shop to be properly designated as a store. "We do not always," said the New Hampshire court, "mean a store when we use the word 'shop.'"[7] The connection in which the word stands in the statute has something to do with the question. Under the words "a *shop* wherein goods, wares and merchandise are deposited," the cabin of a vessel has in Connecticut been held to be included; but some of the judges have disapproved of this, and probably if the question were new it would not now be so decided.[8]

§ 296. **Junk-shop.**— A city by-law having forbidden the unlicensed keeping of a "junk-shop," it was defined by the court to be "a place where odds and ends are purchased or sold."[9]

§ 297. **Inn — Tavern — Hotel.**— These words, in their original use, differed. But they have been gradually approaching one another in meaning; and now, though they may not perhaps be under all circumstances equivalents in pleading,[10] and

Morgan, 98 N. C. 641, 3 S. E. R. 927; Green *v.* S., 56 Ark. 386, 19 S. W. R. 1055.]

[1] Rex *v.* Stone, *supra.*

[2] Reg. *v.* Sanders, *supra.*

[3] Reg. *v.* Carter, 1 Car. & K. 173.

[4] Com. *v.* Annis, *supra.*

[5] Barth *v.* S., *supra.*

[6] Sparrenberger *v.* S., 53 Ala. 481, [25 Am. R. 643.]

[7] S. *v.* Canney, 19 N. H. 135. And see Com. *v.* Lindsey, 10 Mass. 153; Com. *v.* McMonagle, 1 Mass. 517; [S. *v.* Hanlon, 32 Oreg. 95, 48 Pac. R. 353.]

[8] S. *v.* Carrier, 5 Day, 131; Rex *v.* Humphrey, 1 Root, 63. See also Wilson *v.* S., 24 Conn. 57; S. *v.* Bailey, 10 Conn. 144. And see Wiltshire *v.* Baker, 11 C. B. (N. S.) 237. A charge of breaking into a store where goods are kept for use, sale and deposit is not sustained by proof of breaking into a mere counting-room. P. *v.* Marks, 4 Park. Cr. 153.

Counting-house.—As to the meaning of the word "counting-house," see Reg. *v.* Potter, 2 Den. C. C. 235, 15 Jur. 498, 20 Law J. (N. S.) M. C. 170, 4 Eng. L. & Eq. 575.

["**Door.**"— As to what constitutes a door, see S. *v.* McBeth, 49 Kan. 584, 31 Pac. R. 145.]

[9] Charleston *v.* Goldsmith, 12 Rich. 470.

[10] Jones *v.* Osborn, 2 Chit. 484.

though "inn" is the most nicely technical of the terms, they are for most purposes in legal signification identical.[1] An inn, tavern or hotel, therefore, is a place for the general entertainment of all travelers and strangers who apply, paying a suitable compensation. It may, but need not, be for the accommodation also of their horses and carriages.[2] A coffee-house [3] is not an inn; neither is a restaurant,[4] or a private boarding-house,[5] or a house for private lodgers;[6] nor is one for entertaining company occasionally,[7] as at a watering-place during a portion of the year;[8] nor a steamship carrying for hire passengers who pay a round sum for transportation, board and lodging.[9] A license neither makes its possessor an innkeeper nor prevents his being such.[10] One to be a tavern-keeper need not sell intoxi-

[1] Hall *v.* S., 4 Harring. (Del.) 132, 140; Crown Point *v.* Warner, 3 Hill (N. Y.), 150, 156, 157; Carpenter *v.* Taylor, 1 Hilton, 193; St. Louis *v.* Siegrist, 46 Mo. 593; P. *v.* Jones, 54 Barb. 311; [Anderson, Law Dict.;] Bouv. Law Dict., Tavern: Webster Dict., Hotel. The case of Reg. *v.* Rymer, 2 Q. B. D. 136, 13 Cox, C. C. 378, would seem to indicate that "tavern" has not yet attained the meaning of "inn" or "hotel" in England. Said Kelly, C. B.: "An inn is a place 'instituted for passengers and wayfaring men.' Calye's Case, 8 Co. 32. A tavern is not within the definition." p. 140 of Q. B. D. [Fay *v.* Pacific Imp. Co., 93 Cal. 253, 28 Pac. R. 943, 27 Am. St. R. 198, 16 L. R. A. 188; Bullock *v.* Adair, 63 Ill. Ap. 30; Bostick *v.* S., 47 Ark. 126, 14 S. W. R. 476; McCalman *v.* S., 96 Ala. 98, 11 S. R. 408; Rattenbury *v.* Village Council of Northville (Mich.), 80 N. W. R. 1012; Orchard *v.* Bush & Co., Div. Ct. [1898] 2 Q. B. 284.]

[2] Thompson *v.* Lacy, 3 B. & Ald. 283; Dickerson *v.* Rogers, 4 Humph. 179, [40 Am. D. 642;] Rex *v.* Ivens, 7 Car. & P. 213; Fell *v.* Knight, 8 M. & W. 269; Kisten *v.* Hildebrand, 9 B. Monr. 72, [48 Am. D. 416;] P. *v.* Jones, *supra;* Walling *v.* Potter, 35 Conn. 183; Reg. *v.* Rymer, *supra;* Com. *v.* Wetherbee, 101 Mass. 214; Krohn *v.* Sweeney, 2 Daly, 200; Cromwell *v.* Stephens, 2 Daly, 15; Wintermute *v.* Clark, 5 Sandf. 242.

[3] P. *v.* Jones, 54 Barb. 311; Carpenter *v.* Taylor, 1 Hilton, 193.

[4] Pitt *v.* Laming, 4 Camp. 73, 76; [Sheffer *v.* Willoughby, 163 Ill. 518, 45 N. E. R. 253, 54 Am. St. R. 483, 34 L. R. A. 464; Lewis *v.* Hitchcock, 10 Fed. R. 4.]

[5] Willard *v.* Reinhardt, 2 E. D. Smith, 148; Kisten *v.* Hildebrand, 9 B. Monr. 72, [40 Am. D. 642;] S. *v.* Mathews, 2 Dev. & B. 424; [*In re* Harper, 64 N. Y. S. 524.]

[6] Parkhurst *v.* Foster, 1 Salk. 387, Carth. 417; [*In re* Veeder, 65 N. Y. S. 517.]

[7] S. *v.* Mathews, 2 Dev. & Bat. 424. See Com. *v.* Wetherbee, *supra.*

[8] Bonner *v.* Welborn, 7 Ga. 296; Kisten *v.* Hildebrand, 9 B. Monr. 72, [40 Am. D. 642;] Southwood *v.* Myers, 3 Bush, 681.

[9] Clark *v.* Burns, 118 Mass. 275, [19 Am. R. 456.]

[10] Norcross *v.* Norcross, 53 Me. 163; [Foster *v.* S., 84 Ala. 451, 4 S. R. 838.]

cating liquor,[1] — a question on which the Ohio court divided,[2] and the majority in South Carolina once held the other way.[3] A sign is not essential.[4]

House of entertainment.— The words "house of entertainment," in the Georgia statute of 1791, were adjudged to be synonymous with "tavern;" meaning the same as inn at common law.[5]

§ 298. Public place.— As seen in other connections, an affray,[6] or an exposure of the person,[7] to be indictable at the common law, must be in a "public place." But the inquiry what is a public place most frequently arises in our states under statutes against gaming; sometimes, also, under other statutes. A specimen enactment is an Alabama one to punish gaming "at any tavern or inn, or store-house for retailing spirituous liquors, or house or place where spirituous liquors are retailed or given away, or in any public house or highway, or at *any other public place*, or at any out-house where people resort."[8] Whatever be the general doctrine as to statutory terms overlying one another in meaning,[9] plainly the word "other," in a statute like this, limits the term "public place" to places not specified. So that, for example, a "highway" is not within the expression "any *other* public place."[10] But aside from this peculiarity of the language, and in a statute where the term is in no manner limited by other words, a highway is a public place, though

[1] St. Louis *v.* Siegrist, 46 Mo. 593; Pinkerton *v.* Woodward, 33 Cal. 557, 596, [91 Am. D. 657.] But see, under a Georgia statute, Bonner *v.* Welborn, 7 Ga. 296, 304.

[2] Curtis *v.* S., 5 Ohio, 324.

[3] S. *v.* Chamblyss, Cheves, 220, [34 Am. D. 593.] See S. *v.* Hix, 3 Dev. 116; S. *v.* Cloud, 6 Ala. 628.

[4] Parker *v.* Flint, Holt, 366; Dickerson *v.* Rogers, 4 Humph. 179.

[5] Bonner *v.* Welborn, 7 Ga. 296.

[Place of public refreshment.— Rhone *v.* Loomis, 74 Minn. 200, 77 N. W. R. 31.

Place of accommodation and amusement.— Cecil *v.* Green, 161 Ill. 265, 43 N. E. R. 1105, 32 L. R. A. 566; Kellar *v.* Koerber (Ohio St.), 55 N. E. R. 1002.

Place of public amusement.— Skating rink held not to be. Bowlin *v.* Lyon, 67 Iowa, 536, 25 N. W. R. 766, 56 Am. R. 355. *Contra*, P. *v.* King, 110 N. Y. 418, 18 N. E. R. 245, 6 Am. St. R. 389, 1 L. R. A. 293.]

[6] Crim. Law, II, §§ 1, 2.

[7] Crim. Law, I, § 1128.

[8] Coleman *v.* S., 18 Ala. 602. The statutory language as given in the later case of Windham *v.* S., 26 Ala. 69, differs slightly from this.

[9] *Ante*, §§ 246c-248; S. *v.* Plunket, 2 Stew. 11; Reg. *v.* McCully, 2 Moody, 34; s. c. *nom.* McCully's Case, 2 Lewin, 272. And see *post*, § 326.

[10] Bush *v.* S., 18 Ala. 415; s. p., Windham *v.* S., 26 Ala. 69; McCauley *v.* S., 26 Ala. 135.

not necessarily such in every sort of inhibition; for the question will vary with the subject in contemplation and the connected statutory words.[1] And a road which is not a highway may, under the other requisite circumstances, be a public place.[2] So a place may be such which is merely within view of a traveled way.[3] In holding an inclosed lot, ninety feet from a street from which it is visible, to be at common law a public place wherein an affray may be committed, A. J. Walker, C. J., said: "The street being, *per se*, public, a place ninety feet from the street, and at the time visible from it, must, we think, be also public. At the distance of ninety feet, in the absence of any intervening obstacle, the tumult of the fight could be heard and its exciting scenes witnessed, and persons passing by would be within reach of missiles thrown by the combatants."[4] The manner in which the place was used at the precise time of the offense is important;[5] as, for example, a shop or store to which people go to buy goods or medicines is a public place when open, but not while locked up at night.[6] So are a court in session[7] and a licensed eating-house when open[8] public places. In general the place must be one to which people are at the time privileged to resort without an invitation.[9] And there must be a publicity about it; for persons concealed gaming in bushes and briers, though on land owned by the county for supporting its poor, are not in a public place.[10] On the other hand, any

[1] S. *v.* Weekly, 29 Ind. 206; Moffit *v.* S., 43 Tex. 346; Williams *v.* S., 64 Ind. 553, [31 Am. R. 135;] Carter *v.* Abshire, 48 Mo. 300; S. *v.* Baker, 83 N. C. 649; S. *v.* Moriarty, 74 Ind. 103; [Maddock *v.* Wallasey Local Board, 55 L. J. Q. B. 267.]

[2] Mills *v.* S., 20 Ala. 86.

[3] Henderson *v.* S., 59 Ala. 89. And see Bandalow *v.* P., 90 Ill. 218.

[4] Carwile *v.* S., 35 Ala. 392, 393; [Franklin *v.* S., 91 Ala. 23, 8 S. R. 678; Ford *v.* S. (Ala.), 26 S. R. 503. See Gerrels *v.* S. (Tex. Cr. R.), 26 S. W. R. 394.]

[5] Sewell *v.* Taylor, 7 C. B. (N. S.) 160.

[6] Com. *v.* Feazle, 8 Grat. 585; Clarke *v.* S., 12 Ala. 492; Windsor *v.* Com., 4 Leigh, 680; [Turbeville *v.* S., 37 Tex. Cr. R. 645, 38 S. W. R. 1010.] And see Roquemore *v.* S., 19 Ala. 528. Houses of public worship are ordinarily and *prima facie* public places for posting a notice calling a town meeting. Scammon *v.* Scammon, 8 Fost. (N. H.) 419.

[7] Summerlin *v.* S., 3 Tex. Ap. 444.

[8] Neal *v.* Com., 22 Grat. 917.

[9] Clarke *v.* S., *supra;* Roquemore *v.* S., *supra;* Burdine *v.* S., 25 Ala. 60; Sherrod *v.* S., 25 Ala. 78; [Crutcher *v.* S., 39 Tex. Cr. R. 233, 45 S. W. R. 594.]

[10] Com. *v.* Vandine, 6 Grat. 689; Bythwood *v.* S., 20 Ala. 47. See also Smith *v.* S., 23 Ala. 39. In Alabama a privy belonging to and in the same inclosure with a school-house is not,

place may be made public by a temporary assemblage;[1] and the exclusion of a few persons will not alone prevent its being such.[2] Moreover, "we must look at the character of the place, the manner of ingress to it, and the number of persons" assembling.[3] Any place to which people are privileged to go at pleasure may be, when the privilege is availed of, public;[4] even, under special circumstances and for some purposes, a private dwelling-house may be,[5] though generally it is not.[6] A steamboat is a public place.[7]

§ 299. Public house.— There are connections in which the term "public house" is a synonym for inn.[8] But generally, in our statutes, its meaning is similar to "public place," just explained. Thus, in a statute against gaming, the office of a justice of the peace is a public house. "The reason is," said Rice, C. J., "that, by the very nature of the business to which it is appropriated, every person who has, or desires to have, any official transaction with such officer, or who has any interest in examining his official books, is, in legal contemplation, invited or licensed to go to his office."[9] And a lawyer's office is the same.[10]

in vacation, a public house, public place, or out-house where people resort, within Code, § 3243. McDaniel *v.* S., 35 Ala. 390; [Cole *v.* S., 28 Tex. Ap. 536, 13 S.W. R. 859, 19 Am. St. R. 856; Brock *v.* S. (Tex. Cr. R.), 44 S.W. R. 516.]

[1] Campbell *v.* S., 17 Ala. 369. See Taylor *v.* S., 22 Ala. 15; [Robinson *v.* S., 37 Tex. Cr. R. 195, 39 S. W. R. 662; Finnen *v.* S., 115 Ala. 106, 22 S. R. 593.]

[2] Campbell *v.* S., *supra*.

[3] Coleman *v.* S., 20 Ala. 51; [Graham *v.* S., 105 Ala. 130, 16 S. R. 934; Sisk *v.* S., 35 Tex. Cr. R. 462, 34 S. W. R. 277; P. *v.* King, 110 N. Y. 418, 18 N. E. R. 245, 6 Am. St. R. 389, 1 L. R. A. 293; Bowlin *v.* Lyon, 67 Iowa, 536, 25 N. W. R. 766, 56 Am. R. 355; S. *v.* Brast, 31 W. Va. 380, 7 S. E. R. 11.]

[4] Smith *v.* S., 52 Ala. 384; [Williams *v.* S. (Tex. Cr. R.), 34 S. W. R. 271; Fossett *v.* S., 16 Tex. Ap. 375.]

[5] Cahoon *v.* Coe, 57 N. H. 556; [Nickols *v.* S., 111 Ala. 58, 20 S. R. 564.]

[6] S. *v.* Sowers, 52 Ind. 311. And see S. *v.* Waggoner, 52 Ind. 481; P. *v.* Bixby, 67 Barb. 221, 4 Hun, 636; [Pickens *v.* S., 100 Ala. 127, 14 S. R. 672.]

[7] Coleman *v.* S., 13 Ala. 602. For further illustrations of what is a public place, see Farmer *v.* Com., 8 Leigh, 741; Walker *v.* Com., 2 Va. Cas. 515; Flake *v.* S., 19 Ala. 551; Shihegan *v.* S., 9 Tex. 430; Purcell *v.* Com., 14 Grat. 679.

[8] St. Louis *v.* Siegrist, 46 Mo. 593.

[9] Burnett *v.* S., 30 Ala. 19; Huffman *v.* S., 29 Ala. 40. See also Arnold *v.* S., 29 Ala. 46.

[Gaming-house.— As to what constitutes a gaming-house, see Anderson *v.* S. (Tex. Ap.), 12 S. W. R. 868; S. *v.* Black, 94 N. C. 809; P. *v.* Weithoff, 51 Mich. 203, 47 Am. R. 557; S. *v.* Grimes, 74 Minn. 257, 77 N. W. R. 4; Bollinger *v.* Com., 98 Ky. 574, 35 S. W. R. 553; Com. *v.* Blankenship, 165 Mass. 40, 42 N. E. R. 115; Swigert

[10] Smith *v.* S., 37 Ala. 472.

So, within such a statute, an apartment wherein goods are sold appears to be deemed a public house, even though the playing is at night when doors and windows are closed, and only the players are present.[1] But if no others could gain admittance, would not the holding of it to be such contravene the doctrine of the last section? The books furnish other illustrations, but they need not be minutely traced.[2]

§ **299a. Town.**— The meaning of the word "town" will vary more or less with the connection and subject. It may include cities[3] and incorporated villages;[4] and, on the other hand, a mere congregation of dwelling-houses[5] not incorporated. Or it may denote a civil division of contiguous territory.[6]

§ **300. Plantation,**— in a statute, has been defined to mean, as in common parlance, "any body of land consisting of one or

v. P., 154 Ill. 284, 40 N. E. R. 432; McBride *v.* S., 39 Fla. 442, 22 S. R. 711; Cochran *v.* S., 102 Ga. 631, 29 S. E. R. 438.]

[1] Skinner *v.* S., 30 Ala. 524. And see Huffman *v.* S., 30 Ala. 532. Said Walker, J., in this case: "The fact that the room in which the gaming occurred was used by one of the proprietors of the store, a single man, engaged in the business of the store, as a bed-room, and was used for no other purpose, does not so disconnect that room from the adjoining room, in which a public store was kept, as to take it out of the prohibition which, *prima facie*, extends to the entire house, made a public house by the fact that a store was kept in it." P. 534. See also Sheppard *v.* S., 1 Tex. Ap. 304; [Gomprecht *v.* S., 36 Tex. Cr. R. 434, 37 S. W. R. 734.]

[2] Moore *v.* S., 30 Ala. 550; Wilson *v.* S., 31 Ala. 371; Smith *v.* S., 37 Ala. 472; Redditt *v.* S., 17 Tex. 610. A saddler's shop, including a back room in the second story, accessible only by an external stairway, and used by a journeyman of the saddler as a sleeping-room, was held in Alabama to be a "public house," within the meaning of section 3243 of the code, prohibiting gaming. Bentley *v.* S., 32 Ala. 596. Where the room in which cards were played was a part of a tavern-house, but, having been let by the month for a shoe-shop, was not under the control of the landlord, it was held not to be within the North Carolina Revised Code, section 75, chapter 34. S. *v.* Keisler, 6 Jones (N. C.), 73; [Comer *v.* S., 26 Tex. Ap. 509, 10 S. W. R. 106; Goldstein *v.* S. (Tex. Cr. R.), 36 S. W. R. 289; Galloway *v.* S. (Tex. Cr. R.), 26 S. W. R. 67.]

[3] Flinn *v.* S., 24 Ind. 286; S. *v.* Goldstucker, 40 Wis. 194; Kittredge *v.* Milwaukee, 26 Wis. 46; Beaudette *v.* Fond du Lac, 40 Wis. 44; S. *v.* Parsons, 11 Vroom, 1; Whitall *v.* Gloucester, 11 Vroom, 302; New York *v.* McGurrin, 6 Daly, 349.

[4] Peck *v.* Weddell, 17 Ohio St. 271.

[5] London, etc. Ry. Co. *v.* Blackmore, Law R. 4 H. L. 610, 615; Reg. *v.* Cottle, 16 Q. B. 412; Collier *v.* Worth, 1 Ex. D. 464. See Murray *v.* Menefee, 20 Ark. 561; Truax *v.* Pool, 46 Iowa, 256; [Anderson, Law Dict. 1042.]

[6] Chicago, etc. Ry. Co. *v.* Oconto, 50 Wis. 189, [36 Am. R. 840;] Smith *v.* Sherry, 50 Wis. 210; Harris *v.* Schryock, 82 Ill. 119.

several adjoining tracts, on which is a planting establishment."[1] It is practically synonymous with farm.[2]

§ 301. Bridge.— A "bridge" is a structure for persons or vehicles to pass upon, spanning a stream or other obstruction to travel. While commonly it is over water, it need not be, either wholly, or even in part.[3] Ordinarily, but not necessarily, it is a part of a highway; or, more accurately, a public bridge[4] is such.[5] A structure not accessible at either end is not a bridge,[6] nor is one not finished for travel.[7] The abutments, finished for travel, and giving access to what is primarily the bridge, are parcel of the bridge.[8]

§ 301a. Ferry.— A ferry is a water transportation, or the franchise therefor, of passengers and vehicles, for toll, between two points of land.[9]

[1] S. *v.* Blythe, 3 McCord, 363. See also Sanderlin *v.* S., 2 Humph. 315; Molett *v.* S., 33 Ala. 408; [Ala. & V. Ry. Co. *v.* Odoneal, 73 Miss. 34, 19 S. R. 202.]

[2] Attorney-General *v.* Judges, 38 Cal. 291; [Anderson, Law Dict. 777.]

[3] S. *v.* Gloucester, 11 Vroom, 302; Sussex *v.* Strader, 3 Harrison, 108, [35 Am: D. 530;] S. *v.* Gorham, 37 Me. 451; Reg. *v.* Derbyshire, 2 Q. B. 745, 2 Gale & D. 97, 6 Jur. 438, and the authorities there cited. See Rex *v.* Oxfordshire, 1 B. & Ad. 289; S. *v.* Hudson, 1 Vroom, 137, 147. Some appear to have deemed that a structure, to be a bridge, must be adapted to travel by foot passengers and ordinary vehicles; so that, for example, a mere railroad bridge is not a bridge. Proprietors of Bridges *v.* Hoboken Land, etc. Co., 2 Beasley, 503. But the contrary, as to a railroad bridge, has also been held, and such would seem to be the better doctrine. Enfield Toll Bridge *v.* Hartford, etc. R. R. Co., 17 Conn. 40, [42 Am. D. 716; Westfield *v.* Tioga County, 150 Pa. St. 152, 24 Atl. R. 700; Carroll Co. Com'rs *v.* Bailey, 122 Ind. 46, 23 N. E. R. 672. For "drawbridge," see Savannah F. & W. Ry. Co. *v.* Daniels, 90 Ga. 608, 17 S. E. R. 647, 20 L. R. A. 416. For "causeway," see Swanzey *v.* Somerset, 132 Mass. 312. See Anderson, Law Dict. 136.]

[4] Rex *v.* Northampton, 2 M. & S. 262; Rex *v.* Devon, Ryan & Moody, N. P. 144; Rex *v.* Buckingham, 4 Camp. 189.

[5] P. *v.* Buffalo, 4 Neb. 150; Malone *v.* S., 51 Ala. 55; Penn *v.* Perry, 78 Pa. St. 457; [Pittsburgh, etc. Ry. Co. *v.* Point Bridge Co., 165 Pa. St. 37, 30 Atl. R. 511, 26 L. R. A. 323.]

[6] Sussex *v.* Strader, *supra*, at p. 112.

[7] Penn *v.* Perry, *supra*.

[8] Sussex *v.* Strader, *supra;* Tolland *v.* Willington, 26 Conn. 578. And see Rex *v.* West Riding of York, 7 East, 588; West Riding of Yorkshire *v.* Rex, 2 Dow, 1; Reg. *v.* Lincoln, 8 A. & E. 65; London, etc. Ry. Co. *v.* Skerton, 5 B. & S. 559; [City Council *v.* Hudson, 94 Ga. 135, 21 S. E. R. 289; Board *v.* Sisson, 2 Ind. Ap. 331, 28 N. E. R. 374; Shaw *v.* Saline Township, 113 Mich. 342, 71 N. W. R. 642; Francis *v.* Franklin Township, 179 Pa. St. 195, 36 Atl. R. 202; Tinkham *v.* Town of Stockbridge, 64 Vt. 480, 24 Atl. R. 761.]

[9] Attorney-General *v.* Boston, 123 Mass. 460, 468; Parrot *v.* Lawrence, 2

§ 302. River.—A river is a stream of flowing water, of greater magnitude than a rivulet or brook. It may be navigable or not; the right to use it may be purely public, or it may be private property; may arise from streams, or constitute the outlet of a lake; bear the appellation of river, or be known by some other name,—these particulars not being material to its legal character as a river.[1]

§ 303. Navigable river—Navigable waters.—A "navigable river" is one practically available for floating commerce by any of its methods,[2] or for travel.[3] In England, where the rivers are short and small compared with ours, the ebbing and flowing of the tide therein establishes *prima facie* their navigability, but it is not conclusive.[4] With us, a river found navigable by this English test is so also.[5] But the test is not commonly applicable. "Some of our rivers," observed Field, J., in the supreme court of the United States, "are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are even not affected by the tide at any

Dill. 332; S. *v.* Wilson, 42 Me. 9; Munroe *v.* Thomas, 5 Cal. 470; Ward *v.* Gray, 6 B. & S. 345; Newton *v.* Cubitt, 12 C. B. (N. S.) 32; Letton *v.* Goodden, Law R. 2 Eq. 123, 130; Giles *v.* Groves, 12 Q. B. 721; Aikin *v.* Western R. R. Co., 20 N. Y. 370; [Mayor of the City of New York *v.* N. J. Steamboat Transportation Co., 106 N. Y. 28, 12 N. E. R. 435; Anderson, Law Dict. 455.]

[1] Webster Dict., River; Anderson, Law Dict.; Bouv. Law Dict., River; S. *v.* Gilmanton, 14 N. H. 467; [Paine Lumber Co. *v.* U. S., 55 Fed. R. 854.]

Navigable stream.— As to what is a "navigable stream," see Munson *v.* Hungerford, 6 Barb. 265; Dawson *v.* James, 64 Ind. 162; [Shaw *v.* Oswego Iron Co., 10 Oreg. 371, 45 Am. R. 146; Burrows *v.* Whitvam, 59 Mich. 279; Murray *v.* Preston (Ky.), 50 S. W. R. 1095; Ten Eyck *v.* Town of Warwick, 75 Hun, 562, 27 N. Y. S. 536; East Hoquiam Boom & Logging Co. *v.* Nesson, 20 Wash. 142, 54 Pac. R. 1001.]

[2] The Montello, 20 Wall. 430; McManus *v.* Carmichael, 3 Iowa, 1; Tomlin *v.* Dubuque, etc. R. R. Co., 32 Iowa, 106, [7 Am. R. 176.]

[3] Attorney-General *v.* Woods, 108 Mass. 436, [11 Am. R. 380; Olive *v.* S., 86 Ala. 88, 5 S. R. 653, 4 L. R. A. 33; City of Oakland *v.* Oakland Water-works, 118 Cal. 160, 50 Pac. R. 277.]

[4] Miles *v.* Rose, 5 Taunt. 705; Murphy *v.* Ryan, Ir. Law R. 2 C. P. 143; Lynn *v.* Turner, Cowp. 86; Vooght *v.* Winch, 2 B. & Ald. 662; Rex *v.* Montague, 4 B. & C. 598; [Earl of Ilchester *v.* Raishleigh, 61 L. T. 477; Poynter *v.* Chipman, 8 Utah, 442, 32 Pac. R. 642.]

[5] P. *v.* Tibbetts, 19 N. Y. 523; Com. *v.* Chapin, 5 Pick. 199, [16 Am. D. 386;] Cobb *v.* Davenport, 3 Vroom, 369; Veazie *v.* Dwinel, 50 Me. 479; Flanagan *v.* Philadelphia, 42 Pa. St. 219; [Charleston & Sav. Ry. Co. *v.* Johnson, 73 Ga. 306.]

point during their entire length." When, therefore, "they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water," they are navigable rivers. "And they constitute navigable waters of the United States within the meaning of the act of congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continual highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which commerce is conducted by water." Within this distinction, Grand river, in Michigan, was held to constitute a portion of the "navigable waters of the United States."[1] And such also is the general doctrine in our state tribunals.[2] Even a river capable only of floating logs to market, and used for the purpose, has been adjudged navigable.[3] The Mississippi is navigable at St. Paul.[4] Fox river, in Wisconsin, not originally navigable, has been made so by artificial improvements.[5] In-

[1] The Daniel Ball, 10 Wall. 557, 563; [Chisholm *v.* Caines, 67 Fed. R. 285; Leovy *v.* U. S., 92 Fed. R. 344, 34 C. C. A. 392.]

[2] McManus *v.* Carmichael, 3 Iowa, 1; Tyler *v.* P., 8 Mich. 320; Depew *v.* Wabash & Erie Canal, 5 Ind. 8; Diedrich *v.* Northwestern Union Ry. Co., 42 Wis. 248, [24 Am. R. 399;] Wilson *v.* Forbes, 2 Dev. 30; Ingram *v.* Threadgill, 3 Dev. 59; Stuart *v.* Clark, 2 Swan (Tenn.), 9, [58 Am. D. 49;] Hickok *v.* Hine, 23 Ohio St. 523, [13 Am. R. 255; S. *v.* Eason, 114 N. C. 787, 19 S. E. R. 88, 41 Am. St. R. 811, 23 L. R. A. 520; Heyward *v.* Farmers', etc. Co., 42 S. C. 138, 19 S. E. R. 963, 46 Am. St. R. 702, 28 L. R. A. 42; Walker *v.* Allen, 72 Ala. 456; Sullivan *v.* Spotswood, 82 Ala. 163, 2 S. R. 716; Goodwell *v.* Bossier Police Jury, 38 La. An. 752; Hinkle *v.* Avery, 88 Iowa, 47, 55 N. W. R. 77, 45 Am. St. R. 224.]

[3] Olson *v.* Merrill, 42 Wis. 203. And see Veazie *v.* Dwinel, 50 Me. 479. But compare with Peters *v.* New Orleans, etc. R. R. Co., 56 Ala. 528; Ross *v.* Faust, 54 Ind. 471, [23 Am. R. 655;] American River Water Co. *v.* Amsden, 6 Cal. 443; Wethersfield *v.* Humphrey, 20 Conn. 218; [Falls Mfg. Co. *v.* Oconto River Imp. Co., 87 Wis. 134, 58 N. W. R. 257; Smith *v.* Fonda, 64 Miss. 551, 1 S. R. 757; Haines *v.* Hall, 17 Oreg. 165, 20 Pac. R. 831, 3 L. R. A. 609; Allison *v.* Davidson (Tenn. Ch. Ap.), 39 S. W. R. 905; Willow River Club *v.* Wade, 100 Wis. 86, 76 N. W. R. 273, 42 L. R. A. 305.]

[4] Castner *v.* Franklin, 1 Minn. 73. The Illinois court, rejecting the common American doctrine, has held the Mississippi not to be navigable. Houck *v.* Yates, 82 Ill. 179; [St. Anthony Falls Water Power Co. *v.* Board, etc. of St. Paul, 168 U. S. 349, 18 S. Ct. 1157, 42 L. ed. 497.]

[5] The Montello, 20 Wall. 430; [Bucki *v.* Cone, 25 Fla. 1, 6 S. R. 160. The Wabash is navigable for four hundred and fifty miles from its mouth.

terruption by falls does not prevent a river being navigable above.[1]

§ 304. High seas.— In England, for giving jurisdiction to the central criminal court under 4 and 5 Will. 4, ch. 36, § 22, wherein, to the words "high seas," are added "and other places within the jurisdiction of the admiralty of England," a British vessel off Whampoa in China, stated in the case to be twenty or thirty miles from the sea on a river, and no evidence appearing whether or not the tide flowed there, was held to be covered by the statute.[2] Our own courts have had occasion to consider the meaning of the term "high seas" standing in somewhat different relations. It includes, under our national legislation, waters of our own and foreign coasts within the marine league of the shore, and therefore parts of the adjoining territory, when without the boundaries of counties; but not, on our own coast, when within such boundaries.[3] Nor does it extend to our great lakes.[4] With us, an American vessel off the before-mentioned Whampoa, said in the case to be on the river Tigris thirty-five miles from its mouth, was adjudged not to be on the high seas.[5] It is otherwise with one lying in a harbor, fastened by cables to the shore, and communicating by her boats with the land, yet not within any inclosed dock, or at any pier or wharf.[6] Waters of a bay entirely landlocked and inclosed by reefs,[7] and an inclosed dock in a foreign port, are respectively deemed not of the high seas. "The admiralty," said Story, J., "has never held that the waters of havens, where the tide ebbs and flows, are properly the high seas, unless those waters are without low-water mark."[8] But an open roadstead is such.[9] And —

S. *v.* Wabash Paper Co., 21 Ind. Ap. 167, 51 N. E. R. 949. The Rio Grande is not navigable in New Mexico. U. S. *v.* Rio Grande Dam & Irrigation Co., 174 U. S. 690, 19 S. Ct. 770, 43 L. ed. 1136.]

[1] Spooner *v.* McConnell, 1 McLean, 337; [*In re* State Reservation Com'rs, 37 Hun, 537.]

[2] Rex *v.* Allen, 7 Car. & P. 664, 1 Moody, 494. See also Rex *v.* Depardo, 1 Taunt. 26.

[3] U. S. *v.* Pirates, 5 Wheat. 184, 200; U. S. *v.* Smith, 1 Mason, 147; U. S. *v.* Ross, 1 Gallis. 624; U. S. *v.* Grush, 5 Mason, 290; Johnson *v.* Merchandise, 2 Paine, 601.

[4] Miller's Case, 1 Brown, Adm. 156.

[5] U. S. *v.* Wiltberger, 5 Wheat. 76.

[6] U. S. *v.* Seagrist, 4 Blatch. 420.

[7] U. S. *v.* Robinson, 4 Mason, 307.

[8] U. S. *v.* Hamilton, 1 Mason, 152.

[9] U. S. *v.* Pirates, 5 Wheat. 184, 200; U. S. *v.* Ross, 1 Gallis. 624. See U. S. *v.* Davis, 2 Sumner, 482.

Sea.— There appears to be a sense in which, relating to other questions than those now in contemplation, the word "sea" comprehends all waters extending inland as far as the tide flows.[1]

§ 305. Sea-shore.— The "sea-shore" is, in the words of Parsons, C. J., "all the ground between the ordinary high-water mark and low-water mark."[2]

III. The Thing Done.

§ 306. Utter — Uttering.— To "utter" is a verb of common use in the law of crimes, particularly in forgery, counterfeiting, and the like.[3] It means to offer by some overt act; as, one who thus offers another a forged instrument or a piece of counterfeit coin, intending it shall be received as good, utters it, whether accepted or not. The offer, it is said, need not proceed to a tender.[4] Hence the word "utter" is far from being the equivalent of "pass."[5] But there must be a complete attempt to do the specific forbidden thing,[6] though there may be

[1] Thackarey *v.* The Farmer, Gilpin, 524, 1 Curt. Com., § 38.

Beyond seas.— For "beyond seas," see *ante*, § 261*b*; Campbell *v.* Rankins, 2 Fairf. 103; Mason *v.* Johnson, 24 Ill. 159, [76 Am. D. 740; Brown *v.* Heard, 85 Me. 294, 27 Atl. R. 182; Wright *v.* Seymour, 69 Cal. 122, 10 Pac. R. 323.]

[2] Storer *v.* Freeman, 6 Mass. 435, 439, [4 Am. D. 155.] 3 Kent. Com. 431. And see Com. *v.* Charlestown, 1 Pick. 180, 182, [11 Am. D. 161.]

Beach.— "By a beach is to be understood the shore or strand." Weston, C. J., in Cutts *v.* Hussey, 15 Me. 237, 241; S. P., East Hampton *v.* Kirk, 6 Hun, 257. Yet it is said to have no such inflexible meaning as necessarily to denote the land between high and low-water mark. Merwin *v.* Wheeler, 41 Conn. 14; [Snow *v.* Mt. Desert Island R. E. Co., 84 Me. 14, 24 Atl. R. 429, 30 Am. St. R. 331, 17 L. R. A. 280; Litchfield *v.* Scituate, 136 Mass. 39; Stillman *v.* Burfund, 47 N. Y. S. 280, 21 Ap. Div. 13.]

[3] Crim. Law, I, §§ 359, 437, 765; II, §§ 286, 288, 605–608; Crim. Pro., II, §§ 259*i*, 261, 263, 271, 425, 426, 442, 447, 452, 453, 460, 482.

[4] Reg. *v.* Welch, 2 Den. C. C. 78, 1 Eng. L. & Eq. 588, 15 Jur. 136; s. c. *nom.* Reg. *v.* Welsh, Temp. & M. 409; Rex *v.* Arscott, 6 Car. & P. 408; Reg. *v.* Ion, 2 Den. C. C. 475, 14 Eng. L. & Eq. 556; Reg. *v.* Radford, 1 Car. & K. 707, 1 Den. C. C. 59; Rex *v.* Martin, 1 Moody, 483, 7 Car. & P. 549; U. S. *v.* Mitchell, Bald. 366; P. *v.* Brigham, 2 Mich. 550. Said Tilghman, C. J., in Com. *v.* Searle, 2 Binn. 332, 339, [4 Am. D. 446,] "to *utter* and *publish* is to declare or assert, directly or indirectly, by words or actions, that a note is *good*. To offer in payment would be an uttering or publishing; but it is not *passed* until it is received by the person to whom it is offered." See, however, Rex *v.* Shukard, Russ. & Ry. 200.

[5] P. *v.* Tomlinson, 35 Cal. 503. See U. S. *v.* Nelson, 1 Abb. (U. S.) 135.

[6] See and compare Reg. *v.* Lough-

a conditional uttering, as well as any other, which will be criminal.[1] One utters a threatening letter who puts it where the person addressed will be likely to see and read it, or another to find it, and it is found and conveyed to such person.[2] So to place on record a forged deed of land is to utter the deed.[3]

In what county — (*Analogous to attempt*).— The majority of the English judges held that one who gave his innocent servant forged stamps, to be transmitted by him to another person in another county, might be treated as having uttered them where he thus passed them out of his manual possession.[4] As this delivery to the servant, who, in these circumstances, was the innocent agent[5] of the master, could have no greater effect than the putting of them into a letter-box properly addressed,[6] this case, if sound, shows how absolutely the doctrine of uttering is within that of attempt.

§ 307. Put off.[7] — The words "pay or put off," in a statute, are not satisfied by a mere uttering or by a tender; there must be an acceptance. One who had bargained away and counted out counterfeit coin, but the transfer was not complete when he was arrested, was held not to have put off the coin.[8]

§ 308. Passing — a thing of real or assumed value is putting it off in payment or exchange.[9] More than an offer is meant, it must be received.[10] But a concurrent agreement to take it back should it not prove good will not prevent the act from

ran, 3 Crawf. & Dix C. C. 333; Rex *v.* Collicott, Russ. & Ry. 212, 4 Taunt. 300; Reg. *v.* Heywood, 2 Car. & K. 352; S. *v.* Beeler, 1 Brev. 482; [Reg. *v.* Colclough, 15 Cox, C. C. 92; Lockard *v.* Com., 87 Ky. 201, 8 S. W. R. 266; Thurmond *v.* S., 25 Tex. Ap. 366, 8 S. W. R. 473; Smith *v.* S., 20 Neb. 284, 29 N. W. R. 923, 57 Am. R. 832; S. *v.* Calkins, 73 Iowa, 128, 34 N. W. R. 777; S. *v.* Sherwood, 90 Iowa, 550, 58 N. W. R. 911, 48 Am. St. R. 461.]

[1] Reg. *v.* Cooke, 8 Car. & P. 582; Rex *v.* Birkett, Russ. & Ry. 86.

[2] Reg. *v.* Jones, 5 Cox, C. C. 226. See Crim. Law, II, § 1200; [Reg. *v.* Finkelstein, 16 Cox, C. C. 107.]

[3] U. S. *v.* Brooks, 3 McAr. 315; [Espalla *v.* S., 108 Ala. 38, 19 S. R. 82; P. *v.* Swetland, 77 Mich. 53, 43 N. W. R. 779; P. *v.* Baker, 100 Cal. 188, 34 Pac. R. 649, 38 Am. St. R. 276; Preston *v.* S. (Tex. Cr. R.), 48 S. W. R. 581.]

[4] Rex *v.* Collicott, Russ. & Ry. 212, 4 Taunt. 300.

[5] Crim. Law, I, §§ 310, 651.

[6] Crim. Pro., I, §§ 53, 61.

[7] See Crim. Law, II, §§ 288, 608.

[8] Rex *v.* Wooldridge, 1 Leach, 307, 1 East, P. C. 179. And see Rex *v.* Giles, 1 Moody, 166; Rex *v.* Palmer, Russ. & Ry. 72, 1 New R. 96, 2 Leach, 978.

[9] U. S. *v.* Mitchell, Bald. 366; U. S. *v.* Nelson, 1 Abb. (U. S.) 135.

[10] *Ante*, § 306, note.

constituting a passing.[1] A mere pledge was by the majority of the Tennessee judges held not to be adequate.[2] Yet how, in principle, does the "passing" of a thing in pledge differ from the like in conditional payment?

§ 309. Show forth in evidence.— These words, in a statute, refer to a judicial proceeding, wherein the thing shown forth is offered in evidence. They are not, therefore, an equivalent for "utter" or "publish."[3]

§ 310. Burn — Burning.— The word "burn" enters into the definition of arson at the common law; and it occurs in many statutes.[4] It means to consume by fire. To blacken the wood without wasting any of the fibres is not to burn it, yet there need be no blaze.[5] And the burning of any part, however small, completes the offense, the same as of the whole.[6] Thus, to char the floor in a single place, so as to destroy any of the fibres of the wood, is a sufficient burning in arson.[7]

§ 311. Set fire to.— As the wasting of any particles of the wood, to however small an extent, constitutes a burning, and as the setting of fire thereto without such wasting is a physical impossibility, there can be no wide difference between the terms "burn" and "set fire to." And in the books they are generally regarded as substantially or absolutely synonymous.[8] To constitute the setting of fire to a building there need not be a flame visible,[9] yet there must be some consumption of the wood,[10] — the precise description of the meaning of the word burn. Yet it does not necessarily follow, that, where the in-

[1] 4 Perdue *v.* S., 2 Humph. 494.

[2] Gentry *v.* S., 3 Yerg. 451.

[3] S. *v.* Britt, 3 Dev. 122; S. *v.* Stanton, 1 Ire. 424.

Having in possession.— As to "having in possession," see Com. *v.* Whitmarsh, 4 Pick. 233; Com. *v.* Morse, 2 Mass. 128; Rex *v.* Rowley, Russ. & Ry. 110. [See Webb *v.* S. (Tex. Cr. R.), 44 S. W. R. 498.]

[4] Crim. Law, I, § 559; II, §§ 8, 17; Crim. Pro., II, §§ 46, 47.

[5] Crim. Law, II, § 10; Com. *v.* Tucker, 110 Mass. 403; Reg. *v.* Russell, Car. & M. 541; Reg. *v.* Parker, 9 Car. & P. 45; Rex *v.* Stallion, 1 Moody, 398; P. *v.* Simpson, 50 Cal. 304; [Woolsey *v.* S., 30 Tex. Ap. 346, 17 S. W. R. 546.]

[6] Com. *v.* Van Shaack, 16 Mass. 105; S. *v.* Mitchell, 5 Ire. 350; [Smith *v.* S., 23 Tex. Ap. 357, 5 S. W. R. 219, 59 Am. R. 773.]

[7] Reg. *v.* Parker, *supra;* S. *v.* Sandy, 3 Ire. 570; Com. *v.* Betton, 5 Cush. 427; P. *v.* Cotteral, 18 Johns. 115; P. *v.* Butler, 16 Johns. 203; [Blanchette *v.* S. (Tex. Cr. R.), 24 S. W. R. 507.]

[8] 2 East, P. C. 1020; Com. *v.* Van Shaack, 16 Mass. 105; S. *v.* Babcock, 51 Vt. 570; Lockett *v.* S., 63 Ala. 5.

[9] Rex *v.* Stallion, 1 Moody, 398.

[10] Rex *v.* Taylor, 1 Leach, 49, 2 East, P. C. 1020.

dictment is on a statute the word wherein is "burn," it may employ the substantially synonymous term "set fire to."[1] On this question judicial opinion is divided.[2] So also a difference may be wrought by varying the expression; as, in Vermont, where the statutory words are "wilfully and maliciously set fire, with intent to burn, to the dwelling-house of another." And they are held not to require any consumption of the wood of the building. The English doctrine was admitted to be otherwise; but said the court: "Our statute contains the important qualifying words, '*with intent to burn*,' which are not contained in any of the English statutes; most clearly implying that the offense intended to be covered by the statute was something short of an actual burning." The expression may "reasonably and fairly be understood the same as *put fire to*, or *place fire upon*, or *against*, or *put fire in connection with*." Thus the language and intent of the enactment are brought into harmony.[3]

§ 312. Break — Breaking.[4] — The verb "to break" occurs in various connections in our legal language.[5] But its chief use, whence mainly we derive its meanings, is in the law of burglary and the analogous statutory breakings.[6] Applied to a building, it signifies to make an opening, or way of admission, into it, and it does not necessarily require any destruction of parts. It is a breaking, for example, to lift the latch or draw the bolt of a door not otherwise fastened,[7] to push upward or lower a window

[1] Crim. Pro., I, § 612.

[2] Id., § 618; II, § 47; S. *v.* Taylor, 45 Me. 322; Howe *v.* Com., 5 Grat. 664; Mary *v.* S., 24 Ark. 44, 47, [81 Am. D. 60;] Cochrane *v.* S., 6 Md. 400, 405; [S. *v.* Hall, 93 N. C. 571.]

[3] S. *v.* Dennin, 32 Vt. 158, 164, 165.

[4] Crim. Law, II, § 91.

[5] As, in the law of arrest, *ante*, §§ 277, 290; Crim. Pro., I, §§ 194–204; and prison-breach. Crim. Law, II, §§ 1070–1083. And see Ryan *v.* Shilcock, 7 Exch. 72; Samanni *v.* Com., 16 Grat. 543.

[6] Crim. Law, I, § 559; II, §§ 90, 91, 118 and note.

[7] J. Kel. 67; Rex *v.* Gray, 1 Stra. 481; Reg. *v.* Wheeldon, 8 Car. & P. 747; S. *v.* Wilson, Coxe, 439, [1 Am. D. 216;] Curtis *v.* Hubbard, 1 Hill (N. Y.), 336, 4 Hill (N. Y.), 437, [40 Am. D. 292;] Bass *v.* S., 1 Lea, 444; McCourt *v.* P., 64 N. Y. 583; Rex *v.* Robinson, 1 Moody, 327; S. *v.* Robertson, 32 Tex. 159; Owen's Case, 1 Lewin, 35. And see S. *v.* Newbegin, 25 Me. 500; Rex *v.* Bailey, 1 Moody, 23; Lowder *v.* S., 63 Ala. 143, [35 Am. R. 9;] *ante*, § 290; [S. *v.* Hecox, 83 Mo. 531; S. *v.* Woods, 137 Mo. 6, 38 S. W. R. 722; S. *v.* Moore, 117 Mo. 395, 22 S. W. R. 1086; S. *v.* O'Brien, 81 Iowa, 93, 46 N. W. R. 861; S. *v.* Groning, 33 Kan. 18, 5 Pac. R. 446; Kent *v.* S., 84 Ga. 438, 11 S. E. R. 355, 20 Am. St. R. 376; Daniels *v.* S., 78 Ga. 98; Webb *v.* Com. (Ky.), 35 S. W. R. 1038; Ferguson *v.* S., 52 Neb. 432, 72

held by a pulley-weight,[1] or to raise a door constructed to be kept down simply by its own gravitation.[2] So it is a breaking of a corn-crib to bore into it a hole whence to draw out the kernels.[3] Nor is it less a breaking if the way to the place to be entered is made by fire.[4] Or a constructive breaking, as it is termed, sufficient in burglary, occurs where one procures by craft,[5] or by threats and intimidation,[6] a person within the building to open the door. To push open a closely fitting door, which has no lock, latch or other fastening, is to break the place.[7] And the removal of a portion of the building, however small, as a pane of glass, or any part of a shutter, is suffi-

N. W. R. 590, 66 Am. St. R. 512; Metz *v.* S., 46 Neb. 547, 65 N. W. R. 190; Anderson *v.* S., 17 Tex. Ap. 305; Gonzales *v.* S. (Tex. Cr. R.), 50 S. W. R. 1018; Hedrick *v.* S. (Tex. Cr. R.), 51 S. W. R. 252.]

[1] Rex *v.* Haines, Russ. & Ry. 451; Rex *v.* Hall, Russ. & Ry. 355; S. *v.* Carpenter, 1 Houst. Crim. 367; Dennis *v.* P., 27 Mich. 151; S. *v.* Tutt, 63 Mo. 595. And see Rex *v.* Robinson, 1 Moody, 327; Rex *v.* McKearney, Jebb, 99; Rex *v.* Bailey, Russ. & Ry. 341; Reg. *v.* Bird, 9 Car. & P. 44.

[2] Rex *v.* Russell, 1 Moody, 377; Rex *v.* Brown, 2 East, P. C. 487, 2 Leach, 1016, note. But if fastenings are intended to be put upon a trap-door, it has been held that lifting it up is not a breaking. Rex *v.* Lawrence, 4 Car. & P. 231. And see Rex *v.* Callan, Russ. & Ry. 157; Hunter *v.* Com., 7 Grat. 641, [56 Am. D. 121;] Roscoe, Crim. Ev. 341; [Nash *v.* S., 20 Tex. Ap. 384, 54 Am. R. 529. Removing a prop from an upright door held in position by that means is breaking. S. *v.* Powell (Kan.), 58 Pac. R. 968; Rose *v.* Com. (Ky.), 40 S. W. R. 245.]

[3] Walker *v.* S., 63 Ala. 49, [35 Am. R. 1; S. *v.* Crawford, 8 N. D. 545, 80 N. W. R. 193, 73 Am. St. R. 772, 46 L. R. A. 312.]

[4] White *v.* S., 49 Ala. 344, 349; [Washington *v.* S., 87 Ga. 12, 13 S. E. R. 12.]

[5] Crim. Law, II, § 91; Rolland *v.* Com., 82 Pa. St. 306, [22 Am. R. 758;] Johnston *v.* Com., 85 Pa. St. 54, [27 Am. R. 622;] Parke *v.* Evans, Hob. 62*a*; Rex *v.* Hawkins, 2 East, P. C. 485; Ducher *v.* S., 18 Ohio, 308; Rex *v.* Bigley, 1 Crawf. & Dix, C. C. 202; S. *v.* Carter, 1 Houst. Crim. 402; Clarke *v.* Com., 25 Grat. 908. But see S. *v.* Henry, 9 Ire. 463. [Gaining admission to an express car by hiding in a chest, and causing the same to be shipped in the car, is a breaking. Nichols *v.* S., 68 Wis. 416, 32 N. W. R. 543. Entering a store during business hours at night, through an open door and in the same manner as other persons, with intent to remain concealed until the closing of the store and committing theft, is not constructive breaking within the Texas statute against entering a house by force, threats or fraud at night, or in like manner by day and remaining concealed therein until night, with intent, etc. Edwards *v.* S., 36 Tex. Cr. R. 387, 37 S. W. R. 438.]

[6] Rex *v.* Swallow, 1 Russ. Crimes (3d Eng. ed.), 793.

[7] Finch *v.* Com., 14 Grat. 643; [May *v.* S., 40 Fla. 426, 24 S. R. 498; Grimes *v.* S., 77 Ga. 762, 4 Am. St. R. 796; S. *v.* Conners, 95 Iowa, 485, 64 N. W. R. 295; Sparks *v.* S., 34 Tex. Cr. R. 86, 29 S. W. R. 264; Wagner *v.* S. (Tex. Cr. R.), 47 S. W. R. 372.

cient.[1] Even the cutting and tearing down of a netting of twine, nailed at the top, bottom and sides of a window purposely left open at night, so that an entry could be effected, has been adjudged a breaking in burglary. "It makes no difference," observed the court, "whether the door is barred and bolted, or the window secured or not; it is enough that the house is secured in the ordinary way; so that by the carelessness of the owner in leaving the door or window open the party accused of burglary be not tempted to enter. Shutting the window-blinds and leaving the windows open for air is a common mode of closing a house in the warm season; if the blinds are forced, it is a breaking."[2] But if a door or window is open a little way, it is not a breaking to push it further open.[3] The thing displaced must be a part of the freehold.[4] Yet as the chimney is never to be shut, an entrance there is a breaking, though nothing is moved.[5] It is no breaking to walk into an open door or window,[6] or crawl through a sufficient hole.[7]

[1] Rex *v.* Perkes, 1 Car. & P. 300; Reg. *v.* Bird, 9 Car. & P. 44; Anonymous, 1 Anderson, 115; Gibbon's Case, Foster, 107; Rex *v.* Bailey, Russ. & Ry. 341, 1 Moody, 23; Rex *v.* Davis, Russ. & Ry. 499; Rex *v.* Hughes, 1 Leach, 406, 2 East, P. C. 491; [Kelley *v.* Com. (Ky.), 54 S. W. R. 949.]

[2] Com. *v.* Stephenson, 8 Pick. 354, opinion by Parker, C. J. And see P. *v.* Nolan, 22 Mich. 229; [Sims *v.* S., 136 Ind. 358, 36 N. E. R. 278.]

[3] Rex *v.* Smith, 1 Moody, 178, Car. Crim. Law (3d ed.), 293; Com. *v.* Steward, 7 Dane Abr. 136. The majority of the Scotch judges held that it is not house-breaking to enter by means of a key left in the door locked on the outside. Alston's Case, 1 Swinton, 433; [Rose *v.* Com. (Ky.), 40 S. W. R. 245. Unlocking the door to an apartment by means of a key on the same ring with key to defendant's own apartment is breaking. Com. *v.* Ballard (Ky.), 38 S. W. R. 678; P. *v.* Dupree, 98 Mich. 26, 56 N. W. R. 1046.]

[4] Com. *v.* Trimmer, 1 Mass. 476; Rex *v.* Paine, 7 Car. & P. 135; *ante*, § 281. [Digging under an unfloored log-house, and thus effecting an entrance, constitutes breaking. Pressley *v.* S., 111 Ala. 84, 20 S. R. 647.]

[5] Rex *v.* Brice, Russ. & Ry. 450; S. *v.* Boon, 13 Ire. 244, [57 Am. D. 555;] Stone *v.* S., 63 Ala. 115, 119; Walker *v.* S., 52 Ala. 376; [Olds *v.* S., 97 Ala. 81, 12 S. R. 409.]

[6] S. *v.* Boon, *supra;* Rex *v.* Lewis, 2 Car. & P. 628; Com. *v.* Steward, 7 Dane Abr. 136; Anonymous, J. Kel. 70; S. *v.* Wilson, Coxe, 439; Pines *v.* S., 50 Ala. 153; [McGrath *v.* S., 25 Neb. 780, 41 N. W. R. 780; Milton *v.* S., 24 Tex. App. 287, 6 S. W. R. 303; Williams *v.* S. (Tex. Ap.), 13 S. W. R. 609; Costello *v.* S. (Tex. Cr. R.), 21 S. W. R. 360.]

[7] Stone *v.* S., *supra;* [Miller *v.* S., 77 Ala. 41. Entering by a hole used for the passage of a band to and from the machinery of a gin house, where it is necessary to climb to the second story of the building and push the band to one side to make room for

§ 313. Forcibly break.— In Ohio, under a statute making it criminal to "forcibly break and enter" a building, actual force is held not to be necessary; but a breaking at common law, such as our last section describes, is sufficient.[1]

§ 314. Wound — Wounding.— A "wound" is a breach of the skin, or of the skin and flesh, produced by external violence.[2] Separation of only the cuticle or upper membrane of the skin is not sufficient — all of it must be parted; yet the injury need not extend into the flesh, and there need not be effusion of blood.[3] Without such parting of the skin, it seems, there can be no wounding; for a man was held not to be wounded when his person was bruised and his collar-bone fractured.[4] Yet a disruption of the internal skin — as, that within the mouth,[5] or the membrane lining the urethra[6] — will suffice. Moreover, in the adjudged law, the meaning of the word has been considerably varied by the subject, and the connection in which it stands. Under 9 Geo. 1 (ch. 22, § 1), making punishable those who should "unlawfully and maliciously kill, maim or *wound* any cattle," etc., it was held that driving a nail into the frog of a horse's foot was a wounding,— "which word 'wound,'" the court said, "appears to be used as contradistinguished from a permanent injury, such as maiming."[7] Statutes which a good while prevailed in England

the body, is breaking. Marshall *v.* S., 94 Ga. 589, 20 S. E. R. 432. But see Knotts *v.* S. (Tex. Cr. R.) 32 S. W. R. 532.]

[1] Crim. Law, II, § 118, note; Ducher *v.* S., 18 Ohio, 308; Timmons *v.* S., 34 Ohio St. 426, [32 Am. R. 376.]

Forcible passing.— The passing of a toll-gate, after the keeper's refusal because of the non-payment of toll, is a "*forcible passing.*" Camden, etc. Turnpike *v.* Fowler, 4 Zab. 205.

Damaging.— As to what is a "damaging," see Reg. *v.* Whittingham, 9 Car. & P. 234; Rex *v.* Tracy, Russ. & Ry. 452; Reg. *v.* Norris, 9 Car. & P. 241; Reg. *v.* Fisher, Law Rep. 1 C. C. 7, 10 Cox, C. C. 146.

[2] "In criminal cases, the definition of a wound is an injury to the person by which the skin is broken." S. *v.* Leonard, 22 Mo. 449, 451; [Jones *v.* Com., 87 Va. 63, 12 S. E. R. 220.]

[3] Reg. *v.* McLoughlin, 8 Car. & P. 635; Rex *v.* Beckett, 1 Moody & R. 526; Com. *v.* Gallagher, 6 Met. 565; Moriarty *v.* Brooks, 6 Car. & P. 684; Rex *v.* Wood, 1 Moody, 278; Reg. *v.* Smith, 8 Car. & P. 173. And see Reg. *v.* Price, 8 Car. & P. 282.

[4] Rex *v.* Wood, 4 Car. & P. 381.

[5] Reg. *v.* Smith, 8 Car. & P. 173; Reg. *v.* Warman, 1 Den. C. C. 183.

[6] Reg. *v.* Waltham, 3 Cox, C. C. 442. See Reg. *v.* Jones, 3 Cox, C. C. 441.

[7] Haywood's Case, 2 East, P. C. 1076, 1077. According to the report of this case by Russell and Ryan (Rex *v.* Haywood, Russ. & Ry. 16), the sole question submitted to the judges was whether an injury not permanent is within the statute.

were 9 Geo. 4 (ch. 31, § 12), and 7 Will. 4 and 1 Vict. (ch. 85, § 4), superseding it, the words whereof are "stab, cut or wound;" and it was decided, not without some differences of opinion, that, as the first two of these three connected words imply the use of some instrument, so must also the last one;[1] and that, therefore, a wound inflicted with the teeth, as in biting off the finger, ear or nose, is not within the statute.[2] The kind of instrument was immaterial; a blow from a hammer,[3] from the butt-end of a gun,[4] from a bludgeon,[5] or a kick with a shoe,[6] parting the skin, being as good in law as a cut from a sharp weapon. Nor was it any objection that the instrument, instead of inflicting the wound directly, fell on some other thing,— for example, the injured person's hat,— and the latter broke or cut the skin.[7] But oil of vitriol, thrown on the face, was not deemed an instrument to make the injury a wound within the statute.[8] The later enactments of 24 and 25 Vict. (ch. 97, § 40), employing the words "kill, maim or wound any cattle," and 24 and 25 Vict. (ch. 100, § 11), the expression wherein is "wound, or cause any grievous bodily harm to, any person," are differently construed. They do not require, to inflict a "wound," the use of any instrument. Thus, under the former, a wound in the mouth of a horse may be created by drawing out its tongue with the hand.[9]

§ 315. Cut—Cutting—Stab—Stabbing.— Where the words "cut or stab" are used as in the before-mentioned English statutes,[10] they "relate only to such wounds as are made by an instrument capable of stabbing or cutting; stabbing being properly as the injury was to a part where nature has provided no skin, or where perhaps the hoof may be deemed the skin, the decision is not absolutely in conflict with the general doctrine. Still perhaps the particular wording of this statute required the term "wound" to be construed as meaning something different from what it does in the other statutes.

[1] See *ante*, § 245.

[2] Jenning's Case, 2 Lewin, 130; Elmsly's Case, 2 Lewin, 126; Rex *v.* Stevens, 1 Moody, 409; Rex *v.* Harris, 7 Car. & P. 446. Even according to the other report,

[3] Reg. *v.* Smith, 8 Car. & P. 173; Rex *v.* Withers, 1 Moody, 294, 4 Car. & P. 446; Rex *v.* Hughes, 2 Car. & P. 420.

[4] Rex *v.* Sheard, 2 Moody, 13, 7 Car. & P. 846.

[5] Rex *v.* Payne, 4 Car. & P. 558.

[6] Rex *v.* Briggs, 1 Moody, 318, 1 Lewin, 61.

[7] Rex *v.* Sheard, 2 Moody, 13, 7 Car. & P. 846.

[8] Rex *v.* Morrow, 1 Moody, 456; Henshall's Case, 2 Lewin, 135. And see 1 Russ. Crimes (3d Eng. ed.), 731.

[9] Reg. *v.* Bullock, Law R. 1 C. C. 115, 11 Cox, C. C. 125.

[10] *Ante*, § 314.

erly a wounding with a pointed instrument, and cutting being a wounding with an instrument having a sharp edge. And if the indictment be for cutting, evidence of a stab will not support the charge; for, as the statute uses the words in the alternate, 'stab or cut,' so as to distinguish them, the distinction must be attended to in the indictment."[1] Yet cutting or stabbing need not have been the purpose for which the instrument was manufactured. For example, a blow from the sharp claw of a hammer,[2] or the sharpened point of an iron crow,[3] may inflict a cut; but not from the blunt end of a hammer,[4] or from a square iron bar producing a contused or lacerated gash,[5] or from the scabbard of a sword,[6] or from the handle of a windlass.[7] It was held in New Jersey that, if the nose is bitten off, it is cut off,[8]— a conclusion not in accord with the English doctrine.[9] Under 1 Jac. 1 (ch. 8, § 2), employing the words "stab or thrust any person," Hawkins says, "the killing of a man with a hammer, or such like instrument, which cannot come properly under the words 'thrust' or 'stab,' is not a killing within the statute."[10] The knife, to stab, need not do more than penetrate the skin and draw blood; at least, a depth of a quarter of an inch is enough.[11]

§ 316. Maim — Maiming.— The word "maim" is not, according to the better use, a synonym for mayhem, which is a particular sort of aggravated maim.[12] But, like mayhem, it im-

[1] 1 Russ. Crimes (3d Eng. ed.), 728; *ante*, § 298; Rex *v.* McDermot, Russ. & Ry. 356. See, however, *ante*, §§ 247, 248; *post*, § 326.

[2] Rex *v.* Atkinson, Russ. & Ry. 104, 1 Russ. Crimes (3d Eng. ed.), 728.

[3] Rex *v.* Hayward, 1 Russ. Crimes (3d Eng. ed.), 729, Russ. & Ry. 78. And see Wilson *v.* Com., 3 Bush, 105.

[4] Rex *v.* Atkinson, *supra*.

[5] Rex *v.* Adams, 1 Russ. Crimes (3d Eng. ed.), 728.

[6] Rex *v.* Whitfield, 1 Russ. Crimes (3d Eng. ed.), 728.

[7] Anonymous, 1 Russ. Crimes (3d Eng. ed.), 728.

[8] S. *v.* Mairs, Coxe, 453.

[9] See Rex *v.* Harris, 7 Car. & P. 446; *ante*, § 314.

[10] 1 Hawk. P. C. (Curw. ed.), p. 90, § 8. And see Wilson *v.* Com., 3 Bush, 105; [Riggs *v.* Com. (Ky.), 33 S. W. R. 413.]

[11] Ward *v.* S., 56 Ga. 408.

[Shooting.— For definition of shooting, see Clark *v.* S., 84 Ga. 577, 10 S. E. R. 1094.]

[12] Crim. Law, II, §§ 1001, 1005; Toml. Law Dict., Maihem. But sometimes we find the word "maim" employed in the sense of mayhem; as, in 1 Hawk. P. C. (Curw. ed.), p. 107, §§ 1–3. And the indictment for mayhem appears properly to employ the expression "did feloniously maim," as an equivalent for the Latin *felonice mayhemavit*. Crim. Pro., II, § 852; 1 Chit. Crim. Law, 244; Com. *v.* Newell, 7 Mass. 245, 247; 3 Inst. 118; 2 Hawk. P. C. (Curw. ed.), p. 249, § 77.

plies a permanent injury[1] or crippling,[2] certainly when employed with reference to cattle.[3] And such appears to be its general legal meaning.[4] Mayhem, not unfrequently termed maim of the person, signifies more when we are speaking of the common law; namely, such a bodily injury as renders the sufferer less able in fighting to defend himself or annoy his adversary.[5] Under a statute making it a misdemeanor to cut off the ear with intent to maim, the court observed that the word was used in the popular sense of mutilate, and not as synonymous with mayhem.[6] Another statute provided in terms that maiming should consist in "unlawfully disabling a human being, by depriving him of the use of a limb or member, or rendering him lame, or defective in bodily vigor."[7] And there are still other statutory definitions in our states.[8] The English judges held that pouring acid into the eye of a mare, and thereby blinding her, is a maiming within 7 and 8 Geo. 4, ch. 30, § 16, which made it felony to "unlawfully and maliciously kill, maim or wound any cattle."[9]

§ 317. Slit the nose.[10] — These words are answered by any division, perpendicular or transverse, of the flesh or gristle.[11]

§ 318. Grievous bodily harm. — This "is a generic term, which may comprehend severe wounds or hurts of various kinds; but they are not required to be such as are likely to produce a permanent injury."[12] Much less need they put in hazard the life.[13] It is, for example, a grievous bodily harm to

[1] S. *v.* Briley, 8 Port. 472.

[2] Turman *v.* S., 4 Tex. Ap. 586.

[3] Id.; Roscoe, Crim. Ev. 375, 376; Reg. *v.* Jeans, 1 Car. & K. 539; *ante*, § 314. And see Baker *v.* S., 4 Pike, 56.

[4] S. *v.* Briley, 8 Port. 472, where the same meaning was given to the word "disabling," in the statute.

[5] Crim. Law, II, § 1001; 1 Hawk. P. C. (Curw. ed.) p. 107, §§ 1, 2; Roscoe, Crim. Ev. 785.

[6] Com. *v.* Newell, 7 Mass. 245, 249.

[7] Baker *v.* S., 4 Pike, 56.

[8] S. *v.* Briley, 8 Port. 472; S. *v.* Simmons, 3 Ala. 497.

Disfiguring. — As to the word "disfiguring," see Crim. Law, II, §§ 995, 1001; S. *v.* Smith, Cheves, 157.

[9] Rex *v.* Owens, 1 Moody, 205.

[10] See Crim. Law, II, § 1003; Crim. Pro., II, § 855.

[11] Rex *v.* Carroll, 1 Leach, 55; s. c. *nom.* Rex *v.* Carrol, 1 East, P. C. 394; [Com. *v.* Blaney, 133 Mass. 571.]

[12] Archb. New Crim. Pro. 264; Reg. *v.* Ashman, 1 Fost. & F. 88.

[13] Reg. *v.* McNeill, 1 Crawf. & Dix, C. C. 80. And see Rex *v.* Phillips, 1 Crawf. & Dix, C. C. 164; Reg. *v.* Caruthers, 3 Crawf. & Dix, C. C. 391; Rex *v.* Hunt, 1 Moody, 93; Roscoe, Crim. Ev. 786.

Great bodily harm, and serious bodily harm, — in the law of self-defense, are substantial equivalents. Lawlor *v.* P., 74 Ill. 228; [Branch *v.*

a female child to cut her private parts so as to enlarge them for the time, though the wound is not deep or dangerous, and the hymen is not broken.[1]

IV. The Objects Acted upon and the Instrumentalities.

§ 319. Tool — Instrument — Implement.— These words, commonly connected in statutes, are nearly but not exactly identical in meaning.[2] They severally denote some inanimate, physical thing, which can be used manually in the way of labor, skill or chicanery. For example, a game-cock, which acts of his own volition, is not an implement.[3] Nor is a printing-press, with the types and forms, which are serviceable only in combination with it, sufficiently light and exclusive for the hand to be a tool.[4] Also within statutes exempting property of debtors from attachment, the following are not tools: cart-wheels, and other parts or the whole of vehicles drawn by horses or by oxen;[5] a mill-saw worked by water-power;[6] the moulds of a paper manufacturer;[7] a portable machine for spinning and manufacturing cloth, of the sort used in factories, even though propelled by the hand;[8] and, it has been adjudged, a peg-machine operated by the hand-power of a single person.[9] So, in the criminal law, a crucible or other pot for melting or boiling is not a tool or instrument for counterfeiting.[10] But a press,[11] and likewise a mould[12] for coinage, have been held to be such within the English statutes; wherein, however, the meaning of these words is perhaps enlarged by their connection. Moreover, a collar, as it is called, employed for marking the edge of

S., 35 Tex. Cr. R. 304, 33 S. W. R. 356; George *v.* S., 21 Tex. Ap. 315, 17 S. W. R. 351; S. *v.* Clark, 80 Iowa, 517, 45 N. W. R. 910.]

[1] Rex *v.* Cox, Russ. & Ry. 362.

[2] See Atwood *v.* De Forest, 19 Conn. 513; Coolidge *v.* Choate, 11 Met. 79.

[3] *Ante*, § 216; Coolidge *v.* Choate, *supra*.

[4] Buckingham *v.* Billings, 13 Mass. 82; Danforth *v.* Woodward, 10 Pick. 423, [20 Am. D. 531;] Spooner *v.* Fletcher, 3 Vt. 133, [21 Am. D. 579.] *Contra*, Patten *v.* Smith, 4 Conn. 450, [10 Am. D. 166.]

[5] Daily *v.* May, 5 Mass. 313.

[6] Batchelder *v.* Shapleigh, 1 Fairf. 135, [25 Am. D. 213.]

[7] Burbank *v.* Reed, cited 2 Vt. 406.

[8] Kilburn *v.* Demming, 2 Vt. 404, [21 Am. D. 543.]

[9] Knox *v.* Chadbourne, 28 Me. 160, [48 Am. D. 487.]

[10] S. *v.* Bowman, 6 Vt. 594. See Wetherby *v.* Foster, 5 Vt. 136.

[11] Rex *v.* Bell, 1 East, P. C. 169, Foster, 430.

[12] Rex *v.* Lennard, 2 W. Bl. 807, 1 Leach, 90, 1 East, P. C. 170.

a counterfeit coin, the process being to force the coin through it by machinery, is an edger, edging tool, instrument, or engine.[1] Of course, if the statute speaks of an instrument *for* a purpose named, it must be meant to be used for the purpose; yet its adaptation need not be exclusive. Keys, for example, are instruments of house-breaking, or not, according to the intent of the person having them.[2]

§ 320. Deadly weapon.— The term "deadly weapon" occurs in the common law of homicide[3] and in various statutes. It is a weapon likely to produce death or great bodily injury.[4] In a case of doubt, the manner in which it was used may be taken into the account in determining whether or not it was deadly.[5] And when the facts are all established, the question whether a particular weapon was deadly or not is of law for the court;[6] yet practically, as in most instances the establishment of the facts awaits the rendition of the verdict, the jury must pass upon this question under instructions from the court.[7]

[1] Rex *v.* Moore, 1 Moody, 122, 2 Car. & P. 235.

[2] Reg. *v.* Oldham, 2 Den. C. C. 472, 14 Eng. L. & Eq. 568. And see Rex *v.* Palmer, 1 Moody & R. 70; Rex *v.* Johnson, Russ. & Ry. 492; [P. *v.* Jones (Mich.), 82 N. W. R. 806.

Burglar's tools.— See P. *v.* Reilly, 63 N. Y. S. 18, 49 Ap. Div. 218. Shoplifter's bag held not an implement designed or commonly used for the commission of larceny. P. *v.* Lyons, 41 N. Y. S. 646, 11 N. Y. Cr. R. 330, 18 Misc. R. 339; P. *v.* Leyba, 74 Cal. 407, 16 Pac. R. 200.]

[3] Crim. Law, II, §§ 680. 681, 690, 698; Foster, 294; Rex *v.* Howlett, 7 Car. & P. 274.

[4] S. *v.* Jarrott, 1 Ire. 76, 87; Rex *v.* Howlett, *supra;* Macklin's Case, 2 Lewin, 225; Briggs *v.* S., 6 Tex. Ap. 144, 146; McReynolds *v.* S., 4 Tex. Ap. 327; Com. *v.* Branham, 8 Bush, 387; [S. *v.* Rosener, 8 Wash. 42, 35 Pac. R. 357; Pittman *v.* S., 25 Fla. 648, 6 S. R. 437; Garner *v.* S., 28 Fla. 113, 9 S. R. 835, 29 Am. St. R. 232; McNary *v.* P., 32 Ill. Ap. 58; Long *v.* Com. (Ky.), 35 S. W. R. 919.]

[5] Crim. Law, II, § 681; Hunt *v.* S., 6 Tex. Ap. 663; Skidmore *v.* S., 43 Tex. 93; [Wilson *v.* S., 37 Tex. Cr. R. 156, 38 S. W. R. 1013; P. *v.* Rodrigo, 69 Cal. 601, 11 Pac. R. 481; S. *v.* Sinclair, 120 N. C. 603, 27 S. E. R. 77.]

[6] Crim. Law, II, § 680; S. *v.* Collins, 8 Ire. 407; S. *v.* Cæsar, 9 Ire. 391; S. *v.* Craton, 6 Ire. 164.

[7] Kouns *v.* S., 3 Tex. Ap. 13; Flournoy *v.* S., 16 Tex. 31. Curtis, J., speaking to a case where the statutory word was "dangerous," said: "In many cases it is practicable for the court to declare that a particular weapon was, or was not, a dangerous weapon, within the meaning of the law. And when it is practicable, it is matter of law, and the court must take the responsibility of so declaring. But where the question is whether an assault with a dangerous weapon has been proved, and the weapon might be dangerous to life, or not, according to the manner in which it was used, or according to the part of the body attempted to be struck, I think a more general direction must be given to the jury;

Dangerous weapon.— Some of the statutes employ the term "dangerous weapon."[1] It is a milder term than the other, yet otherwise of the same meaning. A weapon may be dangerous without being deadly.[2] Upon an indictment for robbing the mail and putting the mail-carrier's life in jeopardy, it was considered that a sword or pistol in the hand of the robber, through terror whereof the robbery was effected, is a "dangerous weapon," though the sword is not drawn or the pistol not pointed.[3] And a pistol may be a dangerous weapon, even without proof of its being loaded.[4]

§ 321. Offensive weapon.— These words occur in some former and perhaps present English statutes, forbidding the doing of things by one "armed with fire-arms or other offensive arms

and it must be left for them to decide whether the assault, if committed, was with a dangerous weapon." U. S. *v.* Small, 2 Curt. C. C. 241, 243. See also S. *v.* Jarrott, 1 Ire. 76; Rex *v.* Grice, 7 Car. & P. 803; S. *v.* Dineen, 10 Minn. 407; Skidmore *v.* S., *supra;* Com. *v.* O'Brien, 119 Mass. 342, [20 Am. R. 325. The following have been held to be deadly weapons: Iron weight, Long *v.* Com. (Ky.), 35 S. W. R. 919; four-tined pitchfork, S. *v.* Smith, 57 Kan. 673, 47 Pac. R. 541; knife, S. *v.* Warren, 1 Marv. (Del.) 487, 41 Atl. R. 190; Terr. *v.* Armigo, 7 N. M. 571, 37 Pac. R. 1117; Ellison *v.* S. (Tex. Cr. R.), 34 S. W. R. 945; S. *v.* Henn, 39 Minn. 476, 40 N. W. R. 572; razor, S. *v.* Clayborne, 14 Wash. 622, 45 Pac. R. 303; stick of stove-wood, Henry *v.* S. (Tex. Cr. R.), 49 S. W. R. 96; corn knife, Montgomery *v.* Com. (Va.), 36 S. E. R. 371; sledge hammer, Philpot *v.* Com., 86 Ky. 595, 6 S. W. R. 455; piece of iron gas pipe, S. *v.* Drumms (Mo.), 56 S. W. R. 1086; hoe, Hamilton *v.* P., 113 Ill. 34, 55 Am. R. 396; loaded gun or pistol, S. *v.* Doyle, 107 Mo. 36, 17 S. W. R. 751; Hamilton *v.* P., *supra;* Smith *v.* S. (Tex. Cr. R.), 57 S. W. R. 949. The following have been held not *per se* deadly weapons: Brass knuckles, Ballard *v.* S. (Tex. Ap.), 13 S. W. R. 674; pistol, Branch *v.* S., 35 Tex. Cr. R. 304, 33 S. W. R. 356. An ax was held to be a deadly weapon in S. *v.* Shields, 110 N. C. 492, 14 S. E. R. 779; and not to be, necessarily, in Gladney *v.* S. (Tex. Ap.), 12 S. W. R. 868, and Melton *v.* S., 30 Tex. Ap. 273, 17 S. W. R. 257. A club was held to be a deadly weapon in S. *v.* Phillips, 104 N. C. 786, 10 S. E. R. 463; and not to be, in Erwin *v.* Com., 96 Ky. 422, 29 S. W. R. 340. A revolver may be proved to be a deadly weapon. P. *v.* Savercool, 81 Cal. 650, 22 Pac. R. 856.]

[1] Filkins *v.* P., 69 N. Y. 101, [25 Am. R. 143; S. *v.* Godfrey, 17 Oreg. 300, 20 Pac. R. 625, 11 Am. St. R. 830.]

[2] Pinson *v.* S., 23 Tex. 579.

[3] U. S. *v.* Wood, 3 Wash. C. C. 440.

[4] U. S. *v.* Wilson, Bald. 78; [Jackson *v.* U. S., 102 Fed. R. 473. The following have been held to be dangerous weapons: Razor, S. *v.* Singeal, 51 La. An. 932, 25 S. R. 957; piece of timber, S. *v.* Alfred, 44 La. An. 582, 10 S. R. 887. The following are not necessarily dangerous weapons: Pocket knife, S. *v.* Scott, 39 La. An. 943, 3 S. R. 83; unloaded gun, S. *v.* Godfrey, 17 Oreg. 300, 20 Pac. R. 625, 11 Am. St. R. 830.]

or weapons,"[1] "carrying offensive arms or weapons,"[2] "with an offensive weapon or instrument,"[3] and the like. We have no exact definition of the term "offensive weapon." But it includes guns and other instruments of war; with bludgeons, clubs and other things employed only in private encounters;[4] and heavy walking-sticks, crutches, and the like, being offensive or not according to the intent with which they are used or carried.[5] On the other hand, a horsewhip;[6] bats, which are long poles wherewith smugglers convey away tubs of spirits;[7] and large sticks, three feet in length, with some prongs, the natural growth of the timber, and knobs at the ends,[8] have severally been adjudged not to be offensive weapons. And the judicial impressions seem to have been that a weapon to be offensive must be dangerous.[9]

§ 322. Loaded arms.— A pistol loaded with gunpowder and ball, yet having its touch-hole so plugged that it cannot be fired, is not "loaded arms" within the English statute of 9 Geo. 4, ch. 31, §§ 11 and 12;[10] the words of which are,—"shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person." And one who sent to another, to destroy him, a tin box containing three pounds of gunpowder, and two detonators to ignite it when the box should be opened, was held not to have attempted to discharge at him loaded arms.[11]

§ 323. Weapon drawn.—A sneed has been deemed a "weapon drawn;"[12] so likewise has a pot, thrown at another.[13]

§ 324. Destructive matter.—Boiling water is "destructive matter," within 7 Will. 4 and 1 Vict. (ch. 85, § 5), making

[1] 9 Geo. 2, ch. 35, § 10; 6 Geo. 4, ch. 108, § 56.

[2] 3 & 4 Will. 4, ch. 53, § 60.

[3] 7 Geo. 2, ch. 21.

[4] Cosan's Case, 1 Russ. Crimes (3d Eng. ed.), 119, 1 Leach, 342, note.

[5] Rex *v.* Palmer, 1 Moody & R. 70; Rex *v.* Johnson, Russ. & Ry. 492, 1 Russ. Crimes (3d Eng. ed.), 120; Rex *v.* Fry, 2 Moody & R. 42; *ante*, § 219.

[6] Rex *v.* Fletcher, 1 Leach, 23, 342, note, 2 Stra. 1166.

[7] Rex *v.* Noakes, 5 Car. & P. 326.

[8] Rex *v.* Ince, 1 Leach, 342, note.

[9] And see 1 Russ. Crimes (3d Eng. ed.), 119, 120; Rex *v.* Grice, 7 Car. & P. 803.

[10] Rex *v.* Harris, 5 Car. & P. 159. [But see Reg. *v.* Jackson, 17 Cox, C. C. 104.]

[11] Rex *v.* Mountford, 7 Car. & P. 242, 1 Moody, 441.

[12] Keat's Case, Skin. 666, 668.

[13] Rex *v.* Hunter, 3 Lev. 255. "But when he had thrown it out of his hand without hurt, and out of his reach, he had no weapon drawn." Id., p. 256.

it punishable to "cast or thrown upon, or otherwise apply to, any person any corrosive fluid or other destructive matter."[1]

§ 325. Words indicating classes of written instruments: *In general.*— There are numerous statutes, English and American, present and repealed, making punishable the forgery, the larceny, or the like, of any "bank-bill, promissory note or bill of exchange," — of any warrant, order or request for the payment of money," — of any "deed, bond or writing obligatory," and so on; their forms being various. How to interpret the present American ones becomes a practical inquiry of much importance, to the answering of which the decisions on the English and the repealed are nearly as serviceable as any other.

§ 326. Overlying of meanings.— We have seen what are the conflicting rules on the decisions, and what is the true one in reason, for interpreting statutory words which overlie one another in meaning.[2] If formerly, and by some American opinions at the present day, the word "sheep," for example, was taken to mean an animal of either sex when standing alone, but only a male when the expression is "sheep or ewe,"[3] the distinction is now substantially discarded in England,[4] while there is no very distinct ground for saying that it is recognized in this country beyond one or two states. In the class of statutes now in contemplation, it seems never to have had in either country much influence; for the courts appear to have given each of the several terms embraced in them substantially the same meaning as if it had stood alone, so that sometimes a writing may be equally well indicated by any one of several alternative statutory names.[5] Yet where one section provided a particular penalty

[1] Reg. *v.* Crawford, 2 Car. & K. 129, 1 Den. C. C. 100.

[Explosive substance.— For construction of, within 46 Vict., ch. 3, § 9, see Reg. *v.* Charles, 17 Cox, C. C. 499.]

[2] *Ante*, §§ 143, 246c, 248.

[3] *Ante*, § 247; Rex *v.* Cook, 1 Leach, 105, 2 East, P. C. 616.

[4] Reg. *v.* McCulley, 2 Moody, 34; s. c. *nom.* McCully's Case, 2 Lewin, 272. And see Reg. *v.* Spicer, 1 Car. & K. 699; Rex *v.* Teague, 2 East, P. C. 979, Russ. & Ry. 33; *ante*, § 247.

[5] Reg. *v.* Williams, 2 Car. & K. 51; Rex *v.* Mitchell, 2 East, P. C. 936; Rex *v.* Willoughby, 2 East, P. C. 581, 944; Reg. *v.* Thorn, 2 Moody, 210; Reg *v.* Dawson, 1 Eng. L. & Eq. 589, 2 Den. C. C. 75; Rex *v.* Shepherd, 2 East, P. C. 944; s. c. *nom.* Rex *v.* Sheppard, 1 Leach, 226; Reg. *v.* Smith, 2 Moody, 295; Reg. *v.* Gilchrist, Car. & M. 224; S. *v.* Wilkins, 17 Vt. 151; S. *v.* Wilson, 3 Brev. 196; Reg. *v.* White, 9 Car. & P. 282.

for passing counterfeit bank-bills, and another a different one for passing counterfeit promissory notes, it was held that, though the words "promissory notes" would on general principles include bank-bills, they did not here; because to construe them so would render the sections repugnant.[1] Again,—

Foreign securities.— Though statutes are not given an extra-territorial force,[2] so that those now in contemplation do not extend to wrongs committed abroad, they do comprehend as well written securities issued under the laws of foreign states and countries, if of current value in the locality where the offense is committed, as domestic.[3]

§ 327. Order — (For payment of money — Delivery of goods).[4]— An "order" is, in its principal elements, the same, whether it is "for the payment of money,"[5] or "for the delivery of goods."[6]

How defined.— By reason of differences of judicial opinions and statutory terms, there can be no definition of an "order" in the correctness whereof all will concur. According to what seemed once to be, and probably is,[7] the English doctrine, not universally concurred in with us, an order is a written direction from one who either has in fact, or in the writing professes to have, control over a fund or thing, to another who either purports in the writing to be under obligation to obey or who is

[1] S. *v.* Ward, 6 N. H. 529. For the same principles, see also P. *v.* Howell, 4 Johns. 296. And see *ante*, § 168.

[2] *Ante*, § 141.

[3] Com. *v.* Hensley, 2 Va. Cas. 149; Cummings *v.* Com., 2 Va. Cas. 128; P. *v.* Flanders, 18 Johns. 164; Rex *v.* Kirkwood, 1 Moody, 311; Rex *v.* McKeay, Car. Crim. Law (3d ed.), 190, 1 Moody, 130. And see Rex *v.* Goldstein, 7 Moore, 1, 3 Brod. & B. 201, 10 Price, 88, Russ. & Ry. 473; Rex *v.* Dick, 1 Leach, 68, 2 East, P. C. 925; Lewis *v.* Com., 2 S. & R. 551; *ante*, § 205; *post*, § 340. [See Sanabria *v.* P., 24 Hun, 270.]

[4] See Crim. Law, II, §§ 560, 785; Crim. Pro., II, §§ 473, 474.

[5] [Granby Mercantile Co. *v.* Webster, 98 Fed. R. 604.]

[6] Dakin *v.* Graves, 48 N. H. 45; Hinnemann *v.* Rosenback, 39 N. Y. 98, 100; [P. *v.* James, 110 Cal. 155, 42 Pac. R. 479; Roberts *v.* S. (Tex. Cr. R.), 53 S. W. R. 864. See Garmire *v.* S., 104 Ind. 444. And an order is none the less such for the purposes of forgery, though it lacks the revenue stamp required by statute. Thomas *v.* S. (Tex. Cr. R.), 51 S. W. R. 242; Hanks *v.* S. (Tex. Cr. R.), 54 S. W. R. 587; King *v.* S. (Tex. Cr. R.), 57 S. W. R. 840; Laird *v.* S., 61 Md. 309; S. *v.* Imboden (Mo.), 57 S. W. R. 536.]

[7] But see Reg. *v.* Tuke, 17 U. C. Q. B. 296, 299, and cases referred to, namely: Reg. *v.* Carter, 1 Cox, C. C. 170, 172, [1 Den. C. C. 65, 1 Car. & K. 741;] Reg. *v.* Dawson, 5 Cox, C. C. 220, [2 Den. C. C. 75;] 2 East, P. C. 940; Reg. *v.* Vivian, 1 Den. C. C. 35, [1 Car. & K. 719.] See *post*, § 330 and note.

in fact under such obligation, commanding some appropriation thereof. And,—

Two kinds.— According equally to this definition and to the opinions of all the tribunals, orders are of two kinds,— those which are such on their face and those which may be shown to be orders by averment and proof. Following now the judicial expositions which accord with this definition we have,—

§ 328. No funds — What on face an order.— If on the face of the writing there is all that belongs to an order, the law regards it as such, though in fact the drawer had no funds and the drawee was under no obligation to respond.[1] The question whether or not particular words bring a case within this branch of the definition may be nice and delicate. The tests are that, looking simply at the writing, there must appear on its face to be a drawer, having a disposing power over the fund or goods, a person under obligation to obey,[2] and one to whom delivery or payment is to be made,[3] sufficiently described to exclude uncertainties of meaning,[4] though there is doubt whether he must be mentioned by name.[5] The writing need not concern

[1] Rex *v.* Lockett, 1 Leach, 94, 2 East, P. C. 940; Reg. *v.* Carter, 1 Car. & K. 741; Rex *v.* Clinch, 1 Leach, 540, 544; P. *v.* Way, 10 Cal. 336. And see Rex *v.* Froud, 7 Price, 609, 1 Brod. & B. 300, Russ. & Ry. 389; s. c. *nom.* Rex *v.* Fraude, 3 Moore, 645; Reg. *v.* Illidge, 2 Car. & K. 871, 875. [See P. *v.* Bixby, 91 Cal. 470, 27 Pac. R. 781; Smith *v.* S., 29 Fla. 408, 10 S. R. 894.]

[2] S. *v.* Lamb, 65 N. C. 419; Walton *v.* S. 6 Yerg. 377; Rex *v.* Baker, 1 Moody, 231; Rex *v.* Clinch, 1 Leach, 540, 544; Rex *v.* Mitchell, 2 East, P. C. 936; Reg. *v.* Williams, 2 Car. & K. 51; Rex *v.* Hart, 6 Car. & P. 106; Reg. *v.* Thorn, 2 Moody, 210; Reg. *v.* Curry, 2 Moody, 218; Rex *v.* Cullen, 5 Car. & P. 116; Reg. *v.* Roberts, 2 Moody, 258, Car. & M. 652; Reg. *v.* Newton, 2 Moody, 59; Rex *v.* Ravenscroft, Russ. & Ry. 161; Reg. *v.* Morrison, Bell, C. C. 158, 162, 163; S. *v.* Leak, 80 N. C. 408; 2 Russ. Crimes (3d Eng. ed.), 516, 519, 520, 522.

[3] Rex *v.* Richards, Russ. & Ry. 193. So also as to a bill of exchange. Rex *v.* Randall, Russ. & Ry. 195. And a like principle prevails as to a receipt. *Post*, § 341.

[4] P. *v.* Farrington, 14 Johns. 348.

[5] And see Reg. *v.* Gilchrist, Car. & M. 224, 2 Moody, 233. It is sufficient made payable to bearer, P. *v.* Brigham, 2 Mich. 550; or, what is equivalent, payable to "this man." Thomas *v.* S., 59 Ga. 784. And see S. *v.* Keeter, 80 N. C. 472; S. *v.* Lane, 80 N. C. 407. It need not, in New York, be addressed to any one. Noakes *v.* P., 25 N. Y. 380. And see Peete *v.* S., 2 Lea, 513; S. *v.* Baumon, 52 Iowa, 68; *post*, § 335. [In the following cases it was held that the instrument was an order, though no drawee was named: Moriarty *v.* S., 46 Neb. 652, 65 N. W. R. 784; Powers *v.* S., 87 Ind. 97; Dixon *v.* S. (Tex. Cr. R.), 26 S. W. R. 500; S. *v.* Gullette, 121 Mo. 447, 26 S. W. R. 354.]

commercial transactions;[1] and it is no objection that the payee purports to be merely the agent of the drawer, to convey the thing drawn to him.[2] Though the drawer should be a married woman, if the form is such as apparently to bind her separate estate, it will suffice.[3]

Checks and bills as orders.— A check in common form on bankers is an order, and so is a bill of exchange;[4] and, if the check is postdated, this makes no difference.[5] But —

§ 329. Not order on face.—The following instruments were held not to be orders, where there was no external proof to make them such: "Mr. A., please to let B. have a thirty-five dollar watch, and you will please your friend, Charles Young."[6] "Mr. A., let B. have the amount of five dollars in goods, and I will settle with you next week. Violet Pond."[7] "Messrs. A. & Co., Bankers, please to advance the bearer, B., the sum of two hundred and fifty pounds, and place the same to my account. Morgan Thomas."[8] "Mr. A., Sir, You will please to pay the bearer, for B., three pounds, for three weeks due to him a country member, and you will much oblige, Yours, &c. J. Beswick;" the drawer not appearing to have any disposing authority over fund.[9] So, "Please to send 10*l.* by bearer, as I am so ill I cannot wait on you."[10] "Mr. A., I desire you to let this woman have six yards of ordinary stuff, one pair of stockings, one shift, one apron, one handkerchief; and I will see it all

[1] Rex *v.* Graham, 2 East, P. C. 945, 2 Russ. Crimes (3d Eng. ed.), 514; Reg. *v.* Lonsdale, 2 Cox, C. C. 222; S. *v.* Baumon, 52 Iowa, 68; *ante*, § 206.

[2] S. *v.* Nevins, 23 Vt. 519.

[3] Wilcoxson *v.* S., 60 Ga. 184. [See King *v.* S. (Tex. Cr. R.), 57 S. W. R. 840.]

[4] Rex *v.* Willoughby, 2 East, P. C. 944; Rex *v.* Shepherd, 2 East, P. C. 944; s. c. *nom.* Rex *v.* Sheppard, 1 Leach, 226; P. *v.* Howell, 4 Johns. 296; 2 Russ. Crimes (3d Eng. ed.), 515; [P. *v.* Kemp, 75 Mich. 410, 43 N. W. R. 439; Com. *v.* Parsons, 138 Mass. 189; S. *v.* Vincent, 91 Mo. 662, 4 S. W. R. 430; Thomas *v.* S., 18 Tex. Ap. 218. See Reg. *v.* Martin, 5 Q. B. D. 34; St. Clair *v.* S., 100 Ala. 61, 14 S. R. 544; Glenn *v.* S., 116 Ala. 483, 23 S. R. 1; Townsend *v.* S., 92 Ga. 732, 19 S. E. R. 55.]

[5] Reg. *v.* Taylor, 1 Car. & K. 213.

Words transposed. — Where the words of a check were transposed,— as, "pay A. B. seventeen or bearer pounds,"— it was still ruled, in a case of forgery, to be a check and order for the payment of money. Reg. *v.* Boreham, 2 Cox, C. C. 189; [Rollins *v.* S., 22 Tex. Ap. 548, 3 S. W. R. 759, 58 Am. R. 659.]

[6] Walton *v.* S., 6 Yerg. 377.

[7] Horton *v.* S., 53 Ala. 488. And see Evans *v.* S., 8 Ohio St. 196, [70 Am. R. 98;] Carberry *v.* S., 11 Ohio St. 410.

[8] Reg. *v.* Williams, 2 Car. & K. 51.

[9] Rex *v.* Baker, 1 Moody, 231.

[10] Rex *v.* Ellor, 1 Leach, 323, 2 East, P. C. 938.

paid for. Witness my hand, George May."[1] So, "Mr. A., I should feel greatly obliged to you if you will please to send by the bearer the sum of three pounds, as I have had a large quantity of bones this week, and the man from Coleford is coming in to-morrow with 10 cwt. I have about one ton now. Yours, Thomas Davis."[2] On the other hand,—

Order on face.— Without the aid of external proofs, the following have been adjudged orders: "Mr. A., Sir, Please to pay to B. the sum of 13*l.*, by order of Christopher Sadler, Thornton-le-Moor, brewer. I shall see you on Monday. Your obliged, Chr. Sadler. The District Bank."[3] "Please to deliver my work to the bearer," signed and addressed; the objection that the writing did not sufficiently specify the articles to be delivered being overruled.[4] "Credit the person named in my letter of advice the sum of 5*l.*, and debit the same to this office,"— signed by the postmaster of Shrewsbury, and addressed "To the Post-office, London."[5]

§ 330. Exceptions to the foregoing.— Not in all our states are the foregoing interpretations strictly held. Thus, in Massachusetts, the following writing was adjudged to be an order for the delivery of goods, though it affirmatively appeared that the person purporting to be the drawer had no goods in the hands of the drawee: "Mr. A., Sir, deliver my son one pair of walking-

[1] Rex *v.* Mitchell, 2 East, P. C. 936.

[2] Reg. *v.* Roberts, 2 Russ. Crimes (3d Eng. ed.), 522. For other illustrations, see Rex *v.* Rushworth, Russ. & Ry. 317, 2 Russ. Crimes (3d Eng. ed.), 517, and see note; Reg. *v.* Curry, 2 Moody, 218; Reg. *v.* Reopelle, 20 U. C. Q. B. 260. [And see P. *v.* Smith, 112 Mich. 192, 70 N. W. R. 466, 67 Am. St. R. 392.]

[3] Reg. *v.* Carter, 1 Car. & K. 741, 1 Den. C. C. 65. Sadler was proved to be a customer of the bank, but the decision seems not to have proceeded on this fact.

[4] Rex *v.* Jones, 1 Leach, 53, 2 East, P. C. 941. There was, however, in this case some extrinsic proof, though probably it did not vary the result. An order for the payment of money need not specify the sum to be paid. McIntosh's Case, 2 East, P. C. 942. Yet concerning the sum, see, as to a receipt, *post*, § 341.

[5] Reg. *v.* Gilchrist, Car. & M. 224, 2 Moody, 233. [See *Ex parte* Hibbs, 26 Fed. R. 421.] For further cases in which the writing was held to be an order, see Rex *v.* McIntosh, 2 East, P. C. 942, 956, 2 Russ. Crimes (3d Eng. ed.), 515, 516; s. c. *nom.* Rex *v.* Mackintosh, 2 Leach, 883; Rex *v.* Bamfield, 1 Moody, 416; Reg. *v.* Anderson, 2 Moody & R. 469; Reg. *v.* Dawson, 1 Eng. L. & Eq. 589, 2 Den. C. C. 75, Temp. & M. 428; Rex *v.* Richards, Russ. & Ry. 193; Rex *v.* Harris, 6 Car. & P. 129; Reg. *v.* McConnell, 1 Car. & K. 371; Reg. *v.* Raake, 2 Moody, 66, 8 Car. & P. 626; Reg. *v.* Autey, Dears. & B. 294, 7 Cox, C. C. 329.

shoes, and charge the same to me. Yours, James Fisher." The court was aware that the decisions in England were contrary to this; but said that in favor of life the English statutes had "received a stricter construction than we think it necessary to give our own, by which the life of the offender is not put in jeopardy."[1] The like conclusion appears to have been arrived at in Connecticut,[2] New York,[3] South Carolina[4] and Georgia.[5] Even some of the English judges have expressed opinions in favor of the doctrine which regards as unnecessary any right in the maker of the order.[6] And our neighbors across the St. Lawrence, while following, as they deemed, the English authorities, have held the words, "Mr. A., please let the bearer, B., have the amount of ten pounds, and you will oblige me. B. B. Mitchell," to be an order for the payment of money.[7] On the other hand, the doctrine which in the foregoing sections is assumed to be the English is not without American support.[8]

[1] Com. *v.* Fisher, 17 Mass. 46, 49; Com. *v.* Kepper, 114 Mass. 278. See *ante*, § 199.

[2] S. *v.* Cooper, 5 Day, 250.

[3] P. *v.* Shaw, 5 Johns. 236. And see P. *v.* Farrington, 14 Johns. 548; P. *v.* Krummer, 1 Buf. 549.

[4] S. *v.* Holley, 1 Brev. 35. As to Vermont, see S. *v.* Nevins, 23 Vt. 519.

[5] Hoskins *v.* S., 11 Ga. 92, the court observing: "The strict construction adopted in relation to this English statute never has obtained in the American courts. . . . It arose wholly in the mother country from the penalty which was to follow a conviction, namely, death." Lumpkin, J., p. 101. See Johnson *v.* S., 62 Ga. 299; Thomas *v.* S., 59 Ga. 784. See also S. *v.* Baumon, 52 Iowa, 68. [See Hendricks *v.* S., 26 Tex. Ap. 176, 9 S. W. R. 555, 8 Am. St. R. 463; S. *v.* Ferguson, 35 La. An. 1042; Stewart *v.* S., 113 Ind. 505, 16 N. E. R. 186; P. *v.* Phillips, 118 Mich. 699, 77 N. W. R. 245.]

[6] Sir Sidney Stafford Smythe, in Rex *v.* Mitchell, 2 East, P. C. 936, 937.

[7] Reg. *v.* Tuke, 17 U. C. Q. B. 296. Said Robinson, C. J.: "It has been held lately in England that the true criterion is whether, if the instrument were genuine, and the person to whom it was directed paid it, he could recover the amount. Now this instrument was in fact tendered as an order, and paid accordingly, and no doubt, if it had been genuine, Mr. Mitchell could have been sued by Warren for money paid by his order. We therefore think the conviction was legal. We refer to [etc. See *ante*, § 327, note]. There have been, no doubt, many decisions which are inconsistent with these, and which must be considered as having been overruled by them." p. 299.

[8] American cases cited *ante*, §§ 327–329; S. *v.* Lamb, 65 N. C. 419; S. *v.* Leak, 80 N. C. 408; Horton *v.* S., 53 Ala. 488 (see Jones *v.* S., 50 Ala. 161; Walton *v.* S., 6 Yerg. 377. Compare with Tyler *v.* S., 2 Humph. 37, [36 Am. D. 298). But see Allen *v.* S., 44 Ala. 557; Hobbs *v.* S., 75 Ala. 1; Lee *v.* S., 118 Ala. 672, 23 S. R. 699.]

§ 331. Order shown by averment and proof.— Where sufficient does not appear on the face of an instrument to make it an order, the defect may sometimes be supplied by averment and proof, as already indicated.[1] It is not easy to lay down, in a word, how extensively this may be done, for the decisions have not been so numerous as to give material for an exact rule.[2] Yet something on this point will be attempted a few sections further on,[3] in connection alike with this word and the words "warrant" and "request."

§ 332. Warrant — (For payment of money — Delivery of goods).— Passing by those meanings of the word "warrant" which are not within the scope of these discussions, a "warrant for the payment of money" or "for the delivery of goods" is the same as an "order" for the like purpose, except that the latter implies a command, and the former a bare authority.[4] Thus, the words "Messrs. A. & Co., Please to advance the bearer, B., the sum of two hundred and fifty pounds, and place the same to my account. Morgan Thomas," supplemented by proof that Thomas had a deposit account, not a drawing one, with A. & Co., were held to constitute a warrant, yet not an order.[5] Contrary to this view, some earlier cases appear to have regarded "warrant" and "order" as synonymous.[6] And by some English opinions the word now under consideration implies, like the other, that the drawer has a disposing power over the fund or goods, to appear either on the face of the writing or by averment and proof.[7] Yet later decisions indicate that this is not essential,[8] the judges in one case observing that "any instrument for payment under which, if genuine, the payer may recover the amount against the party signing it, may properly be considered a warrant for the pay-

[1] *Ante*, § 327.

[2] See Reg. *v.* Atkinson, Car. & M. 325; Reg. *v.* Vivian, 1 Den. C. C. 35, 1 Car. & K. 719; S. *v.* Lane, 80 N. C. 407.

[3] *Post*, § 335.

[4] Reg. *v.* Morrison, Bell, C. C. 158, 162, 163, 8 Cox, C. C. 194; Reg. *v.* Williams, 2 Car. & K. 51; Reg. *v.* Dawson, *supra;* Rex *v.* Crowther, 5 Car. & P. 316.

[5] Reg. *v.* Williams, 2 Car. & K. 51.

[6] Rex *v.* Mitchell, 2 East, P. C. 936; Rex *v.* Clinch, 1 Leach, 540, 544, 2 East, P. C. 938, 940.

[7] Rex *v.* Mitchell, *supra;* Rex *v.* Clinch, *supra;* Reg. *v.* Thorn, 2 Moody, 210, Car. & M. 206.

[8] Reg. *v.* Vivian, 1 Car. & K. 719, 1 Den. C. C. 35; Reg. *v.* Rogers, 9 Car. & P. 41; Reg. *v.* Roberts, 2 Russ. Crimes (3d Eng. ed.), 522, note; Reg. *v.* Dawson, 1 Eng. L. & Eq. 589, 2 Den. C. C. 75, Temp. & M. 428.

ment of money; and it is equally this, whatever be the state of the account between the parties, and whether the party signing it has, at the time, funds in the hands of the party to whom it is addressed or not."[1] And such, we may infer from what was said under the word "order," will be the opinion most current in our American courts.[2]

§ 333. Illustrations of warrants.— The following was held to be a warrant from Luke Lade, who kept cash with A. & Co., bankers, for the payment of money to B.: "To A. & Co. Pay to my order, two months after date, to B., the sum of 80*l*., and deduct the same out of my account." It was not signed; but across its face was written, "Accepted, Luke Lade;" and on the back the name of B. with his address appeared.[3] So a letter of credit,[4] a bill of exchange,[5] a postoffice money order,[6] and generally whatever may be described by the word "order,"[7] are warrants.[8]

§ 334. Request — (For payment of money — Delivery of goods).— There are no decisions from our own courts as to the meaning of the word "request" in the connection now under contemplation. We can look only to the English.[9] It is more comprehensive than "warrant" and "order." Therefore the following was held to be a request: "Please to let bearer, B., have spillshoul and grafting tools for me."[10] And such also is a writing asking for a loan of money, while yet it is not an order.[11] For the person requesting need not appear to have, or have in fact, any interest in, or control over, the fund or goods.

[1] Reg. *v.* Vivian, *supra;* Reg. *v.* Ferguson, 1 Cox, C. C. 241. In Reg. *v.* Thorn, *supra*, some of the judges said that, if this question were *res integra*, they should so hold.

[2] *Ante*, § 330; S. *v.* Holley, 1 Brev. 35.

[3] Reg. *v.* Smith, 1 Car. & K. 700, 1 Den. C. C. 79.

[4] Reg. *v.* Raake, 8 Car. & P. 626, 2 Moody, 66.

[5] Rex *v.* Willoughby, 2 East, P. C. 581.

[6] Reg. *v.* Gilchrist, Car. & M. 224.

[7] *Ante*, § 332; Rex *v.* Beard, Jebb, 9.

[8] See also the cases cited to the last section, and Reg. *v.* Anderson, 2 Moody & R. 469; Reg. *v.* Harris, 2 Moody, 267, 1 Car. & K. 179; Reg. *v.* McConnell, 1 Car. & K. 371, 2 Moody, 298; Reg. *v.* Autey, Dears. & B. 294, 7 Cox, C. C. 329; Reg. *v.* Pilling, 1 Fost. & F. 324; Reg. *v.* Mitchell, 2 Fost. & F. 44.

[9] For a full statement of English cases under this word, see 2 Russ. Crimes (3d Eng. ed.), 526–531.

[10] Reg. *v.* James, 8 Car. & P. 292. And see Reg. *v.* Newton, 2 Moody, 59; Reg. *v.* Roberts, 2 Moody, 258; Reg. *v.* Thorn, 2 Moody, 210.

[11] Reg. *v.* Roepelle, 20 U. C. Q. B. 260.

Nor need the writing be in words to charge him.[1] Yet if it purports to charge him, it will not therefore be the less a request.[2]

§ 335. Supplementing by extrinsic evidence — (Order — Warrant — Request).— Within limits not well defined, a writing which is not on its face an order, warrant or request may be shown by oral evidence to be such.[3] For example, the omission of the name of the person to whom is addressed a request,[4] or a warrant[5] or an order[6] may be thus supplied.[7] And evidence is admissible of a course of dealing between the parties whereby a writing acquires a character of which otherwise it would come short.[8] In this way the words,— "August 3, 1839 — one 16-in. helmet scoop, one 4-qt. kettle — James Hayward," — were interpreted to be a request for the delivery of goods.[9] And where, between two persons, the method was for one of them to make a list of names, with a sum against each, on sight whereof the other would furnish them severally with goods to the amounts specified,— the writing, illumined by this extrinsic fact, was held to be a request, though otherwise it would come short.[10] Where also, by the course at a bank, a depositor who takes an accountable receipt for his money draws it out with interest on indorsing his name on the face of the receipt, such receipt thus indorsed becomes an order for the payment of money.[11] Likewise the facts that there is a fund, and that the drawer has a disposing power over it, may be established orally to make an instrument an order, where these particulars do not sufficiently appear on its face.[12]

[1] Rex *v.* Thomas, 2 Moody, 16, 7 Car. P. 116; Reg. *v.* Pulbrook, 9 Car. & P. 37; Reg. *v.* Atkinson, Car. & M. 325; Reg. *v.* Rogers, 9 Car. & P. 41; *post*, § 342.

[2] Reg. *v.* White, 9 Car. & P. 282; Reg. *v.* Walters, Car. & M. 588.

[3] *Ante*, §§ 327, 331.

[4] Rex *v.* Carney. 1 Moody, 351; Reg. *v.* Pulbrook, 9 Car. & P. 37; Rex *v.* Cullen, 5 Car. & P. 116, 1 Moody, 300.

[5] Reg. *v.* Rogers, 9 Car. & P. 41.

[6] Reg. *v.* Snelling, Dears. 219, 23 Law J. (N. S.) M. C. 8, 17 Jur. 1012, 22 Eng. L. & Eq. 597.

[7] And see *ante*, § 328.

[8] Reg. *v.* Walters, Car & M. 588; Rex *v.* Cullen, 1 Moody, 300, 5 Car. & P. 851.

[9] Reg. *v.* Pulbrook, 9 Car. & P. 37.

[10] Reg. *v.* Walters, Car. & M. 588.

[11] Reg. *v.* Atkinson, Car. & M. 325.

[12] Reg. *v.* Vivian, 1 Den. C. C. 35, 2 Car. & K. 719; Reg. *v.* Williams, 2 Car. & K. 51. See, for further illustration, Reg. *v.* Illidge, Temp. & M. 127, 13 Jur. 543, 18 Law J. (N. S.) M. C. 179, 1 Den. C. C. 404, 2 Car. & K. 871.

Such are some illustrations of a general doctrine which necessarily has its limits, but what its limits are the books do not render certain. The extrinsic matter must appear by averment in the indictment, as well as by proof at the trial.[1]

§ 336. Promissory note.[2] — A "promissory note" has been defined to be "a written promise, by one person to another, for the payment of money at a specified time, absolutely and at all events."[3] Negotiability is not essential,[4] even under a criminal statute, as one against forgery.[5] But a written promise on condition is not a promissory note;[6] nor is one payable in what is not money,[7] — as, for example, in current bank-bills,[8] — though there may be statutes under which it will be such.[9] The words, "Due B. one dollar on settlement this day," etc.,— written on paper, were held to be a note for the payment of money.[10] In general, a bank-bill, whether of our own state or of any other, is a promissory note;[11] though, of course, not every promissory

[1] Carberry *v.* S., 11 Ohio St. 410; *post*, §§ 341, 342; [Baysinger *v.* S., 77 Ala. 63, 54 Am. R. 46; Dixon *v.* S., 81 Ala. 61, 1 S. R. 69; Fornby *v.* S., 87 Ala. 36, 6 S. R. 271; Shannon *v.* S., 109 Ind. 407, 10 N. E. R. 87; S. *v.* Murphy, 46 La. An. 415, 14 S. R. 920; S. *v.* Weaver, 94 N. C. 836, 55 Am. R. 647; King *v.* S., 27 Tex. Ap. 567, 11 S. W. R. 525, 11 Am. St. R. 203; Crawford *v.* S. (Tex. Cr. R.), 50 S. W. R. 378; Polk *v.* S. (Tex. Cr. R.), 51 S. W. R. 909; Lynch *v.* S. (Tex. Cr. R.), 53 S. W. R. 693; Roberts *v.* S. (Tex. Cr. R.), 53 S. W. R. 864. See Duffin *v.* P., 107 Ill. 113, 47 Am. R. 431.]

[2] See Crim. Law, I, § 578; II, §§ 157, 768, 785, 787.

[3] 3 Kent, Com. 74.

[4] Story, Bills, § 60; Bates *v.* Butler, 46 Me. 387; Sibley *v.* Phelps, 6 Cush. 172; P. *v.* Bradley, 4 Park. Cr. 245; Arnold *v.* Sprague, 34 Vt. 402; Smith *v.* Kendall, 6 T. R. 123; [S. *v.* Schwartz, 64 Wis. 432, 25 N. W. R. 417; P. *v.* Bennett (Mich.), 81 N. W. R. 117.]

[5] Rex *v.* Box, Russ. & Ry. 300, 6 Taunt. 325. But see S. *v.* Brower, 30 Ohio St. 101. [And under such a statute it is no defense that on its face the note bears date on Sunday. S. *v.* Sherwood, 90 Iowa, 550, 58 N. W. R. 91, 48 Am. St. R. 461; or apparently is barred by the statute of limitations. S. *v.* Dunn, 23 Oreg. 562, 32 Pac. R. 621.]

[6] Corbett *v.* S., 24 Ga. 287; Reg. *v.* Howie, 11 Cox, C. C. 320; Syracuse Bank *v.* Armstrong, 25 Minn. 530; Robins *v.* May, 11 A. & E. 213. [See P. *v.* Parker, 114 Mich. 442, 72 N. W. R. 250; *Ex parte* Prince, 27 Fla. 196, 9 S. R. 659, 26 Am. St. R. 67; Anderson *v.* S., 20 Tex. Ap. 595.]

[7] *Post*, § 346; Bunker *v.* Athearn, 35 Me. 364; Wallace *v.* Dyson, 1 Speers, 127; Carleton *v.* Brooks, 14 N. H. 149; [Hollister *v.* Jones' Co-operative Mercantile Institution, 111 U. S. 62, 4 S. Ct. 263, 28 L. ed. 352; U. S. *v.* White, 19 Fed. R. 723.]

[8] Wolfe *v.* Tyler, 1 Heisk. 313; Kirkpatrick *v.* McCullough, 3 Humph. 171, [39 Am. D. 158;] Leiber *v.* Goodrich, 5 Cow. 186; McCormick *v.* Trotter, 10 S. & R. 94.

[9] Fink *v.* Maples, 15 Ind. 297; P. *v.* Bradley, 1 Buf. 576.

[10] P. *v.* Finch, 5 Johns. 237. [See S. *v.* Jefferson, 39 La. An. 331, 1 S. R. 669.]

[11] Hobbs *v.* S., 9 Mo. 855; Com. *v.*

note is a bank-bill.[1] Yet a statute may be in terms to render it inadmissible to describe in an indictment a bank-bill as a promissory note.[2] The name of a payee, or something from which to ascertain to whom payment is to be made, is essential;[3] but it will suffice that the name is left in blank, because[4] the holder is authorized to fill it in.[5] A promise to pay to one's own order is good when indorsed;[6] but, until then, it is not complete as a promissory note.[7] For further particulars, the reader is referred to the books on bills and notes.[8]

§ 337. Bank-bill — Bank-note.[9] — These terms are in meaning identical.[10] And we have just seen that a "bank-note" is also a promissory note. But not every promissory note is a bank-note. Thus, in New Jersey, a statute made punishable one who "shall purloin, embezzle or convert to his own use any money, bank-bill or note," etc.; and it was held that commercial paper other than bank-bills and bank-notes were not included. "The phrase 'bank-bill or note' means bank-bill or bank-note."[11]

Paulus, 11 Gray, 305; Com. *v.* Woods, 10 Gray, 477; Com. *v.* Thomas, 10 Gray, 483; Reg. *v.* McDonald, 12 U. C. Q. B. 543. *Contra*, Culp *v.* S., 1 Port. 33, [26 Am. D. 357.] A silver certificate is not a promissory note. Stewart *v.* S., 62 Md. 142.]

[1] S. *v.* Wilson, 3 Brev. 196. And see S. *v.* Wilkins, 17 Vt. 151; S. *v.* Ward, 6 N. H. 529; *ante*, § 326; S. *v.* Tillery, 1 Nott & McC. 9; S. *v.* Cassados, 1 Nott & McC. 91.

[2] Com. *v.* Dole, 2 Allen, 165. See Com. *v.* Simonds, 14 Gray, 59.

[3] Cowie *v.* Stirling, 6 Ellis & B. 333; Yates *v.* Nash, 8 C. B. (N. S.) 581; Holmes *v.* Jaques, Law R. 1 Q. B. 376; Musselman *v.* Oakes, 19 Ill. 81, [68 Am. D. 583;] Tittle *v.* Thomas, 30 Miss. 122, [64 Am. D. 154.]

[4] Harding *v.* S., 54 Ind. 359, 363.

[5] Cruchley *v.* Clarance, 2 M. & S. 90; Atwood *v.* Griffin, 2 Car. & P. 368.

[6] Scull *v.* Edwards, 8 Eng. 24, [56 Am. D. 294;] Smith *v.* Lusher, 5 Cow. 689, 712; Plets *v.* Johnson, 3 Hill (N. Y.), 112, 115; Absolon *v.* Marks, 11 Q. B. 19; Brown *v.* De Winton, 6 C. B. 336; Wood *v.* Mytton, 10 Q. B. 905. But see Flight *v.* Maclean, 16 M. & W. 51.

[7] Com. *v.* Dallinger, 118 Mass. 439.

[8] And see, as decided under the criminal law, Rex *v.* Elliott, 2 East, P. C. 591; Wilcock's Case, 2 Russ. Crimes (3d Eng. ed.), 497; Rex *v.* Clark, Russ. & Ry. 181; s. c. *nom.* Rex *v.* Clarke, 2 Leach, 1036; Rex *v.* Treble, 2 Leach, 1040, 2 Taunt. 328, Russ. & Ry. 164; Butler *v.* S., 22 Ala. 43; Reg. *v.* John, 13 Cox, C. C. 100. An indorsement of a promissory note is a "contract." Poage *v.* S., 3 Ohio St. 229.

[9] See Crim. Law, I, § 578; II, §§ 411, 417, 601, 785.

[10] S. *v.* Hays, 21 Ind. 176; Roth *v.* S., 10 Tex. Ap. 27; Low *v.* P., 2 Park. Cr. 37; Munson *v.* S., 4 Greene (Iowa), 483.

[11] S. *v.* Stimson, 4 Zab. 9, 29. But as to Vermont, see S. *v.* Wilkins, 17 Vt. 151. See also on the subject of this section, S. *v.* Watson, 4 Ind. 595; Rex *v.* Sadi, 2 East, P. C. 601.

§ 338. Bill of exchange.[1] — Similar in legal meaning to the term promissory note is "bill of exchange." It is "a written order or request by one person to another for the payment of money, at a specified time, absolutely and at all events."[2] Like a promissory note,[3] it is generally negotiable, not necessarily so.[4] It is considerably explained in "Criminal Law;"[5] and further expositions do not seem necessary, beyond what appear in the books on Bills and Notes.[6]

§ 339. Undertaking for payment of money.[7]—A promissory note, bank-note, or bill of exchange is an "undertaking for the payment of money," but the expression signifies more.[8] Thus, a written guaranty against loss from a third person, not exceeding a sum named, is such undertaking, though it does not belong to the other of these classes.[9] No consideration need appear on the face of it; therefore a simple "I. O. U." is an undertaking.[10]

[1] See Crim. Law, II, §§ 562, 785.

[2] 3 Kent, Com. 74; Rice *v.* Ragland, 10 Humph. 545, [53 Am. D. 737. See Reg. *v.* Bowerman, 17 Cox, C. C. 151; Lascelles *v.* S., 90 Ga. 347, 16 S. E. R. 945, 35 Am. St. R. 216.]

[3] *Ante*, § 336.

[4] Story, Bills, §§ 3, 60.

[5] Crim. Law, II, § 562.

[6] See, for decisions under the criminal law, Rex *v.* Hart, 6 Car. & P. 106; Reg. *v.* Butterwick, 2 Moody & R. 196; Rex *v.* Wicks, Russ. & Ry. 149; Rex *v.* Randall, Russ. & Ry. 195; Reg. *v.* Smith, 2 Moody, 295; Reg. *v.* Bartlett, 2 Moody & R. 362; Rex *v.* Birkett, Russ. & Ry. 251; Rex *v.* Pooley, Russ. & Ry. 12; P. *v.* Howell, 4 Johns. 296; Rex *v.* Chisholm, Russ. & Ry. 297; Reg. *v.* Curry, 2 Moody, 218; Rex *v.* Szudurskie, 1 Moody, 429; Rex *v.* McIntosh, 2 East, P. C. 942, 956, 2 Leach, 883; Warner *v.* Com., 1 Pa. St. 154, [44 Am. D. 114;] Reg. *v.* Harper, 7 Q. B. D. 78.

Acceptance.—As to what is an "acceptance of a bill of exchange," see Reg. *v.* Cooke, 8 Car. & P. 582; Reg. *v.* Rogers, 8 Car. & P. 629; S. *v.* Morton, 27 Vt. 310, [65 Am. D. 201.]

Indorsement.—As to what is an "indorsement," see Crim. Law, II, § 570*a*; Rex *v.* Arscott, 6 Car. & P. 408; S. *v.* Davis, 53 Iowa, 252; Rex *v.* Bigg, 1 Stra. 18; [U. S. *v.* Jolly, 37 Fed. R. 108.]

Draft.—What a "draft for the payment of money," Crim. Law, II, § 785; Rex *v.* Pooley, 3 B. & P. 311, Russ. & Ry. 31.

[7] Crim. Law, II, §§ 563, 785.

[8] Reg. *v.* Reed, 2 Moody, 62, 8 Car. & P. 623; 2 Lewin, 185; Reg. *v.* Stone, 1 Den. C. C. 181, 2 Car. & K. 364; S. *v.* Humphreys, 10 Humph. 442; Reg. *v.* Thorn, Car. & M. 206.

[9] Reg *v.* Reed, *supra*; Reg. *v.* Joyce, Leigh & C. 576.

[10] Reg. *v.* Chambers, Law R. 1 C. C. 341. As to whether any consideration is necessary, see Thompson *v.* Blanchard, 3 Comst. 335.

[As to "instruments," "writings," etc., consult the following:

Instrument.— Alexander *v.* S., 28 Tex. Ap. 186, 12 S. W. R. 595; S. *v.* Grisham, 90 Mo. 163, 2 S. W. R. 223; S. *v.* Bullock, 54 S. C. 300, 32 S. E. R. 424; Burden *v.* S., 120 Ala. 388, 25 S. R. 190; S. *v.* Morgan, 35 La. An. 293;

§ 340. Security — (For money — Valuable security — Securities and effects).[1] — There are statutes containing such words as "securities for money," "valuable securities," "securities and effects," etc. The meanings of these terms are obvious, and something of them is said elsewhere.[2] The reader may like to see in a note[3] a reference to some of the cases. A recorded judgment is an illustration of a "valuable security."[4] And a writing may be such while resembling a promissory note, yet lacking some essential element.[5] So the certificate of a foreign railway company is a "valuable security," even under a statute which adds the words, "in the funds of any body corporate, company, or society, or to any deposit in any savings bank."[6]

Deed.[7] — This term is elsewhere explained.[8] A mortgage, for example, is a deed.[9]

S. *v.* Burling, 102 Iowa, 681, 72 N. W. R. 295; S. *v.* Heaton, 17 Wash. 310, 49 Pac. R. 493.

Writing. — S. *v.* Gullette, 121 Mo. 447, 26 S. W. R. 354; Luttrell *v.* S., 85 Tenn. 232; Lascelles *v.* S., 90 Ga. 347, 16 S. E. R. 945, 35 Am. St. R. 216; Billups *v.* S., 88 Ga. 27, 13 S. E. R. 830; U. S. *v.* Ah Won, 97 Fed. R. 494; Moore *v.* Com., 92 Ky. 518, 18 S. W. R. 833.

Instrument or writing. — S. *v.* Hilton, 35 Kan. 338, 11 Pac. R. 164; S. *v.* Wilson, 95 Iowa, 341, 64 N. W. R. 266.

Instrument in writing. — Shirk *v.* P., 121 Ill. 61, 11 N. E. R. 888; S. *v.* Rigde, 125 N. C. 655, 34 S. E. R. 439.

Writing of legal efficacy. — S. *v.* Wingard, 40 La. An. 733, 5 S. R. 54.

Written instrument. — Dixon *v.* S., 81 Ala. 61, 1 S. R. 69.

As to "obligation," see S. *v.* Stewart, 1 Marv. 542, 41 Atl. R. 188; S. *v.* Campbell, 103 N. C. 344, 9 S. E. R. 410; Dooley *v.* S., 21 Tex. Ap. 549, 2 S. W. R. 284; Scott *v.* S. (Tex. Cr. R.), 48 S. W. R. 523; Munoz *v.* S. (Tex. Cr. R.), 50 S. W. R. 949; Crawford *v.* S. (Tex. Cr. R.), 50 S. W. R. 378; U. S. *v.* Albert, 45 Fed. R. 452. See P. *v.* Brie, 4 N. Y. St. R. 752.

Printing is writing in the legal sense of that term. *In re* Benson, 34 Fed. R. 649.]

[1] Crim. Law, II, §§ 570*b*, 785; *ante*, § 217.

[2] See the places cited in the last note.

[3] Rex *v.* Hart, 6 Car. & P. 106; Rex *v.* Yates, 1 Moody, 170. Car. Crim. Law (3d ed.), 273, 333; Rex *v.* Aslett, Russ. & Ry. 67, 2 Leach, 958; Reg. *v.* Heath, 2 Moody, 33; Rex *v.* Bakewell, 2 Leach, 943; Reg. *v.* Greenhalgh, Dears. 267, 25 Eng. L. & Eq. 570; Reg. *v.* Tatlock, 2 Q. B. D. 157, 13 Cox, C. C. 328; [Reg. *v.* Holloway, 18 Cox, C. C. 631.]

[4] West Ham Union *v.* Ovens, Law R. 8 Ex. 37.

[5] Reg. *v.* John, 13 Cox, C. C. 100; [Reg. *v.* Bowerman, 17 Cox, C. C. 151.]

[6] Reg. *v.* Smith, Dears. 561, 7 Cox, C. C. 93, 33 Eng. L. & Eq. 569. See *ante*, § 326.

[7] Crim. Law, II, §§ 567, 770, 785; *ante*, § 205, note.

[8] Id. And see Rex *v.* Fauntleroy, 1 Moody, 52, 2 Bing. 413, 1 Car. & P. 421; [Allgood *v.* S., 87 Ga. 668, 13 S. E. R. 569; Lessiter *v.* S. (Tex. Cr. R.), 34 S. W. R. 751.]

[9] P. *v.* Caton, 25 Mich. 388. [Also

Book of accounts.[1] — A mere small memorandum book, and not of original entries, may, as well as the large and the original ones, be a "book of accounts."[2] And a city assessment roll is a book of accounts kept in a public office.[3]

§ 341. Receipt — (For money — For goods).[4] — A receipt is a written[5] acknowledgment, by the maker, of something delivered him from another.[6] Illustrations of writings adjudged, without extrinsic proof, to be receipts are, "Received the contents above by me, Stephen Withers,"[7] — "settled 4*l*. Samuel Hughes,"[8] — "paid sadler," Sadler being shown to be a person's name, though written with a small *s*,[9] — severally placed below bills of parcels. A writing in the words "Received from Mr. Bendon, due to Mr. Warman, 17*s*. Settelled," no signature being added below, was held to be Bendon's receipt, it being shown to have been uttered as such.[10] And a ticket issued by a turnpike company, indicating that the holder has passed the toll-gate and paid the toll, is a receipt.[11] But an acknowledgment in the form of a recital, introductory to something else, seems to come short.[12] And so did the following: "*William Chinnery*, Esq., paid to × *tomson*, the som of 8 pounds, *feb.* 13,

a chattel mortgage. P. *v.* Watkins, 106 Mich. 437, 64 N. W. R. 324; S. *v.* Adamson, 43 Minn. 196, 45 N. W. R. 152. And a discharge of a mortgage. Meserve *v.* Com., 137 Mass. 109.]

[1] Crim. Law, II, § 785.

[2] Com. *v.* Williams, 9 Met. 273.

[3] Turbeville *v.* S., 56 Miss. 793.

[As to "certificate," see S. *v.* Alten (S. C.), 35 S. E. R. 209; Maddox *v.* S., 87 Ga. 429, 13 S. E. R. 559; S. *v.* Rhine, 84 Iowa, 169, 50 N. W. R. 676; P. *v.* Brie, 43 Hun, 317; S. *v.* Hilton, 35 Kan. 338, 11 Pac. R. 164.

Ticket. — A blank railway pass is not a "passage ticket." S. *v.* Musgang, 51 Minn. 556, 53 N. W. R. 874.]

[4] Crim. Law, II, §§ 546, 564, 785, 787.

[5] S. *v.* Bibb, 68 Mo. 286.

[6] Krutz *v.* Craig, 53 Ind. 561.

[7] Testick's Case, 2 East, P. C. 925. And see Reg. *v.* Vaughan, 8 Car. & P. 276; Rex *v.* Russel, 1 Leach, 8.

[8] Rex *v.* Martin, 7 Car. & P. 549, 1 Moody, 483, overruling Rex *v.* Thompson, 2 Leach, 910.

[9] Reg. *v.* Houseman, 8 Car. & P. 180. If there are initials, as H. H., in place of the full name, it is necessary to aver and prove what is meant by them. Rex *v.* Barton, 1 Moody, 141. See Reg. *v.* Boardman, 2 Moody & R. 147, 2 Lewin, 181.

[10] Reg. *v.* Inder, 2 Car. & K. 635, 1 Den. C. C. 325.

[11] Reg. *v.* Fitch, Leigh & C. 159, Cox, C. C. 160. For other writings adjudged to be receipts, see Reg. *v.* Meigh, 7 Cox, C. C. 401; Reg. *v.* Hill, 2 Cox, C. C. 246.

Accountable receipt. — For accountable receipt, see Crim. Law, II, § 564. The entry of money by the cashier in the bank-book of a creditor is an accountable receipt. Rex *v.* Harrison, 1 Leach, 180, 2 East, P. C. 926. For another illustration, see Rex *v.* Rice, 6 Car. & P. 634.

[12] Reg. *v.* West, 2 Car. & K. 496, 1

1812;" because it was an assertion, not an acknowledgment, that Chinnery had paid the money.[1] Moreover, the writing, to be a receipt for money, must show what sum, or at least that a sum, was received, and perhaps from whom;[2] and a scrip receipt for money paid on stock subscribed to a bank is not a receipt if the blank for the subscriber's name is not filled.[3] The word "settled," at the foot of a bill of parcels, does not make it a receipt without averments to this effect in the indictment.[4]

§ 342. Extrinsic proof in aid of receipt.— An instrument, not on its face sufficiently full to be a receipt, may be explained to be such[5] by the extrinsic evidence of a course of dealings between the parties wherein it was so treated. This matter must also be averred.[6] And care should be taken that the evidence goes the necessary length, and not merely shows the writing to have been an order, or something else other than a receipt.[7] Precisely how far the criminal law permits these deficiencies to be thus supplied the authorities do not define; but while the doctrine may go further[8] than is thus expressed, it no doubt has limits.[9]

§ 343. Acquittance.— The word "acquittance" is commonly employed in statutes in conjunction with "receipt," and it is nearly synonymous.[10] It is perhaps sufficiently explained in "Criminal Law," but a further reference to authorities may be convenient for the reader.[11]

Den. C. C. 258; Clark *v.* Newsam, 5 Railw. Cas. 69, 1 Exch. 131.

[1] Rex *v.* Harvey, Russ. & Ry. 227.

[2] Yet see, as to an order, *ante*, § 329, note.

[3] Rex *v.* Lyon, 2 Leach, 597, 2 East, P. C. 933.

[4] Rex *v.* Thompson, 2 Leach, 910. See also, on the general subject, S. *v.* Martin, 9 Humph. 55; P. *v.* Hoag, 2 Park. Cr. 86; Reg. *v.* Rodway, 9 Car. & P. 784; Reg. *v.* Frampton, 2 Car. & K. 47; Reg. *v.* Smith, 2 Den. C. C. 449, 9 Eng. L. & Eq. 532; P. *v.* Loomis, 4 Denio, 380; Com. *v.* Williams, 9 Met. 273; Reg. *v.* Inder, 1 Den. C. C. 325, 2 Car. & K. 635; Rex *v.* Hope, 1 Moody, 414; Reg. *v.* Pringle, 2 Moody, 127; Kegg *v.* S., 10 Ohio, 75. [See S. *v.* Henderson, 29 W. Va. 147, 1 S. E. R. 225.]

[5] *Ante*, § 335.

[6] Rex *v.* Hunter, 2 Leach, 624, 2 East, P. C. 928, 977.

[7] Reg. *v.* Cooper, 2 Car. & K. 586.

[8] See Rex *v.* Barton, 1 Moody, 141; S. *v.* Davis, 53 Iowa, 252; Bishop, Con., § 176; and some cases mentioned in the last section.

[9] See *ante*, § 335. [See Gibson *v.* S., 79 Ga. 344, 5 S. E. R. 76.]

[10] Crim. Law, II, § 565; Reg. *v.* Hill, 2 Cox, C. C. 246; S. *v.* Shelters, 51 Vt. 102, [31 Am. R. 679; P. *v.* Swetland, 77 Mich. 53, 43 N. W. R. 779.]

[11] Rex *v.* Martin, 7 Car. & P. 549; S. *v.* Martin, 9 Humph. 55; P. *v.* Hoag, 2 Park. Cr. 86; Reg. *v.* West, 1 Den. C.

§ 344. Other words:—

Goods — Chattels.[1] — In statutes and legal writings these words are generally found combined; thus, "goods and chattels." In significance they are nearly alike. Chattels is the more technical word, and it appears to be somewhat the larger in meaning; for we speak of "chattels real,"[2] but not of goods real. Both are specially elastic, as liable to be varied in extent of meaning by the subject and context.[3] In their largest sense, each, and especially chattels, signifies all property other than real estate.[4] But in the criminal law,— as, for example, in statutes against larceny,— these words seldom or never have so wide a meaning. Here, in general, neither comprehends *choses in action;* as, bank-notes,[5] mortgage-deeds,[6] and the like,[7] not being the subjects of larceny at the common law. So likewise a dog, whereof larceny cannot be committed at the common law,[8] is not within the term "goods and chattels" in statutory larceny.[9] By a part of differing judicial opinions, or opinions founded on differing statutes, these words do not include money coin.[10] By other opinions, or opinions rendered

C. 258; 2 Car. & K. 496; Clark *v.* Newsam, 5 Railw. Cas. 69, 1 Exch. 131; Reg. *v.* Atkinson, 2 Moody, 215.

Discharge for money.— A receipt in full of all demands is a "discharge for money." Com. *v.* Talbot, 2 Allen, 161; [Com. *v.* Brown, 147 Mass. 585, 18 N. E. R. 587, 1 L. R. A. 620.]

[1] Crim. Law, II, §§ 358, 785; Crim. Pro., II, §§ 699, 736.

[2] 1 Bishop, Mar. Women, § 183.

[3] For example, see Ford's Case, 12 Co. 1, 2.

[4] 2 Bl. Com. 385; 2 Kent, Com. 342; Wilson *v.* Rybolt, 17 Ind. 391, [79 Am. D. 486;] Pippin *v.* Ellison, 12 Ire. 61, [55 Am. D. 403;] Weston *v.* McDowell, 20 Mich. 353; Gibbs *v.* Usher, 1 Holmes, 348; Ayres *v.* French, 41 Conn. 142; Chamberlain *v.* Western Transp. Co., 44 N. Y. 305, [4 Am. R. 681.]

[5] S. *v.* Calvin, 2 Zab. 207; Com. *v.* Swinney, 1 Va. Cas. 146, [5 Am. D. 512;] Rutherford *v.* Com., 2 Va. Cas. 141; Rex *v.* Hill, Russ. & Ry. 190; Rex *v.* Sadi, 1 Leach, 468, 2 East, P. C. 748; S. *v.* Jim, 3 Murph. 3.

[6] Reg. *v.* Powell, 14 Eng. L. & Eq. 575, 2 Den. C. C. 403.

[7] And see S. *v.* Foster, 3 McCord, 442.

[8] Crim. Law, II, § 778.

[9] Findlay *v.* Bear, 8 S. & R. 571; S. *v.* Lymus, 26 Ohio St. 400, [20 Am. R. 772. But see Hamby *v.* Samson, 105 Iowa, 112, 74 N. W. R. 918, 40 L. R. A. 508; S. *v.* Brown, 9 Bax. (Tenn.) 53, 40 Am. R. 81; Mullaly *v.* P., 86 N. Y. 365; Kinsman *v.* S., 77 Ind. 132; S. *v.* Doe, 79 Ind. 9, 41 Am. R. 599; S. *v.* Butler (Del.), 43 Atl. R. 480; Com. *v.* Hazelwood, 84 Ky. 681, 2 S. W. R. 489.]

[10] 2 East, P. C. 643, 748; Rex *v.* Guy, 1 Leach, 241, 2 East, P. C. 748; Rex *v.* Davidson, 1 Leach, 242, note; S. *v.* Parker, 1 Houst. Crim. 9. And see the observations of Story, J., in U. S. *v.* Moulton, 5 Mason, 537. According to one case, if an act of parliament vests the property of "goods, chattels, furniture, clothing and debts" in

on other statutes, they do.[1] Some of the differences, and perhaps all, are reconcilable by considerations of the differing connections in which the words stand in the respective statutes. Thus, under an enactment against the larceny of "any goods, wares or merchandise in any vessel upon any navigable river," the word "goods" was construed not even to extend to dollars, or Portugal money, not current by proclamation; but the reason appears to have been that, as it was connected in the clause with "wares or merchandise," the latter limited its meaning.[2] By a familiar rule of statutory interpretation,[3] there is no objection to giving these words a larger and even their largest meaning, when the legislative will sufficiently appears.[4] And in a case where the term "personal goods" was held to embrace all coin, though circulating as money, the court intimated, contrary to what we have seen to be the general doctrine, that under the phrase "goods and chattels" may be comprehended bank-bills, since they circulate as currency; but not other *choses in action*, such as promissory notes.[5] Not only articles of merchandise in a shop, but oats, rye and corn, the produce of a man's farm, and lying in his barn, are "goods, wares and merchandise;"[6] the luggage of a passenger going to a steamboat is "goods and merchandise;"[7] and a railroad passenger ticket is a "chattel;"[8] as are also sheep, fowls and other animals.[9] Now,—

certain persons, the property in money and securities for money is not thereby transferred. Rex *v.* Beacall, 1 Car. & P. 310, 454; [S. *v.* Bishop, 98 N. C. 773, 4 S. E. R. 357.]

[1] Hall *v.* S., 3 Ohio St. 575; S. *v.* Boston, 2 Harring. (Del.) 529; [Brown *v.* S., 23 Tex. Ap. 214, 4 S. W. R. 588.]

[2] Rex *v.* Leigh, 1 Leach, 52; Rex *v.* Grimes, 1 Leach, 53, note, 2 East, P. C. 647, Foster, 79, note. And see *ante*, § 245.

[3] *Ante*, § 204.

[4] Hall *v.* S., *supra*.

[5] U. S. *v.* Moulton, 5 Mason, 537. And see Rex *v.* Dean, 2 Leach, 693, 2 East, P. C. 749; Rex *v.* Mead, 4 Car. & P. 535.

[6] S. *v.* Brooks, 4 Conn. 446; [S. *v.* Hawey, 131 Mo. 339, 32 S. W. R. 1110; s. c., 141 Mo. 343, 42 S. W. R. 938; Reg. *v.* Foley, 17 Cox, C. C. 142; Ball *v.* White, 39 Ohio St. 650. But not a meal purchased at a restaurant. Reg. *v.* Jones, 15 Cox, C. C. 475.]

[7] Rex *v.* Wright, 7 Car. & P. 159.

[8] Reg. *v.* Boulton, 1 Den. C. C. 508, 2 Car. & K. 917, 13 Jur. 1034. [A "diploma" issued by an educational institution. Alexander *v.* S., 28 Tex. Ap. 186, 12 S. W. R. 595.]

[9] 2 East, P. C. 748. Asses and pigs have been held to be "cattle," within Stat. 9 Geo. 1, ch. 22. Rex *v.* Chapple, Russ. & Ry. 77; Rex *v.* Whitney, 1 Moody, 3; [S. *v.* Ward, 49 Conn. 429; Haygood *v.* S., 41 Ark. 479; S. *v.* Taylor, 18 R. I. 541.]

§ 345. Further of choses in action as goods and chattels. Not only, as just seen, in reason, but on authority, the term "goods and chattels," in a criminal statute, may include even *choses in action*[1] when such legislative meaning sufficiently appears. They have been held to comprehend United States treasury notes.[2] And where the stealing of promissory notes was a statutory larceny, and a subsequent enactment made it a misdemeanor to "buy or receive any goods or chattels, knowing the same to have been stolen," the judges of Ireland held that promissory notes fell within the latter act;[3] yet substantially a contrary doctrine was laid down in New Jersey.[4] In England, the halves of country bank-notes, sent in a letter, are adjudged goods and chattels;[5] and a bank-note is within the words "money, goods or chattels, wares or merchandises," of 12 Anne, stat. 1, ch. 7, § 1, concerning stealing from a dwelling-house;[6] but the Virginia court denied that such note was included under words similar to those last mentioned.[7] On the whole, therefore, in states where further inquiry on this question is not precluded by adjudication, the courts are permitted to follow what they may deem the leadings of judicial reason.[8]

§ 346. Money.[9] — The word "money" means, in these statutes, only what is legal tender.[10] It was even adjudged in Texas to extend simply to metallic coin, and not to include our

[1] [Kirk *v.* Roberts (Cal.), 31 Pac. R. 620.]

[2] Sallie *v.* S., 39 Ala. 691; Collins *v.* P., 39 Ill. 233.

[3] Rex *v.* Crone, Jebb, 47. And see Anonymous, 1 Crawf. & Dix, C. C. 152. See P. *v.* Kent, 1 Doug. (Mich.) 42; Hall *v.* S., 3 Ohio St. 575.

[4] S. *v.* Calvin, 2 Zab. 207.

[5] Rex *v.* Mead, 4 Car. & P. 535.

[6] Rex *v.* Dean, 2 Leach, 693, 2 East, P. C. 646, 749.

[7] Com. *v.* Swinney, 1 Va. Cas. 146, 151, [5 Am. D. 512.] And see Rex *v.* Hill, Russ. & Ry. 190. [See S. *v.* James, 58 N. H. 67; Wright *v.* Com., 82 Va. 183.]

[8] [As to "property," see Brown *v.* S., 23 Tex. Ap. 214, 4 S. W. R. 588; P. *v.* Williams, 60 Cal. 1; P. *v.* McGrath, 5 Utah, 525, 17 Pac. R. 116; S. *v.* Smith, 9 Wash. 248, 37 Pac. R. 290.]

[9] Crim. Law, II, §§ 357, 482, 785; Crim. Pro., II, §§ 703, 704; *ante*, § 217; *post*, §§ 874, 901.

[10] 1 East, P. C. 147, 149. And see Hale *v.* S., 8 Tex. 171; Colson *v.* S., 7 Blackf. 590. In England, foreign coin is considered mere bullion, unless made current by proclamation. 1 East, P. C. 149. As to "bullion," see also 1 East, P. C. 188; [and S. *v.* Combe, 47 Kan. 136, 27 Pac. R. 818; Rucker *v.* S. (Tex. Cr. R.), 26 S. W. R. 65. And see Fleener *v.* S., 58 Ark. 98, 23 S. W. R. 1; White *v.* S. (5 Tex. Cr. R.), 57 S. W. R. 100; Edelhoff *v.* S., 5 Wyo. 19, 36 Pac. R. 627.]

national greenbacks.[1] Therefore it does not comprehend bank-bills, though they pass current,[2] or United States treasury warrants,[3] or county claims,[4] or orders of a railroad company on its treasurer,[5] or mere promissory notes,[6] or bills of exchange,[7] or bank-checks,[8] or ordinarily anything which is a mere representative of money.[9]

§ 347. Jewelry.—A watch and chain are not jewelry,[10] but plain gold rings and ear-knobs are.[11]

V. The Proceedings.

§ 347a. Elsewhere.—Words and phrases indicating the procedure are chiefly explained in other connections in this series of works. But something remains for this place; as,—

[1] Block *v.* S., 44 Tex. 620. [Compare Lewis *v.* S., 28 Tex. Ap. 140, 12 S. W. R. 736.] And see Kennedy *v.* Briere, 45 Tex. 305; Paul *v.* Ball, 31 Tex. 10; Stoughton *v.* Hill, 3 Woods, 404; Munson *v.* S., 4 Greene (Iowa), 483; [Otero *v.* S., 30 Tex. Ap. 450, 17 S. W. R. 1081; S. *v.* Hoke, 84 Ind. 137; Com. *v.* Mann (Ky.), 14 S. W. R. 685.]

[2] S. *v.* Jim, 3 Murph. 3; Rex *v.* Hill, Russ. & Ry. 190; Com. *v.* Swinney, 1 Va. Cas. 146, 151, [5 Am. D. 512;] McAuly *v.* S., 7 Yerg. 526; Johnston *v.* S., Mart. & Yerg. 129; Johnson *v.* S., 11 Ohio St. 324.

Valuable thing.—But a bank-note is a "valuable thing." Rex *v.* Robinson, 2 Leach, 749, 2 East, P. C. 1110, 1114. Compare with S. *v.* Walls, 54 Ind. 561; [Robinson *v.* S., 53 N. J. L. 41, 20 Atl. R. 758; Ball *v.* White, 39 Ohio St. 650.] As to the meaning of the word "bank-note," in a statute, see Pomeroy *v.* Com., 2 Va. Cas. 342.

Lawful money — (Extortion).—Bank-notes are not properly described as "lawful money." Thus, an indictment for extortion set out "that the defendant, by color of his office as clerk, demanded and received four dollars forty-three and three-fourths cents, lawful money of the state of Tennessee, for taking probate and certifying a deed of conveyance, containing two hundred acres of land, in five tracts, register's fees inclusive; whereas in fact the lawful fee was two dollars and forty-five cents, and no more, for the services aforesaid." And proof of the receipt of the before-mentioned sum in bank-notes was held not to sustain the allegation. Garner *v.* S., 5 Yerg. 100.

[3] Williams *v.* S., 12 Sm. & M. 58. Or United States bonds. Waterman *v.* Waterman, 34 Mich. 490.

[4] Tucker *v.* S., 16 Ala. 670. [See S. *v.* White, 66 Wis. 343, 28 N. W. R. 202; Bork *v.* P., 91 N. Y. 5.

[5] Grummond *v.* S., 10 Ohio, 510. And see Robinson *v.* S., 6 Wis. 585.

[6] S. *v.* Foster, 3 McCord, 442; Tate *v.* S., 5 Blackf. 174.

[7] Rex *v.* Major, 2 East, P. C. 1118.

[8] Lancaster *v.* S., 9 Tex. Ap. 393.

[9] See distinctions *post*, § 874. And see Rex *v.* Dean, 2 Leach, 693, 2 East, P. C. 646, 649. ["Fractional currency." See App *v.* S., 90 Ind. 73.]

[10] Bernstein *v.* Sweeny, 33 N. Y. Super. Ct. 271; Ramaley *v.* Leland, 43 N. Y. 539, [3 Am. R. 728.]

[11] Com. *v.* Stephens, 14 Pick. 370, 373. [For "package," see U. S. *v.* One Hundred and Thirty-two Pack-

Trial.— By the expression "trial" of a criminal cause, the proceedings in open court after the pleadings are finished and it is otherwise ready, down to and including the rendition of the verdict, are commonly meant.[1] Not extending, on the one hand, to such preliminary steps as the arraignment and giving in of the pleas,[2] it does not comprehend, on the other hand, a hearing on appeal.[3] But where a statute containing this word is for the ease of the accused person, and so is to be liberally construed,[4] the word may in some connections include steps after verdict; as, a motion in arrest of judgment.[5]

§ 348. Conviction — Attaint.— Ordinarily the word "conviction" signifies the finding of the jury, by verdict, that the defendant is guilty. It does not mean also that sentence against him has been rendered.[6] Likewise one's plea of guilty constitutes a conviction of him.[7] Coke distinguishes thus: "The difference between a man attainted and convicted is, that a man is said convict before he hath judgment; as, if a man be convict by confession, verdict, or recreancy. And when he hath his judgment upon the verdict, confession, or recreancy, or upon the outlawry or abjuration, then he is said to be attaint."[8] But

ages of Spirituous Liquors and Wines, 76 Fed. R. 364, 22 C. C. A. 228.]

[1] Crim. Pro., I, §§ 269–274; S. *v.* Overton, 77 N. C. 485; U. S. *v.* Curtis, 4 Mason, 232; Jenks *v.* S., 39 Ind. 1. And see Galpin *v.* Critchlow, 112 Mass. 339, [17 Am. R. 176; S. *v.* Woolsey, 19 Utah, 486, 57 Pac. R. 426.]

[2] U. S. *v.* Curtis, *supra*. And see, for "before trial," St. Anthony Falls Water-power Co. *v.* King Bridge, 28 Minn. 186, [23 Am. R. 682;] Mansfield *v.* Fleck, 28 Minn. 61; Winship *v.* P., 51 Ill. 296; [S. *v.* Little Whirlwind, 22 Mont. 425, 56 Pac. R. 820.]

[3] S. *v.* Overton, *supra*.

[4] *Ante*, §§ 196, 227, 239.

[5] Reg. *v.* Martin, 3 Cox, C. C. 447, 448. Some of the other reports of this case do not contain this point.

[6] 4 Bl. Com. 362; Crim. Pro., I, §§ 252, 253; Crim. Law, I, § 903; U. S. *v.* Gilbert, 2 Sumner, 19, 40; S. *v.* Overton, 77 N. C. 485; S. *v.* Applewhite, 75 N. C. 229; York *v.* Dalhousen, 45 Pa. St. 372; Com. *v.* Lockwood, 109 Mass. 323, [12 Am. R. 699;] Blair *v.* Com., 25 Grat. 850; Williams *v.* U. S., 12 Ct. of Cl. 192. And see S. *v.* Valentine, 7 Ire. 225; Com. *v.* Williamson, 2 Va. Cas. 211; Skinner *v.* Perot, 1 Ashm. 57; S. *v.* Fuller, 1 McCord, 178; Reg. *v.* Faderman, 4 New Sess. Cas. 161, Temp. & M. 286, 1 Den. C. C. 565; Co. Lit. 390*b*; Burgess *v.* Boetefeur, 8 Scott, N. R. 194; S. *v.* Anderson, 5 Harring. (Del.) 493; [Reg. *v.* Blaby, 18 Cox, C. C. 5.]

[7] P. *v.* Goldstein, 83 Cal. 432.

[8] Co. Lit. 390*b*. "A verdict, however, is not always necessary to a conviction, which may be by a judgment upon a demurrer, or upon a confession of guilt, or upon a proceeding in outlawry, as well as by a verdict of a jury on a plea of not guilty. The word 'conviction,' in its ordinary sense, may therefore be said to mean the ascertainment of the fact of guilt in a criminal prosecu-

the word "conviction," in a statute, is very easily extended by the context or the subject to denote also the final judgment.[1] Where the proceeding is civil in form, for the recovery of a fine, there cannot be what in law is called a conviction.[2] It has likewise some other significations; according to one of which, "a conviction is defined to be a record of the summary proceedings upon any penal statute, before one or more justices of the peace, or other persons duly authorized, in a case where the offender has been convicted and sentenced."[3]

§ 349. Term of years.— This expression, in a statute providing the punishment, has been defined to mean not less than two years;[4] and, on the other hand, to include a sentence for life.[5]

§ 350. Action.— The word "action,"[6] familiarly used to denote a civil suit at law, is sometimes applied, and properly, to a criminal suit.[7] Also it may,[8] but does not necessarily,[9] include a suit in equity.

tion, in the mode prescribed by law, which mode, most generally, is a verdict of a jury on a plea of not guilty." Blair *v.* Com., *supra*. at p. 857. [See S. *v.* Hastings, 37 Neb. 96, 55 N. W. R. 774.]

[1] Dwar. Stat. (2d ed.) 683; Keithler *v.* S., 10 Sm. & M. 192; Com. *v.* Gorham, 90 Mass. 420; Faunce *v.* P., 51 Ill. 311.

[2] S. *v.* White, 13 La. An. 578.

[3] Holthouse, Law Dict., Conviction. And see Hartley *v.* Hindmarsh, Law R. 1 C. P. 553; Rey. *v.* Hyde, 7 Ellis & B. 860. ["Imprisonment." Haynes *v.* U. S., 101 Fed. R. 817.]

[4] *Ex parte* Seymour, 14 Pick. 40. ["Term," in N. Y. city charter of 1873. P. *v.* McClave, 99 N. Y. 83, 1 N. E. R. 235.]

[5] Com. *v.* Evans, 16 Pick. 448.

[6] [Tichenor *v.* Collins, 45 N. J. L. 24.]

[7] Co. Lit. 284*b*; 2 Inst. 40; S. *v.* Carr, 6 Oreg. 133.

[8] Coatsworth *v.* Barr, 11 Mich. 199; Kramer *v.* Rebman, 9 Iowa, 114; [Fenstermacher *v.* S., 19 Oreg. 504, 25 Pac. R. 142.]

[9] *Ex parte* Hewitt, 40 Ala. 300; [Hamp *v.* Ossett Corporation, [1898] 1 Ch. 525; Moore *v.* Norwell, 94 N. C. 265.]

BOOK IV.

THE PROCEDURE ON WRITTEN LAWS.

CHAPTER XXVIII.

WHAT HAS BEEN ALREADY EXPLAINED.

§ 351. Written and unwritten, one system.— In the foregoing discussions of this volume, we have seen that the written and unwritten laws are interpreted together into one system,[1] and we have had numerous illustrations of the doctrine. Hence,—

§ 352. Procedure follows like rules.— In the main, the procedure on a written law is the same as on the unwritten. So that the expositions of it in "Criminal Procedure," and elsewhere in this series of works, are, even when they are primarily on the common law, necessarily expositions of the same on statutes. Moreover,—

§ 353. Indictments on statutes.— The doctrine of indictments on statutes is especially set forth in a chapter in "Criminal Procedure."[2] And —

§ 354. Mingling with common-law expositions.— Throughout the discussions in this series of works, the procedure on the statutes, and the variations of the common-law procedure which statutes have created, are kept in view and laid before the reader with the rest. So that, in one way or another, the entire doctrine has been explained, except as to the —

§ 355. Topic of next chapter.— Though seldom are judicial steps on a private statute necessary, and legislation has in most of our states greatly simplified the procedure on municipal by-laws, something of these subjects is important to be known by practitioners, and the explanations will be given in the next chapter.

[1] *Ante*, §§ 86–90, 113*b*–121, and numerous other places.
[2] Crim. Pro., I, §§ 593–642.

CHAPTER XXIX.

PROCEEDINGS ON PRIVATE STATUTES AND MUNICIPAL BY-LAWS.

§ 394. Introduction.
395–402. Indictment on private statutes.
403–408. Procedure on municipal by-law.

§ 394.[1] **How chapter divided.**— We shall consider, I. The indictment on private statutes; II. The procedure upon municipal by-laws.

I. The Indictment on Private Statutes.

§ 395. Not recite public statute.— We have seen elsewhere that an indictment on a public statute need not recite the statute;[2] though, if it does, the recitation should be correct, else it may in some circumstances be pronounced ill.[3] But,—

§ 396. Recite private statute.— Since the courts do not take judicial notice of private statutes,[4] "the parts," says Chitty,[5] "of a private act upon which an indictment is framed must be set out specially,[6] the same as other facts; and a variance, if

[1] §§ 356–393 omitted from this edition.

[2] Crim. Pro., I, § 608; Wright *v.* Gerrard, Hob. 306, 310; Crawford *v.* Planters', etc. Bank, 6 Ala. 289; S. *v.* Cobb, 1 Dev. & Bat. 115; [Clark *v.* Village of North Muskegon, 88 Mich. 308, 50 N. W. R. 254; City of Covington *v.* Hoadley, 83 Ky. 444; S. *v.* Cooper, 101 N. C. 684, 8 S. E. R. 134.]

[3] Id.; Say *v.* Stephens, Cro. Car. 135; Platt *v.* Hill, 1 Ld. Raym. 381, 382; Boyce *v.* Whitaker, 1 Doug. 93*a*; Palgrave *v.* Windham, 1 Stra. 212, 214; Rex *v.* Marsack, 6 T. R. 771; Vander Plunken *v.* Griffith, Cro. Eliz. 236; Farr *v.* East, Cro. Eliz. 186; Whitton *v.* Marine, 1 Dy. 95*a*; Walgrave's Case, 2 Dy. 203*a*; Pelles *v.* Saunderson, 2 Dy. 170*b*, 171*a*; Rex *v.* Hill, Cro. Car. 232, 233.

[4] *Ante*, § 87; Hailes *v.* S., 9 Tex. Ap. 170; Toledo, etc. R. R. Co. *v.* Nordyke, 27 Ind. 95; Perry *v.* New Orleans, etc. R. R. Co., 55 Ala. 413, [28 Am. R. 740; Town of Durham *v.* North Carolina R. R. Co., 108 N. C. 399, 12 S. E. R. 1040; Denver & Rio Grande R. R. Co. *v.* U. S., 9 N. M. 389, 54 Pac. R. 336; City of Mobile *v.* Louisville & Nashville R. R. Co. (Ala.), 26 S. R. 902; Workingmen's Bank *v.* Converse, 33 La. An. 963.]

[5] 1 Chit. Crim. Law, 276–281; Crim. Pro., I, § 609.

[6] The American annotator refers here to Goshen, etc. Turnpike *v.* Sears, 7 Conn. 86, 92; 1 Stark. Ev. (5th Am. ed.) 197, notes; S. *v.* Cobb, 1 Dev. & Bat. 115; Cochran *v.* Couper, 1 Harr. (Del.) 200.

properly shown to the court, will be fatal.[1] But the error must be properly shown to the court by the defendant, for they will presume the statute, of which they cannot *ex officio* take notice, to be correctly recited.[2] . . .

§ 397. Recital of date.— "It is in no case necessary to set forth the day on which the statute was enacted. And, therefore, it is better altogether to omit it;[3] for a mistake in this respect will frequently prove fatal,[4] though under various circumstances it will not.[5]

§ 398. Repugnancy in recital of date.— "A repugnancy in setting forth the time when the parliament was holden — as, if a statute be recited to have been made in the first and second year of the king — will vitiate the proceedings under it."[6] And it is the same of a date which could not have been true.[7]

§ 399. Title and preamble.— "The title[8] and preamble[9] of the act need not in any case be recited, for they form no part of the law."[10] It would seem to follow that a misrecital of either of these will do no harm, but on this question opinions differ.[11]

§ 400. Accuracy in recital of purview.— As to the recital of the purview, Chitty continues, mingling the doctrine of public statutes with that of private: "If any material part be omitted or misrecited, the indictment will be bad, because it will, in the case of a public act, judicially appear to the court that the charge is professedly grounded upon a vicious foundation.[12] . . . It seems to be a general and established rule

[1] 1 Sid. 356; 2 Hale, P. C., 172; 2 Hawk. P. C., ch. 25, § 103; Bac. Abr., Ind. H. 2; Burn Just., Ind. IX.

[2] 2 Hawk. P. C., ch. 25, § 103; Bac. Abr., Ind. H. 2; Burn Just., Ind. IX; 1 Chit. Pl. (4th ed.) 197. See *post*, § 401.

[3] Walgrave's Case, 2 Dy. 203*a*; 2 Hawk. P. C., ch. 25, § 104; Bac. Abr., Ind. H. 2.

[4] Ford *v.* Hunter, Cro. Jac. 111; Anonymous, Skin. 110, 111; 2 Hawk. P. C., ch. 25, § 104.

[5] Read *v.* Potter, Cro. Jac. 133; Oliver *v.* Collins, Yelv. 126, 127; Owen *v.* Evans, 2 Keb. 34.

[6] Sir F. Moore, 302; 2 Hawk. P. C., ch. 25, § 104; Bac. Abr., Ind. H. 2. And see Birt *v.* Rothwell, 1 Ld. Raym. 210, 243.

[7] Rann *v.* Green, Cowp. 474. And see East *v.* Wilson, Cro. Eliz. 106.

[8] *Ante*, §§ 44–47.

[9] *Ante*, §§ 48–51.

[10] Eckert *v.* Head, 1 Mo. 593.

[11] Shaftsbury *v.* Digby, 3 Keb. 647, 648, T. Jones, 49, 51; Mills *v.* Wilkins, Holt, 662, 6 Mod. 62, 2 Salk. 609, 3 Salk. 331; The Nancy *v.* Fitzpatrick, 3 Caines, 38, 41; P. *v.* Walbridge, 6 Cow. 512; 2 Hawk. P. C., ch. 25, § 107.

[12] Cromwell's Case, 4 Co. 12*b*, 13; Hall *v.* Gaven, Cro. Eliz. 307; Rex *v.* Green, 1 Vent. 171, 172; Boyce *v.*

that a variance which does not alter the sense of a material part of the statute will not vitiate.[1] . . . For the present rule seems to be that, if the variance consists in the introduction or alteration of words purely superfluous and unnecessary, it will not be material, unless indeed the alteration rendered the whole repugnant to the intent of the statute; for then the superfluous words cannot be rejected.[2]

§ 401. Continued.—"If any defect arise in the recital of a public statute, which there was no occasion to set out, and the indictment would be good without it, if the indictment conclude generally 'contrary to the form of the statute in such case made and provided,' . . . the recital may be rejected as surplusage, and judgment may be given against the defendant; but, if it be referred to as *the said* statute, the proceedings will be altogether defective.[3] As it is necessary to recite private statutes, the same rule will not apply to them, and the omission of the word 'said' cannot aid them. And yet in one respect it is more dangerous to misrecite a public than a private statute; for, in the former case, the court, being bound *ex officio* to take cognizance of all public laws, will of themselves notice the variance, whereas in the latter it must be specially pleaded or given in evidence under a plea of *nul tiel record*, for the court will presume the recital to be correct until the contrary is formally shown."[4] Here the learned author appears to have fallen into the mistake of applying to the indictment an inapplicable rule of civil pleadings. On principle, where the prosecutor relies on a private statute, he must prove it at the trial, like any other averred fact; and, should there be a variance between the allegation and proof, there can be no conviction.

§ 402. Modifications of doctrine.—The doctrines of the foregoing sections are directly or indirectly modified or superseded

Whitaker, 1 Doug. 93*a*, 97; Palgrave *v.* Windham, 1 Stra. 212, 214; Platt *v.* Hill, 1 Ld. Raym. 381, 382; Eden's Case, Cro. Eliz. 697; 2 Hawk. P. C., ch. 25, § 101; Bac. Abr., Ind. H. 2.

[1] The American editor refers here to The Nancy *v.* Fitzpatrick, 3 Caines Cas. 38.

[2] 2 Hawk. P. C., ch. 25, § 109; Cromwell's Case, 4 Co. 12, 13; Goodwin *v.* West, Cro. Car. 522, 523.

[3] *Ante*, § 395; Boyce *v.* Whitaker, 1 Doug. 93*a*, 94; Fost. 372; Palgrave *v.* Windham, 1 Stra. 212, 214; Platt *v.* Hill, 1 Ld. Raym. 381, 382; Rex *v.* Hill, Cro. Car. 232, 233; 2 Hale, P. C. 172, 173; 2 Hawk. P. C., ch. 25, § 104.

[4] Platt *v.* Hill, 1 Ld. Raym. 381, 382; Rex *v.* Wilde, 1 Doug. 97, in note.

by statutes in some of the states. One provision is that a private statute may be pleaded by its title and date.[1] Another is that an allegation of the existence of a corporation shall be taken as true unless it is denied on oath.[2] An indirect modification consists of enlarging the class of statutes deemed public.[3] And, in like manner, a private statute recognized by a public becomes therefore public, and it need not be pleaded and proved.[4] So if a statute of a private nature contains a clause declaring it to be public, the courts will take notice of it as public.[5]

II. The Procedure upon Municipal By-laws.

§ 403. How formerly.— We have already seen what are the powers of a municipal corporation to make by-laws, and incidentally something of the procedure under them.[6] By the law of England as it was when we received thence our unwritten law, such corporation could not, by a by-law, authorize an indictment or a summary prosecution before a magistrate; nor could it provide either imprisonment or disfranchisement for disobedience.[7] Therefore the ancient by-laws used to direct that, for a breach of a provision, the offender forfeit a sum named. The forfeiture was not recoverable in the court of the corporation, at least an action in the name of the mayor and commonalty could not be brought in the mayor's court; for the principle, that no man shall be a judge in his own case,[8] forbade. The method mostly employed for recovering the

[1] S. *v.* Loomis, 27 Minn. 521; [Nichols *v.* Bardwell Lodge No. 179 (Ky.), 43 S. W. R. 1091; Zabel *v.* Louisville Baptist Orphans' Home, 92 Ky. 89, 17 S. W. R. 212, 13 L. R. A. 668; East Line, etc. R. R. Co. *v.* Rushing, 69 Tex. 30, 46 S. W. R. 834.]

[2] Hixon *v.* George, 18 Kan. 253.

[3] *Ante*, § 42*a*.

[4] Rogers' Case, 2 Greenl. 301; Lavalle *v.* P., 6 Bradw. 157; P. *v.* Wilson, 3 Bradw. 368.

[5] Brookville Ins. Co. *v.* Records, 5 Blackf. 170; P. *v.* Wilson, *supra;* Ingram *v.* Foot, 12 Mod. 611, 613. And see U. S. *v.* Porte, 1 Cranch, C. C. 369; Duncan *v.* Duboys, 3 Johns. Cas. 125.

[6] *Ante*, §§ 18–26.

[7] Clark's Case, 5 Co. 64*a*, and Fraser's note; s. c. *nom.* Clark's Case, Sir F. Moore, 411; Wood *v.* London, 1 Salk. 397; Glover, Mun. Corp. 312. And see Rex *v.* London, 2 Lev. 200; Clark's Case, 1 Vent. 327; Harscott's Case, Comb. 202.

[8] Broom, Leg. Max. (2d Eng. ed.) 84; Darby's Case, 12 Co. 114; Anonymous, 1 Salk. 396; Great Charte *v.* Kennington, 2 Stra. 1173; Grand Junction Canal *v.* Dimes, 12 Beav. 62; *Ex parte* Medwin, 1 Ellis & B. 609.

penalty was by an action of debt, or sometimes of *assumpsit*, in some one of the other courts, commonly one of the courts at Westminster Hall.[1] But,—

§ 404. Modern changes.— In modern times, the reader is aware, city ordinances and other like by-laws are usually enforced by summary proceedings,[2] before a court sitting within the bounds of the municipal corporation;[3] and the penalty is a fine or imprisonment, or both. These changes are wrought, directly or indirectly, by statutes, both in England and in our states generally. The ancient methods are ill adapted to the later manners and necessities.

§ 405. As to act of incorporation.— The charter, or act of incorporation, is, by the greater number of modern opinions, a public statute.[4] Yet by some it is deemed private.[5] Where it is private, the elucidations of the last sub-title explain that it, or so much of it as shows the power of the corporation to make the by-law in question, must be pleaded, then proved.[6] If the power relied on is such only as springs incidentally from the existence of the corporation,[7] not much of allegation under this head will be needed; but, in fact, all our acts creating municipal corporations contain, it is believed, more or less express power. Then, should the authority to make by-laws be committed by the charter to a body separate from the entire corporation,— as, to the mayor and common council,— this part of the charter must be set out; else the court cannot see that the by-law which this body ordained is valid.[8] So, if the by-law provides a punishment not competent without express legislative authorization, the private statute giving the authority must appear in

[1] 1 Saund. (Wms. ed.) 312c, note; *v.* Meek, 42 N. Y. 186; P. *v.* Davis, 61 Barb. 456.

[2] S. *v.* White, 76 N. C. 15; S. *v.* Threadgill, 76 N. C. 17.

[3] S. *v.* Wells, 46 Iowa, 662; P. *v.* James, 16 Hun, 426.

[4] *Ante*, § 42*b*.

[5] Id.; Dwar. Stat. 464. See Dwar. Stat. 464, 465; P. *v.* O'Brien, 38 N. Y. 193; P. *v.* Hills, 35 N. Y. 449; Gaskin Glover, Mun. Corp. 60; Wood *v.* London, *supra;* Bodwic *v.* Fennell, 1 Wils. 233; London *v.* Bernardiston, 1 Lev. 14; Adley *v.* Reeves, 2 M. & S. 53; Barber Surgeons of London *v.* Pelson, 2 Lev. 252.

[6] Feltmakers *v.* Davis, 1 B. & P. 98; Schott *v.* P., 89 Ill. 195.

[7] *Ante*, § 18.

[8] Rex *v.* Lyme Regis, 1 Doug. 149; Feltmakers *v.* Davis, *supra*, where it was observed, *per curiam*, that the "power of making by-laws is incident to every corporation, either by the body at large or by a select part; and it is in the latter case only that the power need be shown." Page 100. And see Rex *v.* Bird, 13 East, 367.

allegation and proof. But generally in our states matter of this sort is not required, because either the court will hold the incorporating statute to be public, or the act itself will direct that it be judicially noticed.[1]

§ 406. Setting out and proving by-law.— Always, by the common-law rules, the by-laws of municipal corporations are private, not public, laws, and they must be averred in pleadings upon them, and proved like other facts at the hearing.[2] And this is so even though the act of incorporation is deemed public,[3] or a statute requires the courts to notice it judicially. The allegation must contain, at least, so much of the substance of the by-law as is relied on;[4] and such further matter as will enable the court to see that it proceeded from a body having the power, by the act of incorporation, to make by-laws.[5] Then a by-law which appears from the records of this body to have been regularly ordained will be presumed to have been so in the absence of proof to the contrary.[6] But largely, in our states, yet not universally, more convenient methods are established by statutes, or the courts are required to notice by-laws

[1] See S. *v.* McAllister, 24 Me. 139; S. *v.* Soragan, 40 Vt. 450; Clark *v.* Janesville, 10 Wis. 136; S. *v.* Merritt, 83 N. C. 677; [East Tenn., Va. & Ga. Ry. Co. *v.* City of Morristown (Tenn. Ch. App.), 35 S. W. R. 771; Stone *v.* Halstead, 62 Mo. Ap. 136; S. *v.* Olinger (Iowa), 72 N. W. R. 441; Storrie *v.* Cortes, 90 Tex. 283, 38 S. W. R. 154, 35 L. R. A. 666; Missouri Pac. Ry. Co. *v.* Chick, 6 Kan. Ap. 480, 50 Pac. R. 605; City of Passadena *v.* Stinson, 91 Cal. 238, 27 Pac. R. 604; Butler *v.* Robinson, 75 Mo. 192; Burfenning *v.* Chicago, etc. Ry. Co., 46 Minn. 20, 48 N. W. R. 444.]

[2] Porter *v.* Waring, 69 N. Y. 250; Stevens *v.* Chicago, 48 Ill. 498; Laviosa *v.* Chicago, etc. R. Co., 1 McGloin, 299; Winona *v.* Burke, 23 Minn. 254; Green *v.* Indianapolis, 25 Ind. 490 (but *contra* by subsequent statute, Huntington *v.* Pease, 56 Ind. 305); P. *v.* Special Sessions, 12 Hun, 65, 66; [Chicago West Division Ry. Co. *v.* Klander, 9 Ill. Ap. 613; P. *v.* Buchanan, 1 Idaho (N. S.), 681; Watts *v.* Jones, 60 Kan. 201, 56 Pac. R. 16; Field *v.* Malster, 88 Md. 691, 41 Atl. R. 1087; Moore *v.* Town of Jonesboro, 107 Ga. 704, 33 S. E. R. 435; Wilson *v.* S., 16 Tex. Ap. 497; City of McPherson *v.* Nichols, 48 Kan. 430, 20 Pac. R. 679; Stittgen *v.* Rundle, 99 Wis. 78, 74 Wis. 536; P. *v.* Canganda, 37 N. Y. S. 768, 15 Misc. R. 325; Rockford City Ry. Co. *v.* Matthews, 50 Ill. Ap. 267; Com. *v.* Odenweller, 156 Mass. 234, 30 N. E. R. 1022.]

[3] S. *v.* Soragan, 40 Vt. 450.

[4] *Ante*, § 405; P. *v.* Special Sessions, 12 Hun, 65; [City Council of Charleston *v.* Ashley Phosphate Co., 34 S. C. 541, 13 S. E. R. 845.]

[5] Feltmakers *v.* Davis, 1 B. & P. 98. See Miller *v.* Anheuser, 2 Mo. Ap. 168; [Mohrden *v.* Northwestern Ry. Co., 54 S. C. 492, 32 S. E. R. 524.]

[6] Lexington *v.* Headley, 5 Bush, 508. And see Stevens *v.* Chicago, 48 Ill. 498; Com. *v.* Patch, 97 Mass. 221.

or some classes of them judicially like general laws, thus avoiding the necessity of setting out and proving them.[1] A provision of this sort pertains to the remedy, therefore it may be made applicable as well to past offenses as to future.[2]

How complaint conclude.— The complaint or information should conclude both against the form of the by-law,[3] and also against the form of the statute;[4] because it rests both upon the by-law and upon the statute. But,—

§ 407. Formalities diverse.— In the formal parts, the proceeding upon by-laws, varying with the statutes and the general practice of the states, is so far from uniform as to render a minute elucidation of it out of place here.[5] An indictment,

[1] Huntington *v.* Pease, 56 Ind. 305; Goldthwaite *v.* Montgomery, 50 Ala. 486. And see Schrumpf *v.* P., 14 Hun, 10. Wilde, J., in the Massachusetts court, observing on a case in which it was contended that the complaint ought "to have set out the by-law at large," said: "But if the statute dispensing with the necessity of thus incumbering the record is a valid law [which the court held it to be], this objection must fail. Perhaps, even without the aid of a statute, the court below, being composed of citizens of Boston, were bound to take notice of the by-law; though generally, no doubt, a by-law must be pleaded." Com. *v.* Worcester, 3 Pick. 462, 473; [City of Miles *v.* Kern, 12 Mont. 119, 29 Pac. R. 720; Incorporated Town of Bayard *v.* Baker, 76 Iowa, 220, 40 N. W. R. 818; Town of Moundsville *v.* Velton, 35 W. Va. 217, 13 S. E. R. 873; Downs *v.* Comm'rs of Town of Smyrna (Del.), 45 Atl. R. 717; Downing *v.* City of Miltonvale, 36 Kan. 740, 14 Pac. R. 281; Elkhart *v.* Calvert, 126 Ind. 6, 25 N. E. R. 807; City of Durango *v.* Reinsberg, 16 Col. 327, 26 Pac. R. 820; Village of Vicksburgh *v.* Briggs, 85 Mich. 502, 48 N. W. R. 625; S. *v.* Dunbar, 43 La. An. 836, 9 S. R. 492. Judicial notice is taken of municipal by-laws in municipal courts. City Council of Anderson *v.* O'Donnell, 29 S. C. 355, 7 S. E. R. 523, 13 Am. St. R. 728, 1 L. R. A. 632; *Ex parte* Davis, 115 Cal. 445, 47 Pac. R. 258. The circuit court, on an appeal from a municipal court which takes judicial notice of a municipal by-law, will not require the by-law to be set forth and proven, though the proceedings are *de novo*. Town of Moundsville *v.* Velton, 35 W. Va. 217, 13 S. E. R. 873; Incorporated Town of Scranton *v.* Danenbaum (Iowa), 80 N. W. R. 221. *Contra*, McIntosh *v.* City of Pueblo, 9 Col. Ap. 460, 48 Pac. R. 969.]

[2] Com. *v.* Bean, Thacher Crim. Cas. 85.

[3] Com. *v.* Worcester, *supra;* Lewiston *v.* Fairfield, 47 Me. 481.

[4] Crim. Pro., I, § 602, note; Com. *v.* Gay, 5 Pick. 44; S. *v.* Soragan, *supra*. But see Winooski *v.* Gokey, 49 Vt. 282, 286.

[5] A reference to some of the cases may be convenient; as, Fink *v.* Milwaukee, 17 Wis. 26; P. *v.* James, 16 Hun, 426; S. *v.* Herdt, 11 Vroom, 264; S. *v.* Gordon, 60 Mo. 383; P. *v.* Manistee, 26 Mich. 422; P. *v.* Cox, 76 N. Y. 47; Jenkins *v.* Cheyenne, 1 Wy. 287; Platteville *v.* Bell, 43 Wis. 488; S. *v.* Decker, 46 Conn. 241; Cooper *v.* P., 41 Mich. 403; Hoyer *v.* Mascoutah, 59 Ill. 137; S. *v.* Stearns, 11 Fost. (N. H.) 106; Davenport *v.* Bird, 34 Iowa, 524;

founded on the principles of the common law, will not lie for the violation of a municipal by-law.[1] But by force of a statute and the by-law, such violation may be made indictable.[2]

§ 408. The allegations — should conform to the rules of general pleading as established in other classes of causes.[3] For example, an information will be insufficient though it fills the very language of the by-law, if it does not charge such an illegal act as the by-law was intended to prohibit.[4]

Brownville *v.* Cook, 4 Neb. 101; Jaquith *v.* Royce, 42 Iowa, 406; New York *v.* Walker, 4 E. D. Smith, 258; Roberson *v.* Lambertville, 9 Vroom, 69; Com. *v.* Fahey, 5 Cush. 408; Graham *v.* S., 1 Pike, 79; Kansas *v.* Flanagan, 69 Mo. 22; S. *v.* King, 37 Iowa, 462; S. *v.* Merritt, 83 N. C. 677; Alton *v.* Kirsch, 68 Ill. 261; Van Buskirk *v.* Newark, 26 Ohio St. 37; S. *v.* Soragan, 40 Vt. 450; [S. *v.* Carpenter, 60 Conn. 97, 22 Atl. R. 497; City of Springfield *v.* Ford, 40 Mo. Ap. 586; Wagner *v.* Town of Garrett, 118 Ind. 114, 20 N. E. R. 706.]

[1] Rex *v.* Sharples, 4 T. R. 777.

[2] S. *v.* Strauss, 77 N. C. 509.

[3] Petition of Began, 12 R. I. 309; Huntington *v.* Pease, 56 Ind. 305; Roberson *v.* Lambertville, 9 Vroom, 69; Byars *v.* Mt. Vernon, 78 Ill. 11; S. *v.* Bacon, 40 Vt. 456; Goldthwaite *v.* Montgomery, 50 Ala. 486.

[4] S. *v.* Goulding, 44 N. H. 284.

BOOK V.

STATUTORY EXTENSIONS OF THE COMMON-LAW OFFENSES.

CHAPTER XXX.

STATUTORY ENLARGEMENTS OF THE COMMON-LAW LARCENY.

§ 409–411. Introduction.
412–416. Purely and partly statutory.
417–424. Larceny under bailment.
425–429. Larcenies of animals.

§ 409. Elsewhere.— In "Criminal Law" and "Criminal Procedure," under the titles "Larceny," and "Larceny, Compound," the extensions of the offense by statutes are largely explained. There also is discussed the statutory larceny called "Embezzlement."

§ 410. Here — we shall follow out the departures of the statutes from the common law, into details which it seemed best there to postpone.

§ 411. How chapter divided.— We shall consider, I. In general of larcenies purely and partly statutory; II. Larcenies under bailments; III. Larcenies of animals.

I. In General of Larcenies Purely and Partly Statutory.

§ 412. Degrees of departure from common law.— The statutes of our states differ considerably in this, that, by some of them, a statutory larceny is scarcely distinguishable from one at common law, by others the difference is very broad, and between these extremes there is every variety. Perhaps the widest departure from the common law is in —

§ 413. Texas.— In this state the word "theft" takes the place of the common-law term larceny; and it "includes," to quote from the code, "swindling, embezzlement, and all unlaw-

ful acquisitions of personal property punishable by the penal code." The consequence of which and other provisions is, that theft has there become a crime of degrees; that, for example, swindling is an inferior degree of it; and that, on an indictment for theft, the conviction may be for swindling.[1] So it may be for receiving,[2] or for removing without consent another's live-stock from its accustomed range.[3] There are various statutory provisions, but the one indicating its ordinary form declares it to be "the fraudulent taking of corporeal personal property belonging to another, from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking."[4]

§ 414. How the indictment — (Expositions of definition). Under a statute like this Texas one, an indictment in the common-law form for larceny is wholly inadequate. It must allege, for example, that the goods were taken "from the possession" of one mentioned,[5] "with intent to deprive the owner of the value of the same,"[6] and "without his consent,"[7] and the proofs must negative the consent,[8] — no one of which particulars is essential at the common law.[9] On the other hand, as this statutory definition omits the "carried away" of the common-law definition, the asportation, which the common-law indictment alleges, may be omitted from that on the statute.[10] But, though the statute has wrought these and some other departures from the common-law doctrines, still,—

[1] Mathews *v.* S., 10 Tex. Ap. 279, 284; Martin *v.* S., 9 Tex. Ap. 293; [Doss *v.* S., 21 Tex. Ap. 505, 57 Am. R. 618; Atterbury *v.* S., 19 Tex. Ap. 401; Frank *v.* S., 30 Tex. Ap. 381, 17 S. W. R. 936.]

[2] Vincent *v.* S., 10 Tex. Ap. 330.

[3] Marshall *v.* S., 4 Tex. Ap. 549; Powell *v.* S., 7 Tex. Ap. 467; Turner *v.* S., 7 Tex. Ap. 596; Counts *v.* S., 37 Tex. 593.

[4] Quitzow *v.* S., 1 Tex. Ap. 65, 68; Berg *v.* S., 2 Tex. Ap. 148, 149.

[5] Watts *v.* S., 6 Tex. Ap. 263; Castello *v.* S., 36 Tex. 324; [Bailey *v.* S., 20 Tex. Ap. 68; Lane *v.* S. (Tex. Cr. R.), 55 S. W. R. 831.]

[6] Ridgeway *v.* S., 41 Tex. 231; [Bullard *v.* S. (Tex. Cr. R.), 53 S. W. R. 637; Knutson *v.* S., 14 Tex. Ap. 570; Tallant *v.* S., 14 Tex. Ap. 284; Spain *v.* S., 19 Tex. Ap. 469.]

[7] Johnson *v.* S., 39 Tex. 393. See Berg *v.* S., 2 Tex. Ap. 148; Jackson *v.* S., 7 Tex. Ap. 363; [Bowling *v.* S., 13 Tex. Ap. 333.]

[8] Crim. Pro., II, § 752*a*; Stewart *v.* S., 9 Tex. Ap. 321; [Taylor *v.* S., 18 Tex. Ap. 489.]

[9] And see S. *v.* Jones, 7 Nev. 408; Burns *v.* S., 35 Tex. 724.

[10] Musquez *v.* S., 41 Tex. 226; Hall *v.* S., 41 Tex. 287; Austin *v.* S., 42 Tex. 345; [Dukes *v.* S., 22 Tex. Ap.

§ 415. Following common law.— In particulars not provided for by the statute, the courts, in giving bounds to the statutory theft, follow, alike as to the law, the pleading, and the evidence, the rules of common-law larceny.[1]

§ 416. Simply providing punishment.— If a statute merely declares, as many of our statutes do, that one "guilty of larceny" shall be punished in a way pointed out,[2] the offense created differs in no respect from larceny at the common law. The rule as to all offenses is so.[3] For example,—

Attached to freehold, etc.— Under such a statute it is not larceny to take and carry away, with a felonious mind, copper pipe which was attached to the freehold; because it would not be larceny at the common law.[4] But there are statutes in terms to include things of this sort and other things partaking of the realty,— as explained in other connections.[5] In all these and other like cases, the indictment must charge, in the terms of the statute, besides following the common-law form, whatever else the statute has added to the common-law definition of the offense.[6]

II. Larcenies under Bailments.

§ 417. The trespass in larceny.— Trespass is an element in every larceny at the common law.[7] And the common-law form of the indictment — "did steal, take and carry away"[8] — charges, among other things, a trespass. Now,—

§ 418. Statute dispensing with trespass.— If a statute provides that, in circumstances which it points out, one's wrongful appropriation of another's goods shall be larceny though

192; Harris *v.* S., 29 Tex. Ap. 101; 14 S. W. R. 390, 25 Am. St. R. 717.]

[1] Roth *v.* S., 10 Tex. Ap. 27; Landin *v.* S., 10 Tex. Ap. 63; Wright *v.* S., 10 Tex. Ap. 476; Looney *v.* S., 10 Tex. Ap. 520, [38 Am. R. 646;] Walker *v.* S., 9 Tex. Ap. 38; and multitudes of other cases, showing such to be the judicial practice.

[2] La. Rev. Stats. of 1870, § 812.

[3] Crim. Pro., I, § 610; U. S. *v.* Jones, 3 Wash. C. C. 209; U. S. *v.* Wilson, Bald. 78; Burk *v.* S., 27 Ind. 430, 442; S. *v.* Taylor, 29 Ind. 517; [S. *v.* Friend, 47 Minn. 449, 50 N. W. R. 692.]

[4] S. *v.* Davis, 22 La. An. 77; [Langston *v.* S., 96 Ala. 44, 11 S. R. 334.]

[5] Crim. Law, II, §§ 783, 784; Crim. Pro., II, § 733.

[6] Reg. *v.* Trevenner, 2 Moody & R. 476; Reg. *v.* Rice, Bell, C. C. 87; Reg. *v.* Jones, Dears. & B. 555; Reg. *v.* Gooch, 8 Car. & P. 293; U. S. *v.* Davis, 5 Mason, 356; S. *v.* Scott, 68 Ind. 267; [P. *v.* Opie, 123 Cal. 294, 55 Pac. R. 989.]

[7] Crim. Law, II, §§ 758, 799–839.

[8] Crim. Pro., II, § 697.

there is no trespass, a rule of pleading brought to view in the last sub-title requires the circumstances to be set out, in an indictment for the statutory offense. The mere common-law form is inadequate. So it was held in Tennessee, not only on common-law principles, but the court added that, to accept the mere common-law form would violate the provision of the constitution of the state securing to an accused person the right "to demand the nature and cause of the accusation against him."[1] On this principle proceeds the doctrine that, though a statute of embezzlement declares it to be larceny, it cannot be indicted as such, but the allegation must be special.[2] Now,—

§ 419. Whether larceny by bailee.—A bailment of goods, honestly received by the bailee, transmits to him a special property in them, rendering a trespass, therefore a larceny, impossible except in circumstances which terminate the bailment, as explained in "Criminal Law."[3] If he obtains a thing originally by fraud, even though not intending to steal it,—as where he gets possession of a horse to drive to a particular place, and be absent a specified time, meaning to get to another place and be gone longer, the bailment does not attach, and, like a servant in custody, he commits larceny of it by appropriating it to himself with felonious intent.[4]

§ 420. Statutory larceny by bailee.—To do away with the necessity of a trespass in cases of bailees in possession, and place them as to larceny on like ground with servants and others who have a mere custody of the thing, statutes have been enacted in England and pretty generally with us. Thus, in England, by 24 and 25 Vict., ch. 96, § 3, "Whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not

[1] Hall *v.* S., 3 Coldw. 125. Perhaps, if the statute should declare the element of trespass never to be necessary, the case would be different, and the common-law form would suffice; the allegation of trespass being deemed surplusage. Prim *v.* S., 32 Tex. 157.

[2] Crim. Pro., II, §§ 316, 317.

[3] Crim. Law, II, §§ 809, 813, 833, 834, 836, 857–871; Abrams *v.* P., 6 Hun, 491, 492; [P. *v.* Cruger, 102 N. Y. 510, 7 N. E. R. 555, 55 Am. R. 830; Hill *v.* S., 57 Wis. 377, 15 N. W. R. 445.]

[4] S. *v.* Coombs, 55 Me. 477, 480, [92 Am. D. 610. See also Johnson *v.* P., 113 Ill. 99; S. *v.* Taberner, 14 R. I. 270, 51 Am. R. 382; S. *v.* Woodruff, 47 Kan. 151, 27 Pac. R. 842, 27 Am. St. R. 285; Frazier *v.* S., 85 Ala. 17, 4 S. R. 691, 7 Am. St. R. 21; Shell *v.* S., 32 Tex. Cr. R. 512, 24 S. W. R. 646.]

break bulk or otherwise determine bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny;"[1] the latter clause not having been in the earlier enactment of 20 and 21 Vict., ch. 54, § 4. The statutes of our states are similar to these, yet in terms not absolutely uniform.[2]

§ 421. How the indictment — (In England — On principle). We have just seen,[3] that, by the present English statute, the "indictment for larceny" is expressly made sufficient in these cases.[4] But the foregoing discussions have disclosed that, in the absence of such a provision, and on the principles of sound pleading, it is not adequate. Under the earlier English enactment, a single jury case occurred, wherein, the indictment being in form as for a common-law larceny, and concluding against the statute, the presiding judge with some hesitation sentenced the prisoner thereon.[5] Yet it seems not to have satisfied the profession; for, in the subsequent cases which the author has observed, the indictment was special, with a count added as for larceny at the common law.[6] And —

§ 422. With us. — Such decisions also as our own books afford require the allegation to be special, on the statute.[7] Therefore, as in other indictments on statutes, the statutory terms must be so far pursued as to identify the statute and comprehend the offense in full.[8] The bailment must be averred; but, on principle, the particulars of it need not be, because it is matter of inducement, and so the mere general allegation will suffice.[9] Yet, contrary to this, the California court has required the facts out of which the bailment arises to be stated.[10] The gravamen

[1] Reg. *v.* Henderson, 11 Cox, C. C. 68 Mo. 101, 104; Gaddy *v.* S., 8 Tex. Ap. 127; Snell *v.* S., 50 Ga. 219; Hoyt *v.* S., 50 Ga. 313; Alderman *v.* S., 57 Ga. 367; Carter *v.* S., 53 Ga. 326; Keeller *v.* S., 4 Tex. Ap. 527; [P. *v.* Sherman, 133 N. Y. 349, 31 N. E. R. 107; S. *v.* Chew Muck You, 20 Oreg. 215, 25 Pac. R. 355; S. *v.* Barry (Minn.), 79 N. W. R. 656; S. *v.* Lindley (S. D.), 83 N. W. R. 257.]

[2] Crim. Law, II, § 863; Com. *v.* Williams, 3 Gray, 461; Com. *v.* Maher, 11 Phila. 425; S. *v.* Small, 26 Kan. 209; S. *v.* Broderick, 7 Mo. Ap. 19; S. *v.* Stone, 68 Mo. 101.

[3] *Ante*, § 420.

[4] Reg. *v.* Bunkall, Leigh & C. 371; Reg. *v.* Henderson, 11 Cox, C. C. 593.

[5] Reg. *v.* Haigh, 7 Cox, C. C. 403.

[6] Reg. *v.* Hassall, Leigh & C. 58, 8 Cox, C. C. 491; Reg. *v.* Robson, Leigh & C. 93, 9 Cox, C. C. 29; Reg. *v.* Loose, Bell, C. C. 259, 8 Cox, C. C. 302.

[7] P. *v.* Jersey, 18 Cal. 337; S. *v.* Stone,

[8] Crim. Pro., I, §§ 611, 612; S. *v.* Smith, 20 N. H. 399.

[9] Crim. Pro., II, § 555; *post*, § 602.

[10] P. *v.* Poggi, 19 Cal. 600. In this case, Norton, J., speaking for the court, said: "The indictment states

of the offense is the conversion; it therefore must be distinctly charged. But the analogies of the indictment for embezzlement[1] explain that even this allegation need not be expanded beyond the statutory terms; as, for example, it is sufficient to say that the defendant did "convert the same to his own use."[2]

that the defendant 'was the bailee of one hundred and thirty ounces of gold dust,' which he converted to his own use, with intent to steal the same; 'the said gold dust being then and there the property, goods and chattels of one Francisco Gallardo.' There are no other averments showing the character or circumstances of the bailment, or that the defendant was in fact a bailee of gold dust. It was decided in the case of P. *v.* Cohen, 8 Cal. 42, that an indictment like this was insufficient, and the case of P. *v.* Peterson, 9 Cal. 313, was decided in the same way upon the authority of the former case. The remarks of the judge upon this point in the case of P. *v.* Cohen are rather applicable to another statute regarding certain officers who are charged with the custody of public moneys (Wood, Dig., art. 1927) than to the statute under which the indictment in that case was found (Wood, Dig., art. 1931); and there does not appear to be any authority for the conclusion that the legislature intended to use the word bailee, in the statute last referred to, in a limited sense, as designating bailees 'to keep, to transfer or to deliver.' Any bailee who converts the property of which he is the bailee to his own use, with intent to steal the same, may undoubtedly be indicted for larceny under that statute. The decision that the indictment was insufficient was, however, correct, for the reason that it did not set forth the necessary facts to show that the defendant was a bailee of the property. The facts and circumstances which are necessary to constitute a complete offense must be stated with directness and certainty. Proof of the circumstances constituting the bailment must be made at the trial, and the essential facts to be proved should be stated in the indictment. So are the precedents of indictments under statutes substantially the same. 3 Chit. Crim. Law, 967; Com. *v.* Merrifield, 4 Met. 468. By the same precedents it appears that it is sufficient to state the fact of the conversion with intent to steal in the language of the statute, without specifying any particulars of the mode of conversion." Pages 600, 601. As to the authorities referred to by the learned judge near the close of this quotation, I cannot see that they are pertinent to the point, but perhaps I am mistaken. If, as precedents, they covered the precise point, I should adapt to the occasion the words of Seawell, J., sitting in the North Carolina court: "Although it is true that precedents are high authority as to what the law is, yet, in this case, they only prove that they contain these words; for it is certain that most of them contain many things which never were essential, and some they retain which long since have become useless." S. *v.* Sparrow, N. C. Term R. 93, 94.

[1] Crim. Pro., II, §§ 322, 323.

[2] P. *v.* Poggi, *supra*. But see Snell *v.* S., *supra;* Hoyt *v.* S., *supra;* [Reg. *v.* Ashwell, 16 Cox, C. C. 1; Reg. *v.* Holloway, 18 Cox, C. C. 631; Reg. *v.* Wynn, 16 Cox, 231; P. *v.* Campbell (Cal.), 59 Pac. R. 593; Mangum *v.* S., 38 Tex. Cr. R. 231, 42 S. W. R. 291; S. *v.* Kasper, 5 Wash. St. 174, 31 Pac. R. 636; S. *v.* Hopkins, 56 Vt. 250; P. *v.* Hazard, 158 N. Y. 727, 53 N. E. R. 1129.]

§ 423. What the bailment.— The bailment, in these cases, is the same as in others in the law.[1] We saw, in another connection, that it takes place where, and only where, the specific thing delivered is to be returned — this is the test[2] — either in a form to which it is to be changed, or in the form received, when the object of the trust is accomplished.[3] The contract of bailment may be express or implied.[4] If, by it, the title passes with the thing, there is no bailment.[5] The conditional purchase and sale of an article on instalments, the ownership to remain in the vendor and possession to be in the vendee until all the payments are made, and in case of default the thing to be restored to its original possessor, constitute a bailment.[6] And the forms of bailment are numberless. Whether or not a married woman can be a bailee, within these criminal statutes, is perhaps an open question, but probably she can be.[7] Even at the common law she could always receive property, though in some circumstances only to transmit the ownership to her husband.[8] She could be an agent.[9] And she could commit the offense of common-law larceny.[10] It is difficult, therefore, to perceive any just ground to preclude her from being a bailee for the statutory larceny, and committing it of the goods in her possession. The recorder of London in one case intimated, and perhaps ruled, that there cannot be a bailment which is procured by the bailee's fraud.[11] And this accords with other rulings where the facts are open to inquiry.[12] But in just prin-

[1] See the long note to the last section; Reg. *v.* Hassall, Leigh & C. 58, 8 Cox, C. C. 491; Krause *v.* Com., 93 Pa. St. 418, [39 Am. R. 762;] Reg. *v.* Tonkinson, 14 Cox, C. C. 603; Reg. *v.* Flowers, 16 Cox, C. C. 33.]

[2] Powder Co. *v.* Burkhardt, 97 U. S. 110; Marsh *v.* Titus, 6 Thomp. & C. 29, 3 Hun, 550; Mallory *v.* Willis, 4 Comst. 76; [Reg. *v.* Helier, 18 Cox, C. C. 267; Bergman *v.* P., 177 Ill. 244, 52 N. E. R. 363; Caskey *v.* S. (Tex. Cr. R.). 50 S. W. R. 703.]

[3] Crim. Law, II, § 857; Grier *v.* Stout, 2 Bradw. 602; Foster *v.* Pettibone, 3 Seld. 433, [57 Am. D. 530;] Reg. *v.* Hoare, 1 Fost. & F. 647; [Reg. *v.* McDonald, 15 Cox, C. C. 757.]

[4] Phelps *v.* P., 72 N. Y. 334, 357; Bohannon *v.* Springfield, 9 Ala. 789; Newhall *v.* Paige, 10 Gray, 366.

[5] Krause *v.* Com., *supra*.

[6] Whitney *v.* McConnell, 29 Mich. 12; Dunlap *v.* Gleason, 16 Mich. 158, [93 Am. D. 231;] Henry *v.* Patterson, 57 Pa. St. 346. But see and compare Krause *v.* Com., *supra*.

[7] Reg. *v.* Denmour, 8 Cox, C. C. 440; Reg. *v.* Robson, Leigh & C. 93, 9 Cox, C. C. 29.

[8] 1 Bishop, Mar. Women, §§ 699, 700.

[9] 1 id. 701; 2 id. 400.

[10] Crim. Law, I, §§ 361–363; 1 Hale, P. C. 514, 516.

[11] Reg. *v.* Hunt, 8 Cox, C. C. 495.

[12] *Ante*, § 419.

ciple, apart from the adjudications, it would not be unreasonable to refuse to permit a man to set up one fraud as a ground of escape from the consequences of another.[1]

§ 424. Bailee's act of larceny.— The elements of larceny at the common law are stated in another connection.[2] Those of larceny by a bailee are in reason the same, except that in his case the statute dispenses with the trespass.[3] It was once ruled by a single judge to be necessary to show some act of conversion inconsistent with the purpose of the bailment.[4] This doctrine has been both affirmed and denied by other judges; but, where one gave money to another to buy, and bring in the latter's cart, coals for hire, and the person so intrusted bought them in his own name, and on his way with them abstracted some for his own use, it was held that, whichever view of the above point be taken, the conversion here, there being deemed to be a bailment of the coals, was adequate.[5] And a carrier who undertakes to deliver, to persons named in a list, a boat's load of coals in his own cart, commits larceny as a bailee if he fraudulently sells some of them and appropriates the money to himself.[6] In another case it was laid down that a carrier, receiving money to procure goods, becomes guilty of larceny of the money as bailee, if he fraudulently converts it to his own use, though he obtains and delivers the goods.[7]

[1] And see Crim. Law, II, §§ 264, 768. See further as to what is a bailment, Reg. *v.* Loose, Bell, C. C. 259; Reg. *v.* Bunkall, Leigh & C. 371, 9 Cox, C. C. 419; Reg. *v.* Davies, 14 W. R. 679, 14 Law Times (N. S.), 491; Hunt *v.* Wyman, 100 Mass. 198; Becker *v.* Smith, 59 Pa. St. 469; Reg. *v.* Cosser, 13 Cox, C. C. 187; Zschocke *v.* P., 62 Ill. 127; Reg. *v.* Oxenham, 13 Cox, C. C. 349; Hutchison *v.* Com., 82 Pa. St. 472; Coldwell *v.* S., 3 Bax. 429. A man on the ground, partly intoxicated and partly asleep, saw another, with whom he was acquainted, take from his pocket his watch, and made no effort to prevent it, believing the object to be to preserve the watch for him; this was ruled to constitute a bailment, subjecting the bailee, who converted it to his own use, to indictment under the statute. Reg. *v.* Reeves, 5 Jur. (N. S.) 716.

[2] Crim. Law, I, § 737 *et seq.*

[3] And see S. *v.* Stone, 68 Mo. 101; Krause *v.* Com., 93 Pa. St. 418, [39 Am. R. 762; Reg. *v.* Banks, 15 Cox, C. C. 450; S. *v.* Fisher, 38 Minn. 378, 37 N. W. R. 948.]

[4] Reg. *v.* Jackson, 9 Cox, C. C. 505.

[5] Reg. *v.* Bunkall, Leigh & C. 371, 9 Cox, C. C. 419; [Reg. *v.* Holloway, 66 L. J. Q. B. 830, 77 L. T. 247.]

[6] Reg. *v.* Davies, 14 W. R. 679, 14 Law Times (N. S.), 491; [Washington *v.* S., 106 Ala. 58, 17 S. R. 546; Holebrook *v.* S., 107 Ala. 154, 18 S. R. 109.]

[7] Reg. *v.* Wells, 1 Fost. & F. 109.

III. Larcenies of Animals.

§ 425. At common law.— As seen in another connection, most, not absolutely all, animals of which there may be ownership at the common law are the subjects also of common-law larceny.[1] There is, therefore, no such urgent occasion for the statutes within this sub-title as for those within the last, and they have not wrought consequences so wide.

The statutes.— The present English enactment on this subject, condensing the prior ones, is 24 and 25 Vict., ch. 96, § 10,— "Whosoever shall steal any horse, mare, gelding, colt, or filly; or any bull, cow, ox, heifer, or calf; or any ram, ewe, sheep, or lamb,— shall," etc.[2] The South Carolina statute makes punishable "any person found guilty of the larceny of any horse, mule, cow, hog, or any other live-stock."[3] And similar to these two, yet differing more or less from them and from one another, are the enactments in our other states.[4]

§ 426. Word to designate in indictment the animal.[5]— In determining by what statutory word to designate the animal in the indictment, some discussions in an earlier chapter will be helpful.[6] For example, the term "horse," primarily denoting the male, includes also, if it stands alone, mares and geldings.[7] So, therefore, by the better opinion, it does in the statutory expression "horse, mare or gelding."[8] But some would here restrict it, holding, under this expression, an indictment which employs the word "horse" not sustained by proof of a "mare" or a "gelding."[9] While this rule prevailed in Eng-

[1] Crim. Law, II, §§ 771–779.

[2] The prior statute of 7 and 8 Geo. 4, ch. 29, § 25, was in nearly the same words. But there were earlier enactments in forms perhaps less compact. See 2 East, P. C. 614–617.

[3] S. *v.* Corley, 13 S. C. 1, 4.

[4] S. *v.* Buckles, 26 Kan. 237; Hunt *v.* S., 55 Ala. 138; Lavenner *v.* S., 60 Ala. 60; Watson *v.* S., 55 Ala. 150. In Texas, the words, differing from the earlier form (*ante*, § 248), are: "If any person shall steal any cattle he shall be punished," etc. Duval *v.* S., 8 Tex. Ap. 370, 371; [S. *v.* Gilbert, 68 Vt. 188, 34 Atl. R. 697.]

[5] And compare with *post*, §§ 440–442.

[6] *Ante*, §§ 246c–248.

[7] Baldwin *v.* P., 1 Scam. 304; Reg. *v.* Aldridge, 4 Cox, C. C. 143; [S. *v.* Gooch, 60 Ark. 218, 29 S. W. R. 640; P. *v.* Monteith, 73 Cal. 7, 14 Pac. R. 373; P. *v.* Pico, 62 Cal. 50; Smythe *v.* S., 17 Tex. Ap. 244.]

[8] *Ante*, §§ 246c–248; P. *v.* Butler, 2 Utah, 504; P. *v.* Sensabaugh, 2 Utah, 473.

Mule.— That this word will include a "mule," see Allison *v.* Brookshire, 38 Tex. 199; that it will not, see Com. *v.* Edwards, 10 Phila. 215.

[9] S. *v.* Buckles, 26 Kan. 237; [S. *v.* McDonald, 10 Mont. 21, 24 Pac. R. 628, 24 Am. St. R. 25.] In Georgia the code requires the sex to be des-

land, a charge of stealing a "cow" was adjudged not to be sustained by proof of the larceny of a heifer.[1] But in localities and circumstances not governed by this rule, the word designating an animal includes the young with the old; as, a mare filly is a "mare,"[2] a pig is a "hog,"[3] a heifer is a "cow,"[4] and a calf is within the term "cattle."[5] Under the present Texas statute, the words of which are simply "any cattle," the allegation need not contain this word "cattle," but merely to designate the animal by its species — as, a "calf," "steer," "ox," or the like — is sufficient.[6] On the other hand, if the pleader chooses, he may say, instead of this, "one head of neat cattle,"[7] "one beef cattle,"[8] or the like.[9] He must not create a variance; and it will be such if the allegation is one of "beef steer," and the proof is of only a "steer,"[10] or of a "cow" and the evidence shows the animal to have been a "bull,"[11] or if he misdescribes the color.[12] The words "a yearling," and no more, are not sufficient.[13]

§ 427. Value.— A rule pervading the entire procedure in larceny is that the value of the thing stolen must be alleged

ignated. Taylor *v.* S., 44 Ga. 263; [Brown *v.* S., 86 Ga. 633, 13 S. E. R. 20; Nightingale *v.* S., 94 Ga. 395, 21 S. E. R. 221.] See *ante*, § 248; Marshall *v.* S., 31 Tex. 471.

[1] Rex *v.* Cook, 1 Leach, 105, 2 East, P. C. 616.

[2] Rex *v.* Welland, Russ. & Ry. 494.

[3] *Ante*, § 247, note. [Where the indictment charged stealing of "chickens," it was supported by proof of stealing "hens." S. *v.* Bassett, 34 La. An. 1108.]

[4] Parker *v.* S., 39 Ala. 365. And see Watson *v.* S., 55 Ala. 150; [S. *v.* Crow, 107 Mo. 341, 17 S. W. R. 745.]

[5] Grant *v.* S., 3 Tex. Ap. 1.

[6] Id., at p. 5; Robertson *v.* S., 1 Tex. Ap. 311. And see *post*, § 440: [Smith *v.* S., 24 Tex. Ap. 290, 6 S. W. R. 40. See also Sanders *v.* S., 86 Ga. 717, 12 S. E. R. 1058; S. *v.* Baden, 42 La. An. 295, 7 S. R. 582.]

[7] S. *v.* Murphy, 39 Tex. 46; [Matthews *v.* S. (Tex. Cr. R.), 51 S. W. R. 915; S. *v.* Barkuloo, 18 Wash. 141, 51 Pac. R. 350; S. *v.* De Witt (Mo.), 53 S. W. R. 429; Terr. *v.* Christman, 9 N. M. 582, 58 Pac. R. 343.]

[8] Duval *v.* S., 8 Tex. Ap. 370. See Hubotter *v.* S., 32 Tex. 479.

[9] That the word "cattle" alone would be too indefinite, see *post*, § 440; [S. *v.* Bookhouse, 10 Wash. 87, 38 Pac. R. 862; S. *v.* Laun, 80 Mo. 241; S. *v.* Bowers (Mo.), 1 S. W. R. 288. But see McIntosh *v.* S., 18 Tex. Ap. 284; Walton *v.* S. (Tex. Cr. R.), 55 S. W. R. 566.]

[10] Cameron *v.* S., 9 Tex. Ap. 332.

[11] S. *v.* McMinn, 34 Ark. 160; [Terr. *v.* Martinez (Ariz.), 44 Pac. R. 1089.

[12] Courtney *v.* S., 8 Tex. Ap. 257; Wolf *v.* S., 4 Tex. Ap. 332.

[13] Stollenwerk *v.* S., 55 Ala. 142. And see Rivers *v.* S., 57 Ga. 28; Alderman *v.* S., 57 Ga. 367. [The statutory enumeration of different animals applies to live animals only. Golden *v.* S., 63 Miss. 466; P. *v.* Smith, 112 Cal. 333, 44 Pac. R. 663.]

and proved when the punishment or its degree depends on value; but, when it does not, it need not be. And within this rule are the larcenies now under consideration; under most of the statutes the value is not material, under some it is.[1] When not material, it is often in practice alleged,— mere surplusage which does no harm.

Against form of statute.— Of course, where the statute affects anything more than the punishment,[2] the indictment concludes against the form of the statute. But where, in England, the larceny of a mare, saddle and bridle was alleged, and the conclusion was simply as at the common law, it was held that, since the stealing of the mare, as well as of the saddle and bridle, was a common-law felony, not even altered by the statute, this would suffice, and the statutory punishment attach to the stealing of the mare.[3]

§ 428. Other particulars.— In most other particulars the procedure and the law, under these statutes, conform to the common law. Thus,—

Joinder.— Counts charging larcenies of animals and larcenies at the common law may be joined.[4]

Ownership — (Mark or brand).— The ownership of the animal stolen must be alleged and proved conformably to the common-law rules.[5] In Texas, and perhaps some other states, by reason of statutory regulations, there are special considerations connected with the mark or brand, recorded, and on the animal.[6]

[1] Crim. Pro., I, §§ 541, 567; II, §§ 713, 714, 736, 751, 764–767: S. *v.* Pedigo, 71 Mo. 443; McDowell *v.* S., 61 Ala. 172; Williams *v.* S., 10 Tex. Ap. 8; Wells *v.* S., 11 Neb. 409; Adams *v.* S., 60 Ala. 52; S. *v.* Corley, 13 S. C. 1; S. *v.* Daniels, 32 Mo. 558; Sheppard *v.* S., 42 Ala. 531; [Walker *v.* S., 50 Ark. 532, 8 S. W. R. 939; Terr. *v.* Pendry, 9 Mont. 67, 22 Pac. R. 760; S. *v.* Hill, 46 La. An. 736, 15 S. R. 145; Hoge *v.* P., 117 Ill. 35, 6 N. E. R. 796; Chestnut *v.* P., 21 Col. 512, 42 Pac. R. 656; S. *v.* Young, 13 Wash. 584, 43 Pac. R. 881.]

[2] *Ante*, §§ 166, 167.

[3] Williams *v.* Reg., 7 Q. B. 250. [See also S. *v.* Ward, 19 Nev. 297, 10 Pac. R. 133. Compare Waters *v.* P., 104 Ill. 544.]

[4] Barton *v.* S., 18 Ohio, 221. And see S. *v.* Nutting, 16 Vt. 261; [S. *v.* Darden, 117 N. C. 697, 23 S. E. R. 106.]

[5] Grant *v.* S., 3 Tex. Ap. 1; Wells *v.* S., 11 Neb. 409; Turner *v.* S., 7 Tex. Ap. 596; Burt *v.* S., 7 Tex. Ap. 578; Wilson *v.* S., 3 Tex. Ap. 206; Butler *v.* S., 3 Tex. Ap. 48; S. *v.* France, 1 Tenn. 434; [Butler *v.* S., 91 Ala. 87, 9 S. R. 191. See Mizell *v.* S., 88 Fla. 20, 20 S. R. 769; Houston *v.* S., 13 Tex. Ap. 595.]

[6] Lockhart *v.* S., 3 Tex. Ap. 567; Jones *v.* S., 3 Tex. Ap. 498; Smith *v.*

Trespass and asportation — (Accustomed range). — The trespass and asportation must be charged and shown according to the rules of the common law; or, in a state, for example, like Texas,[1] where a statute has changed the common-law limits of larceny and no asportation is required, the trespass only will suffice as to this part of the case.[2] In our new and grazing states, domestic animals simply on their accustomed range are deemed, for purposes of larceny, in the possession of their owners.[3]

§ 429. Felonious intent. — The same felonious intent must appear as in other larcenies.[4] If, for example, one stealing other property takes a horse simply to get off with the other things, then turns it loose, he does not commit larceny of the horse.[5]

S., 1 Tex. Ap. 133; Wilson *v.* S., *supra*; Poag *v.* S., 40 Tex. 151; Hutto *v.* S., 7 Tex. Ap. 44; Allen *v.* S., 8 Tex. Ap. 360; Spinks *v.* S., 8 Tex. Ap. 125; Renfro *v.* S., 9 Tex. Ap. 229; Smith *v.* S., 8 Tex. Ap. 141; Grant *v.* S., 8 Tex. Ap. 1; Stoneham *v.* S., 8 Tex. Ap. 594; Robinson *v.* S., 5 Tex. Ap. 519; Fisher *v.* S., 4 Tex. Ap. 181; Wolf *v.* S., 4 Tex. Ap. 332; Sweat *v.* S., 4 Tex. Ap. 617; Beyman *v.* Black, 47 Tex. 558; [De Garca *v.* Galvan, 55 Tex. 53.]

[1] *Ante*, §§ 413, 414.

[2] Harris *v.* S., 62 Ga. 337; Fowle *v.* S., 47 Wis. 545; Jackson *v.* S., 7 Tex. Ap. 363; Burt *v.* S., 7 Tex. Ap. 578; Turner *v.* S., 7 Tex. Ap. 596; McPhail *v.* S., 9 Tex. Ap. 164, and Hall *v.* S., 41 Tex. 287, compared with S. *v.* Butler, 65 N. C. 309, as to killing the animal; S. *v.* Mansfield, 33 Tex. 129; [Williams *v.* S. (Tex. Cr. R.), 51 S. W. R. 904; Dickson *v.* Terr. (Ariz.), 56 Pac. R. 971.]

[3] Moore *v.* S., 8 Tex. Ap. 496; Deggs *v.* S., 7 Tex. Ap. 369; Jones *v.* S., 3 Tex. Ap. 498; [S. *v.* Everage, 33 La. An. 120; Borer *v.* S. (Tex. Cr. R.), 28 S. W. R. 951.]

[4] S. *v.* Thomas, 30 La. An. 600; Spinks *v.* S., 8 Tex. Ap. 125; McPhail *v.* S., 9 Tex. Ap. 164; Brown *v.* S., 9 Tex. Ap. 81; S. *v.* Murphy, 84 N. C. 742; [Beatty *v.* S., 61 Miss. 18; Com. *v.* Butler, 144 Pa. St. 568, 24 Atl. R. 910; P. *v.* Devine, 95 Cal. 227, 30 Pac. R. 378; Brooks *v.* S. (Tex. Cr. R.), 27 S. W. R. 141; Guest *v.* S., 24 Tex. Ap. 530, 7 S. W. R. 242; Hendricks *v.* S. (Tex. Cr. R.), 56 S. W. R. 55. See Warden *v.* S., 60 Miss. 638.]

[5] Rex *v.* Crump, 1 Car. & P. 658. And see Dove *v.* S., 37 Ark. 261; [Lucas *v.* S., 33 Tex. Cr. R. 290, 26 S. W. R. 213. See also Hughes *v.* Terr. (Okl.), 56 Pac. R. 708.]

CHAPTER XXXI.

STATUTORY ENLARGEMENTS OF THE COMMON-LAW MALICIOUS MISCHIEF.

§ 430. Introduction.
431, 432. Generally of the statutes.
432*a*–437. Nature of the malice.
438–447*b*. Indictment and evidence.
448, 449. Further of the offense.

§ 430. Elsewhere — (Common law). — In "Criminal Law" and "Criminal Procedure," the unwritten law of this offense, with some explanations of the statutes, and the procedure for punishing it, are given.[1]

Here, and how divided. — In this chapter we shall consider, I. Generally of the statutes; II. The nature of the malice; III. The indictment and evidence; IV. Further of the offense.

I. Generally of the Statutes.

§ 431. English legislation. — The early English statutes on this subject are numerous, diversified and complicated. There is an excellent view of them in East's Pleas of the Crown.[2] But no one of them appears ever to have had any common-law force with us.[3] In 1827 all were in England digested into the forty-three sections of 7 and 8 Geo. 4, ch. 30, which superseded them, covering a wide range. Thence onward legislation accumulated; till, in 1861, came 24 and 25 Vict., ch. 97, in seventy-nine sections, "to consolidate and amend the statute law of England and Ireland relating to malicious injuries to property." Of the early statutes the most noted is 9 Geo. 1, ch. 22, known as the —

Black Act. — It took its name from the occasion of making it, and from the recitation in the preamble, that "several ill-designing and disorderly persons have of late associated them-

[1] Crim. Law, II, § 963 *et seq.*, and the places in Vol. I there referred to; Crim. Pro., II, § 837 *et seq.*

[2] 2 East, P. C. 1045–1103.

[3] Crim. Law, II, § 999.

selves under the name of *blacks*." It extends to some other subjects in addition to malicious mischief. A part of the first section is: "If any person, etc., shall unlawfully and maliciously kill, maim or wound any cattle; or cut down or otherwise destroy any trees planted in any avenue or growing in any garden, orchard or plantation, for ornament, shelter or profit; or shall set fire, etc., every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy."

§ 432. American legislation.— The legislation of our states differs; yet mainly copying, more or less closely, the English. We saw something of it in "Criminal Law."[1] Illustrative American expressions are: "Wilfully and wantonly kill, maim, etc., any horse, etc., of another, with intent to injure the owner thereof;"[2] "wilfully or maliciously kill or destroy or wound the beast of another;"[3] "maliciously or mischievously destroy or injure . . any property of another, or any public property;"[4] "wilfully and maliciously enter any orchard, nursery, garden or cranberry meadow, and take away, mutilate or destroy any tree, shrub or vine, or steal, take and carry away any fruit or flower, without the consent of the owner thereof;"[5] "wilfully and maliciously commit an act whereby the real or personal property of another shall be injured;"[6] "kill [omitting 'wilfully, etc.] or abuse any horse, cow, hog, etc., the property of another."[7] And the diversified forms might be greatly augmented by quotations from the reports, or from the statute-books, were it desirable.

II. The Nature of the Malice.

§ 432a. Evil intent.— Whatever be the terms of any one of these statutes, interpretation restricts it — for so it does all criminal statutes[8] — to what is done with the law's criminal in-

[1] Crim. Law, II, §§ 986–990, 995, 999, 1000.

[2] S. *v.* Rector, 34 Tex. 565; slightly different in Uecker *v.* S., 4 Tex. Ap. 234. And see S. *v.* Abbott, 20 Vt. 537.

[3] Taylor *v.* S., 6 Humph. 285.

[4] S. *v.* Merrill, 3 Blackf. 346; S. *v.* Slocum, 8 Blackf. 315. "Any tree, stone, timber or other valuable article." Bates *v.* S., 31 Ind. 72; [Hampton *v.* S., 10 Lea (Tenn.), 639.]

[5] Com. *v.* Dougherty, 9 Gray, 349; [S. *v.* Priebnow, 14 Neb. 484, 16 N. W R. 907.]

[6] S. *v.* Webster, 17 N. H. 543.

[7] S. *v.* Simpson, 73 N. C. 269.

[8] *Ante*, §§ 132, 231.

tent.[1] For example, an act performed under a *bona fide* claim of right,[2] or in the discharge of an official duty,[3] or in the lawful defense of one's property,[4] is not an indictable malicious mischief, however completely within the words of a statutory inhibition. If the form of the criminal intent is specified in the enactment, it, exactly, will be required by the courts, nothing more will be, and no substitute will suffice.[5] But where its form is not thus defined, it will take a form indicated by the nature of the case, compared with the law of the criminal intent in general, and in particular with what is special therein to this offence at the common law.[6] Such is the doctrine of judicial reason, on which also the cases evidently proceeded, though perhaps not appearing in just these words among the judicial utterances. Thus,—

§ 433. Malice against owner.— As explained in "Criminal Law," the evil intent in common-law malicious mischief must, by the predominating opinion, consist of malice against the owner of the property injured or destroyed; instead of, for example, where an animal is the subject of the mischief, malice against the property.[7] Thereupon, under the English statutes, it became, as East expresses it, "clearly settled, that, in order to bring an

[1] S. *v.* Simpson, 73 N. C. 269; Dawson *v.* S., 52 Ind. 478.

[2] Reg. *v.* James, 8 Car. & P. 131 (compared with James *v.* Phelps, 11 A. & E. 483, and Fletcher *v.* Calthrop, 6 Q. B. 880, 887, 888); Reg. *v.* Matthews, 14 Cox, C. C. 5; Windsor *v.* S., 13 Ind. 375; S. *v.* Crosset, 81 N. C. 579. Connected with this question are various modifications of doctrine, depending on the diverse reasons of cases and the terms of different statutes; as, see Castleberry *v.* S., 62 Ga. 442; Derixson *v.* S., 65 Ind. 385; Jenkins *v.* S., 7 Tex. Ap. 146; Daniel *v.* Janes, 2 C. P. D. 351; S. *v.* Jackson, 2 Harring. (Del.) 542; Com. *v.* Wilder, 127 Mass. 1; [Reg. *v.* Clemens, C. C. R. [1898] 1 Q. B. 556; Camp *v.* S. (Tex. Cr. R.), 57 S. W. R. 96; Barlow *v.* S., 120 Ind. 56, 22 N. E. R. 88.]

[3] Schott *v.* S., 7 Tex. Ap. 616.

[4] Williams *v.* Dixon, 65 N. C. 416. And see Lott *v.* S., 9 Tex. Ap. 206; Chappell *v.* S., 35 Ark. 345; [P. *v.* Kane, 142 N. Y. 366, 37 N. E. R. 104; Brady *v.* S. (Tex. Cr. R.), 26 S. W. R. 621.]

[5] Jones *v.* S., 9 Tex. Ap. 178; Reg. *v.* Fisher, Law R. 1 C. C. 7, 10 Cox, C. C. 146; Branch *v.* S., 41 Tex. 622; Brown *v.* S., 26 Ohio St. 176, 184; S. *v.* Parker, 81 N. C. 548; S. *v.* Arnold, 39 Tex. 74; S. *v.* Hussey, 60 Me. 410, [11 Am. R. 209;] Duncan *v.* S., 49 Miss. 331; [S. *v.* Martin, 107 N. C. 904, 12 S. E. R. 194.]

[6] See the two notes next preceding the last; S. *v.* Walters, 64 Ind. 226; S. *v.* Bush, 29 Ind. 110; [Pippen *v.* S., 77 Ala. 81; P. *v.* Keeley, 81 Cal. 210, 22 Pac. R. 593; P. *v.* Olsen, 6 Utah, 284, 22 Pac. R. 168; Heron *v.* S., 22 Fla. 86.]

[7] Crim. Law, II, § 996.

offender within this law, the malice must be directed against the owner of the cattle, and not merely against the animal itself;"[1] though the reasons for this doctrine are not quite apparent in the mere language of the English cases.[2] Now, as to the —

§ 434. Terms of old English statutes.— The cases to this doctrine having all risen under the Black Act, East derives it from the preamble. And he deduces the same result from the earlier enactment of 37 Hen. 8, ch. 7. The word "maliciously" alone[3] he deems inadequate to signify this restricted form of malice.[4] It seems to the present writer that, while he is plainly correct as to the effect of the word "maliciously," he is mistaken in supposing that the preamble[5] of the Black Act furnishes any just foundation for the doctrine.[6] So that, unless

[1] 2 East, P. C. 1072.

[2] The following are the principal English cases on this head: Rex *v.* Austen, Russ. & Ry. 490, holding that malice against a servant or relation of the owner is not sufficient; but, in Rex *v.* Salmon, Russ. & Ry. 26, it appears to have been held that malice against the owner is not essential on a charge of setting fire under this statute; Rex *v.* Pearce, 1 Leach, 527, 2 East, P. C. 1072; Rex *v.* Kean, 2 East, P. C. 1073; s. c. *nom.* Rex *v.* Hean, 1 Leach, 527, note; Rex *v.* Shepherd, 1 Leach, 539, 2 East, P. C. 1073; Anonymous, 2 East, P. C. 1073, 1 Leach, 540, note; in which several cases malice or resentment toward the animal was adjudged insufficient; it must be against the owner.

[3] The exact words are "unlawfully and maliciously." *Ante*, § 431. For the legal meaning of "maliciously," see Crim. Law, I, § 429.

[4] 2 East, P. C. 1062, 1063, 1071, 1072. For example, Stat. 22 and 23 Car. 2, ch. 1, § 7, makes punishable any one who, "on purpose and of malice aforethought, and by lying in wait, shall unlawfully cut out or disable the tongue, etc., of any subject, with intention in so doing to maim or disfigure him;" and this author observes that the malice need not "be directed against any particular individual. If it be conceived against all persons who may happen to fall within the scope of the perpetrator's design, the particular mischief done to any one shall be connected with the general malignant intent, so as for the statute to attach upon the offenders. This is necessarily to be inferred from Carroll's Case [Rex *v.* Carroll, 1 Leach, 55; s. c. *nom.* Rex *v.* Carrol, 1 East, P. C. 394], who was an entire stranger to the gentleman whom he thus assaulted, and who could not have been personally in his contemplation till the occasion occurred on the sudden. So, if a blow be intended to maim one, and by accident maim another, the party is equally liable to be indicted or appealed for such maim." 1 East, P. C. 396. The same doctrine, it may be added, is applied to the "*malice* aforethought" of murder. Crim. Law, I, § 328; II, § 675 *et seq.*

[5] As to how a preamble is to be regarded in interpretation, see *ante*, §§ 48–51, 82, 200.

[6] The preamble is: "Whereas several ill-designing and disorderly persons have of late associated themselves under the name of blacks, and entered into confederacies to support and assist one another in stealing and destroying of deer, rob-

the reason suggested in the last section is the true one, the doctrine itself is inherently unsound.

§ 435. With us, as to malice against owner.— There are, in our American statutes, differences in terms requiring diversities of decision.[1] But whether, where a general expression is simply qualified by the word "maliciously," or "wilfully and maliciously," as in the English Black Act, interpretation will, with us, restrict the malice to such as has for its object the owner, in analogy to the malicious mischief of the common law, or will give to the word "maliciously" the full meaning which it bears in the other departments of the law of crime, is a question whereof we appear to have no judicial discussions of real value, yet whereon judicial opinion differs. Or perhaps nice diversities of statutory expression may in a measure account for apparent differences; so that, in legal fact, the question depends partly on the particular language of the statute and partly on differing views of judges.[2] Now,—

bing of warrens and fish ponds, cutting down plantations and trees, and other illegal practices, and have, in great numbers, armed with swords, fire-arms and other offensive weapons, several of them with their faces blacked, or in disguised habits, unlawfully hunted in forests belonging to his majesty, and in the parks of divers of his majesty's subjects, and destroyed, killed and carried away the deer, robbed warrens, rivers and fish ponds, and cut down plantations of trees; and have likewise solicited several of his majesty's subjects, with promises of money, or other rewards, to join with them; and have sent letters in fictitious names to several persons, demanding venison and money, and threatening some great violence if such their unlawful demands should be refused, or if they should be interrupted in or prosecuted for such their wicked practices, and have actually done great damage to several persons who have either refused to comply with such demands or have endeavored to bring them to justice, to the great terror of his majesty's peaceable subjects." This question could not have arisen in England since 1827, when, by the consolidating act of 7 and 8 Geo. 4, ch. 30, § 25, it was expressly made immaterial "whether the offense shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise." For the interpretation whereof, see Reg. *v.* Tivey, 1 Den. C. C. 63, 1 Car. & K. 704. This provision is continued in the present act of 24 and 25 Vict., ch. 97, § 58.

[1] Irvin *v.* S., 7 Tex. Ap. 78; Rountree *v.* S., 10 Tex. Ap. 110; Johnson *v.* S., 61 Ala. 9; Reg. *v.* Prestney, 3 Cox, C. C. 505; S. *v.* Rector, 34 Tex. 565.

[2] Hobson *v.* S., 44 Ala. 380, 381; Johnson *v.* S., 37 Ala. 457; S. *v.* Pierce, 7 Ala. 728; S. *v.* Enslow, 10 Iowa, 115; Moseley *v.* S., 28 Ga. 190; Wright *v.* S., 30 Ga. 325, [76 Am. D. 656;] S. *v.* Hambleton, 22 Mo. 452; Chappell *v.* S., 35 Ark. 345; Nutt *v.* S., 19 Tex. 340; Brown *v.* S., 26 Ohio St. 176; Stone *v.* S., 8 Heisk. 457; Gaskill *v.* S., 56 Ind. 550; S. *v.* Linde, 54 Iowa, 139; S. *v.*

§ **436. In reason,**— there can be no malice toward a mere inanimate object; and malice against a lower animal will be inadequate, because, by the common law, the animal has no recognized rights.[1] Under a statute simply silent as to the mental condition of the perpetrator,[2] the malice of the common law of this offense will be required, in obedience to the rule that statutes in general terms are to be interpreted by the common law.[3] But where the specific "maliciously" is employed, the evil intent is legislatively defined;[4] and the question is, whether is meant the restrictive malice of this offense, or the general malice of the law of crime. In a statute merely affirming the common law as to the act of mischief, the former might well be taken to be the meaning of "maliciously;"[5] but where, as in most of our enactments on this subject, the range is wider, evidently departing from the restricted common law as to the act, the same legislative purpose should be inferred as to the intent, giving the word "maliciously" its ordinary meaning.

§ **437. Illustrative points.**— Some illustrations of what has been held are, that,—

Passion with animal — Bestiality.— Where the killing or maiming of an animal is in a passion against it,[6] or it is maimed to make it quiet while bestiality is being committed with it,[7] the transaction lacks the sort of malice required in malicious mischief. In like manner,—

Trespassing animal.— One who shoots an animal in the habit of trespassing on his fields and destroying his crops, while in the act of trespass, not from malice but to preserve his crops, does not commit this offense, though he incurs a civil liability.[8] Again,—

Lewis, 10 Rich. 20; S. *v.* Webster, 17 N. H. 543; Com. *v.* Williams, 110 Mass. 401; [S. *v.* Foote, 71 Conn. 737, 43 Atl. R. 488; Finderburk *v.* S., 75 Miss. 20, 21 S. R. 658; Terr. *v.* Crozier, 6 Dak. 8, 50 N. W. R. 124; S. *v.* Phipps, 95 Iowa, 491, 64 N. W. R. 411; *Ex parte* Eads, 17 Neb. 145, 22 N. W. R. 352.]

[1] Crim. Law, I, §§ 594–597*a*.

[2] *Ante*, § 432*a*.

[3] *Ante*, §§ 7, 75, 82, 88, 117, 119, 131–144, 155, 432*a*.

[4] *Ante*, § 432*a*.

[5] As see, perhaps, Com. *v.* Williams, 110 Mass. 401, 402.

[6] Rex *v.* Kean, 2 East, P. C. 1073; Rex *v.* Shepherd, 1 Leach, 539, 2 East, P. C. 1073; Anonymous, 2 East, P. C 1073.

[7] Rex *v.* Pearce, 1 Leach, 527, 2 East, P. C. 1072. Compare this with Reg. *v.* Welch, 1 Q. B. D. 23, 13 Cox, C. C. 121.

[8] Wright *v.* S., 30 Ga. 325, [76 Am. D. 656;] Chappell *v.* S., 35 Ark. 345.

Malice against owner presumed.— As observed by Chitty,[1] "it is not necessary to give evidence of express malice against the owner, which will be presumed until the contrary appears.[2] And in Dawson's case, who was indicted for poisoning horses, in order to prevent them from running the race, defendant having betted against them, it was holden that this intent was sufficient to bring the case within the act, and the defendant was convicted."[3] But where the proven facts rebut the presumption of malice, the result is otherwise.[4]

III. The Indictment and Evidence.

§ 438. In general.— Something was just said of the evidence.[5] The indictment follows the rules explained in "Criminal Procedure" governing all indictments, and adapts itself to the special facts and the particular statutory terms. Thus,—

§ 439. "Feloniously."— Where, as under the Black Act,[6] and some other of the English statutes, the offense is a felony, the indictment must lay it to have been committed "feloniously."[7] But under most of our American enactments it is misdemeanor, and then this word is not required.[8]

§ 440. Word to designate animal.—Some discussions of this question in the last chapter will be helpful here.[9] Under the before-quoted section of the Black Act, the expression being "any cattle,"[10] a form in Chitty designates the animal simply as "one black gelding;"[11] and this, either with or without the superfluous "black,"[12] is adequate, both by the English and American authorities. There is no need to add, what the court

And see Daniel *v.* Janes, 2 C. P. D. 351; Williams *v.* Dixon, 65 N. C. 416; Lott *v.* S., 9 Tex. Ap. 206; Bass *v.* S., 63 Ala. 108; Jones *v.* S., 3 Tex. Ap. 228; Gaskill *v.* S., 56 Ind. 550; Thomas *v.* S., 30 Ark. 433, 435; McDaniel *v.* S., 5 Tex. Ap. 475; [McMahan *v.* S., 29 Tex. Ap. 348, 16 S. W. R. 171; Farmer *v.* S., 21 Tex. Ap. 423, 2 S. W. R. 767; Woods *v.* S., 27 Tex. Ap. 586, 11 S. W. R. 723.]

[1] 3 Chit. Crim. Law, 1087, note.

[2] 2 East, P. C. 1074. The American editor refers also to S. *v.* Council, 1 Tenn. 305. To the same effect see also Chappell *v.* S., *supra;* S. *v.* Linde, 54 Iowa, 139; [P. *v.* Olsen, 6 Utah, 284, 22 Pac. R. 163.]

[3] Dawson's Case, MS. The indictment is given 3 Chit. Crim. Law, 1088.

[4] Reg. *v.* Pembliton, Law R. 2 C. C. 119, 12 Cox, C. C. 607, 9 Eng. R. 501.

[5] *Ante*, § 437.

[6] *Ante*, § 431.

[7] Reg. *v.* Gray, Leigh & C. 365.

[8] Crim. Pro., I, §§ 533–537.

[9] *Ante*, § 426.

[10] *Ante*, § 431.

[11] 3 Chit. Crim. Law, 1087.

[12] *Post*, § 443.

will take notice of, that the gelding is "cattle." And this principle applies to the indictment on all the statutes of this general sort.[1] Nor will the generic term of the statute alone suffice in the indictment,— as, for example, "certain cattle,"— the species under it being required for identification.[2] But to weave into the allegation the statutory word indicating the genus is harmless and proper, if the pleader chooses;[3] as, the statutory word being "beast," to say a "horse beast."[4]

§ 441. Overlying in meaning.— The conflicting views as to statutory terms overlying one another in meaning, already considered, should be duly heeded by the pleader.[5] Now, whatever be the true doctrine on this subject,—

Specific followed by general.— If the statute, after enumerating animals by their species, adds a term indicating a genus,— as, "horse, mare, ewe, sheep, or *other beast*,"[6]— the indictment for an injury to one not within the enumeration yet within the genus must designate it by its species. It is immaterial that the word for the species is not in the statute; nor need the statutory word for the genus be woven into the allegation, though, if the pleader chooses, it may be. Such is the deduction of reason from the doctrines of the last section, or the doctrine itself.

§ 442. Cattle.— The word "cattle" in these statutes includes horses, mares, colts, geldings, and the like,[7] pigs,[8] asses,[9] sheep,[10]

[1] *Ante*, § 426; Crim. Pro., I, § 619; Rex *v.* Paty, 2 W. Bl. 721; Reg. *v.* Tivey, 1 Den. C. C. 63; Taylor *v.* S., 6 Humph. 285, 286; S. *v.* Abbott, 20 Vt. 537; S. *v.* Enslow, 10 Iowa, 115; S. *v.* Hambleton, 22 Mo. 452; S. *v.* Pearce, Peck, 66; S. *v.* Slocum, 8 Blackf. 315; Swartzbaugh *v.* P., 85 Ill. 457; Rivers *v.* S., 10 Tex. Ap. 177.

[2] Crim. Pro., I, §§ 568, 570, 619; Rex *v.* Chalkley, Russ. & Ry. 258. And compare with *ante*, § 426; [McIntosh *v.* S., 18 Tex. Ap. 284.]

[3] S. *v.* Clifton, 24 Mo. 376.

[4] S. *v.* Pearce, Peck, 66. Under the statutory term "cattle," the words "a certain horse beast, to wit, one mare," were held to be adequate. S. *v.* Hambleton, 22 Mo. 452; [S. *v.* Credle, 91 N. C. 640; Smythe *v.* S., 17 Tex. Ap. 244.]

[5] *Ante*, §§ 246c-248, 426; Crim. Pro., I, § 620; Rex *v.* Beaney, Russ. & Ry. 416.

[6] *Ante*, §§ 245-246b.

[7] S. *v.* Hambleton, 22 Mo. 452; Rex *v.* Paty, 1 Leach, 72, 2 East, P. C. 1074, 2 W. Bl. 721; Rex *v.* Moyle, 2 East, P. C. 1076; Rex *v.* Mott, 2 East, P. C. 1075, 1 Leach, 73, note; Reg. *v.* Tivey, 1 Den. C. C. 63, 1 Car. & K. 704; *ante*, § 440.

[8] Rex *v.* Chapple, Russ. & Ry. 77.

[9] Rex *v.* Whitney, 1 Moody, 8.

[10] Rex *v.* Hughes, 2 Car. & P. 420.

a steer,[1] and probably many other specific animals.[2] It has been held not to include a buffalo, though domesticated.[3]

Beast.— Evidently the word "beast" includes whatever "cattle" does, and probably something more. For example, a horse is a beast,[4] so is a cow,[5] and so is a hog.[6]

§ 443. Color.— The color of the animal need not be alleged; and commonly it is not, in good pleading at the present day.[7] If averred, though thus needlessly, it must, to avoid a variance, be proved, for it cannot be rejected as surplusage.[8] And the same rules apply to the color of an inanimate object injured; as, for example, a tree.[9]

Ownership.— Under most statutes and by most opinions, the ownership of the animal or other property injured must be alleged, or the allegation excused by due averments, and it must be proved.[10] In malicious mischief to a sheep, the ownership may be laid in the agistor, the same as it could be in larceny.[11] And the ownership of a maliciously injured dwelling-house may be laid in the tenant at will.[12] It has been held that the dog of a minor son, who lives with his father, cannot, in an indictment for killing it, be charged as the father's.[13] The cases in which this allegation is dispensed with are exceptional, as elsewhere explained.[14]

§ 444. Value— differs from ownership; and, except where special reasons require,[15] the value of the property injured need not be averred.[16] But every indictment, for whatever offense,

[1] S. *v.* Abbott, 20 Vt. 537.
[2] *Ante*, §§ 212, 426.
[3] S. *v.* Crenshaw, 22 Mo. 457.
[4] S. *v.* Pearce, Peck, 66.
[5] Taylor *v.* S., 6 Humph. 285.
[6] S. *v.* Enslow, 10 Iowa, 115.
[7] Taylor *v.* S., 6 Humph. 285; S. *v.* Hambleton, 22 Mo. 452; Com. *v.* Sowle, 9 Gray, 304, [69 Am. D. 289.]
[8] Crim. Pro., I, § 486.
[9] Com. *v.* Butcher, 4 Grat. 544.
[10] Crim. Pro., I, §§ 488*b*, 581, 583; II, §§ 843, 850; S. *v.* Smith, 21 Tex. 748; Rex *v.* Patrick, 2 East, P. C. 1059; S. *v.* Jackson, 7 Ind. 270; Bass *v.* S., 63 Ala. 108; Davis *v.* Com., 30 Pa. St. 421. And see S. *v.* Brant, 14 Iowa, 180; S. *v.* Shadley, 16 Ind. 230; P. *v.* Horr, 7 Barb. 9; [Woodward *v.* S., 33 Tex. Cr. R. 554, 28 S. W. R. 204; Walker *v.* S., 89 Ala. 74, 8 S. R. 144.]
[11] Rex *v.* Woodward, 2 East, P. C. 653.
[12] S. *v.* Whittier, 21 Me. 341, [38 Am. D. 272.] See S. *v.* Mason, 13 Ire. 341; [P. *v.* Coyne, 116 Cal. 295, 48 Pac. R. 218; S. *v.* Haney, 32 Kan. 428, 4 Pac. R. 831.]
[13] S. *v.* Trapp, 14 Rich. 203.
[14] Crim. Pro., II, § 843; Darnell *v.* S., 6 Tex. Ap. 482; S. *v.* Mathes, 3 Lea, 36. And see Smith *v.* S., 63 Ga. 168.
[15] *Ante*, § 427, and places there referred to.
[16] S. *v.* Jones, 33 Vt. 443; Harness *v.* S., 27 Ind. 425; Caldwell *v.* S., 49 Ala. 34; [Finderburk *v.* S., 75 Miss. 20, 21 S. R. 658; Heron *v.* S., 23 Fla. 86;

must set out all the facts which, in law, in distinction from judicial discretion, may influence the punishment.[1] Therefore, for example, under a statute which provides that one injuring "any tree, etc., on the land of another person," shall, on conviction, "be fined in five times the *value of such property*," the value must be alleged in the indictment. But the amount of damage to the owner is immaterial to the punishment, therefore there need be no averment of it.[2] On the other hand,—

§ 445. Damage to property.— There are statutes which make the sum wherein the property is damaged by the mischief an element in the punishment, as, for example, one in Indiana subjects the offender to a fine "not exceeding two-fold the *value of the damage done*, to which may be added imprisonment not exceeding twelve months." An indictment on such a statute is not required to allege the value of the property, but it must the damage; and to justify a particular punishment, so much of the alleged damage as by the statute is essential to it must be proved, yet no more need be.[3] Direct damage is meant, consequential cannot be added. Thus, in England, a statute makes punishable malicious injuries to trees, if it exceeds £5;[4] and, where a damage of £1 was shown to some trees in a hedge, and a repair of the mischief would require the stubbing up of the hedge and planting of a new one at an outlay of over £4, the offense was held not to be committed. "There is," said Pollock, C. B., delivering the opinion of the court, "a consequential injury exceeding £5, but that is not sufficient."[5] Yet the damage is not limited to what is done at a single impulse or to one tree; all the results of one continuous transaction may be combined to make the £5,[6] those of two separate transactions cannot be.[7]

Sample *v.* S., 104 Ind. 289, 4 N. E. R. 40.]

[1] Crim. Pro., I, §§ 77 *et seq.*, 538–542, 571, 578–580; II, §§ 48, 177, 565, 572.

[2] S. *v.* Shadley, 16 Ind. 230. And see Com. *v.* Cox, 7 Allen, 577; McKinney *v.* P., 32 Mich. 284; S. *v.* Allen, 72 N. C. 114; [Beaufire *v.* S., 37 Tex. Cr. R. 50, 38 S. W. R. 608.]

[3] Harness *v.* S., 27 Ind. 425; Uecker *v.* S., 4 Tex. Ap. 234; S. *v.* Heath, 41 Tex. 426; Street *v.* S., 7 Tex. Ap. 5; Nicholson *v.* S., 3 Tex. Ap. 31; [Sample *v.* S., 104 Ind. 289, 4 N. E. R. 40.]

[4] 7 & 8 Geo. 4, ch. 30, § 19, superseded by 24 & 25 Vict., ch. 96, § 32, and 24 & 25 Vict., ch. 97, § 51.

[5] Reg. *v.* Whiteman, Dears. 353, 6 Cox, C. C. 370, 25 Eng. L. & Eq. 590.

[6] Reg. *v.* Shepherd, Law R. 1 C. C. 118, 11 Cox, C. C. 119; Reg. *v.* Thoman, 12 Cox, C. C. 54.

[7] Reg. *v.* Williams, 9 Cox, C. C. 333. See *post*, § 447b.

§ 446. Allegation of injury.— The principles on which the allegation of the injury proceeds are stated in "Criminal Procedure."[1] Some of the statutory words are sufficient alone, others require more of detail. Thus,—

"*Kill.*" — Under a statute making it punishable to "kill" an animal belonging to another, an indictment is sufficient which charges that the defendant did "kill" it, not specifying the manner of the killing.[2] So —

"*Destroy*," — applied to inanimate property, includes all minor injuries, and the particulars or means employed[3] need not be stated.[4] Under the statutory words "cut, injure or destroy," the allegation that the defendant "did cut, injure and destroy" was adjudged adequate.[5] But,—

§ 447. "Injure."[6] — Under the single statutory word "injure," the same word and no more in the indictment is not adequate.[7] It is too indefinite. But a charge that the defendant injured an omnibus, "by then and there wilfully and maliciously driving the pole of a horse railroad car at, against and through a panel of the said omnibus, by means of which said wilful and malicious driving of the said pole against the said panel of the said omnibus, the said panel was broken in pieces, and the said omnibus was otherwise greatly injured," was adjudged sufficient.[8] And so was the allegation of an injury to a wagon, "by then and there removing from the ends of the axletrees of said wagon the nuts or taps on the same, and by then and there removing the hammer and neck yoke of said wagon where the said Kennedy could never find them the said taps, hammer and neck yoke."[9] On the other hand, the averment did not pass the judicial scrutiny, that the defendant maliciously injured, etc., the personal goods and chattels, to

[1] Crim. Pro., II, §§ 841, 846.

[2] Taylor *v.* S., 6 Humph. 285; Com. *v.* Sowle, 9 Gray, 304, [69 Am. D. 289;] Hayworth *v.* S., 14 Ind. 590; S. *v.* Hambleton, 22 Mo. 452; S. *v.* Painter, 70 N. C. 70; [Walker *v.* S., 89 Ala. 74, 8 S. R. 144.]

[3] S. *v.* Merrill, 3 Blackf. 346; [Smith *v.* S. (Ga.), 35 S. E. R. 166; Patterson *v.* S. (Tex. Cr. R.), 55 S. W. R. 338.]

[4] S. *v.* Watrous, 13 Iowa, 489. And see Jarnagin *v.* S., 10 Yerg. 529.

[5] S. *v.* Jones, 33 Vt. 443. And see S. *v.* Hockenberry, 11 Iowa, 269; Brewer *v.* S., 5 Tex. Ap. 248; Crim. Pro., I, § 629 and note; [Kluther *v.* P., 29 Ill. Ap. 448.]

[6] See *post*, § 449.

[7] And see Crim. Pro., I, § 629; [S. *v.* Costello, 62 Conn. 128, 25 Atl. R. 477; Todd *v.* S., 39 Tex. Cr. R. 232, 45 S. W. R. 596; S. *v.* Towle, 62 N. H. 373.]

[8] Com. *v.* Cox, 7 Allen, 577.

[9] S. *v.* Williams, 21 Ind. 206. And see Jay *v.* S., 69 Ind. 158.

wit, fifty head of cattle, of, etc., by then and there maliciously and mischievously dogging and hunting the said cattle. Yet there was another objection on which the decision more distinctly turned.[1] So,—

"*Torture.*"—Under the statutory words "maim, beat or torture," "torture" alone in the indictment has been held to be insufficient.[2] But,—

§ 447a. Allegation on disjunctive words.— Where words are introduced thus disjunctively into a statute, the indictment need not, unless the pleader chooses, do more than cover, in due form, one of the words.[3] Finally,—

§ 447b. Cover all other statutory terms.—It must in all other respects fully cover the statutory terms, and in special circumstances be expanded beyond them, according to the rules laid down in the first volume of "Criminal Procedure."[4] And—

How much in one count.— The whole mischief of one transaction,[5] but not two transactions,[6] should be included in a single count.[7] For example, a malicious injury to two animals, inflicted at the same time, is but one offense.[8]

IV. Further of the Offense.

§ 448. Meanings of words.— The meanings of most of the words employed in the statutes to indicate this offense have been explained in other connections.[9]

[1] S. *v.* Jackson, 7 Ind. 270.

[2] Crim. Pro., I, § 639; S. *v.* Pugh, 15 Mo. 509.

[3] *Ante*, § 244; S. *v.* Batson, 31 Mo. 343.

[4] Maskill *v.* S., 8 Blackf. 299; Com. *v.* Dougherty, 6 Gray, 349; Com. *v.* Bean, 11 Cush. 414; Parris *v.* P., 76 Ill. 274; Allan *v.* Kirton, 2 W. Bl. 841; s. c. *nom.* Allen *v.* Kirton, 3 Wils. 318; S. *v.* Warren, 13 Tex. 45; Bates *v.* S., 31 Ind. 72; Uecker *v.* S., 4 Tex. Ap. 234; S. *v.* Allisbach, 69 Ind. 50; Rivers *v.* S., 10 Tex. Ap. 177; Com. *v.* McLaughlin, 105 Mass. 460; S. *v.* Arnold, 39 Tex. 74; S. *v.* Hussey, 60 M. 410, [11 Am. R. 209;] Rountree *v.* S., 10 Tex. Ap. 110; S. *v.* Walters, 64 Ind. 226; S. *v.* Thorne, 81 N. C. 555; S. *v.* Parker, 81 N. C. 548; Swartzbaugh *v.* P., 85 Ill. 457; Birdg *v.* S., 31 Ind. 88; Thompson *v.* S., 51 Miss. 353; S. *v.* Simpson, 73 N. C. 269; S. *v.* Rector, 34 Tex. 565; S. *v.* Pennington, 3 Head, 119; S. *v.* Purdie, 67 N. C. 326; [Govitt *v.* S., 25 Tex. Ap. 419, 8 S. W. R. 478; Smith *v.* District of Columbia, 12 Ap. D. C. 88. Statute relating to inanimate property will not cover injuries to animals. Patton *v.* S., 93 Ga. 111, 19 S. E. R. 734.]

[5] Rex *v.* Mogg, 4 Car. & P. 364; S. *v.* Moultrieville, Rice, 158; Smith *v.* S., 68 Ga. 168.

[6] Burgess *v.* S., 44 Ala. 190.

[7] See *ante*, § 445.

[8] Hayworth *v.* S., 14 Ind. 590; Rex *v.* Mogg, *supra*.

[9] As to which, the reader should consult the index to this volume.

"*Maim*" *and* "*disfigure*," *distinguished.*—"Maim," and in some measure "disfigure," have been thus considered.[1] Under the words "kill, maim or disfigure," in an Iowa statute, the court said that to "maim" a domestic animal implies a permanent injury; to "disfigure" requires only what will lessen its value to an extent however slight. "Thus," observed Baldwin, J., "to shave a horse's main or tail is a disfiguring of the horse, but the injury is not of a permanent character. So the cutting off the hair, or cutting the skin, of a cow or an ox, would tend to destroy the beauty or symmetry of the animal, and would, although not of a permanent character, be an indictable offense. Malice toward the owner of the animal is the ingredient of this offense; and, although the injury may be but very slight, yet [if] it is of such a character as to lessen the value of the animal to the owner, and shows the malicious intention of the person committing the act, we think, under the statute, the offense is complete."[2]

§ 449. "**Injure**,"—already spoken of,[3] has not been much discussed by the courts. It is an "injuring" of a horse to cut off closely its main and the hair of its tail;[4] or of a dress, to do what will render it unfit for further use as such.[5]

Timber.—Fence rails have been adjudged not to be "timber." They are "made from timber."[6] Yet under the words "timber, wood and trees," in a statute permitting the removal by owners of obstructions from highways, buildings and parts of buildings are included.[7]

And see Crim. Law, II, §§ 985–990, 994, 995.

[1] *Ante*, § 316 and note; Crim. Law, II, § 995.

[2] S. *v.* Harris, 11 Iowa, 414.

[3] *Ante*, § 447.

[4] Oviatt *v.* S., 19 Ohio St. 573.

[5] Com. *v.* Sullivan, 107 Mass. 218. And see Ashworth *v.* S., 63 Ala. 120; Com. *v.* Falvey, 108 Mass. 304.

[6] McCauley *v.* S., 43 Tex. 374.

[7] Com. *v.* Noxon, 121 Mass. 42. And see Simpson *v.* Woodward, 5 Kan. 571. [The English statute 24 & 25 Vict., ch. 97, § 52, does not include injuries to incorporeal hereditaments, as the right to herbage in the soil of a town (Laus *v.* Eltringham, 15 Cox, C. C. 22); nor to uncultivated roots or plants growing upon the realty, as mushrooms. Gardner *v.* Mansbridge, 16 Cox, C. C. 281.]

CHAPTER XXXII.

STATUTORY ENLARGEMENTS OF THE COMMON-LAW CHEAT.

§ 450, 451. Introduction.
452, 453. Unlawful driving of cattle.
454–461. Fraudulent marking and altering of marks.
462–464. Violations of estray laws.

§ 450. Elsewhere — False pretenses.— The most prominent extension of the common law of cheats consists of the familiar statutes against the obtaining of goods by false pretenses. They, and various statutes in affinity with them, are considered in other volumes of this series.[1]

§ 451. Here, and how divided.— It would be useless to bring together here all the minor enactments having a possible relation to this subject. We shall simply consider, I. The unlawful driving of cattle; II. The fraudulent marking and altering of the marks of cattle; III. Violations of estray laws.

I. The Unlawful Driving of Cattle.

§ 452. Offense.— In Texas, one's driving of another's cattle out of the county, or out of their accustomed range, without the latter's authority or written authority, is, because in a large grazing country specially adapted to defraud the "stock-raisers," made by statute indictable.[2] The offense is complete whenever the full statutory terms are covered by acts of violation,[3] with the requisite criminal intent.[4]

§ 453. Procedure.— One driving of cattle, though of various owners, constitutes one offense only, and all may be charged in one count.[5] The indictment need not describe the range, or

[1] Crim. Law, II, §§ 164, 166, 409 *et seq.*; Crim. Pro., II, § 157 *et seq.*

[2] Rogers *v.* S., 9 Tex. Ap. 43; Long *v.* S., 43 Tex. 467; Smith *v.* S., 43 Tex. 433; Wills *v.* S., 40 Tex. 69; [Shubert *v.* S., 20 Tex. Ap. 320.]

[3] Rogers *v.* S., *supra*; [Wilson *v.* S. (Tex. Ap.), 19 S. W. R. 255; Wells *v.* S. (Tex. Ap.), 13 S. W. R. 889.]

[4] Smith *v.* S., 41 Tex. 168; Wills *v.* S., *supra*; [Yoakum *v.* S., 21 Tex. Ap. 260, 17 S. W. R. 254; S. *v.* Swayze, 11 Oreg. 357, 8 Pac. R. 574.]

[5] Long *v.* S., 43 Tex. 467. And see Crim. Law, I, §§ 1060–1064.

allege the distance driven.[1] Perhaps it need not aver the ownership; but, if it does, the averment must be proved.[2] It must negative whatever the general rules of pleading on statutes require;[3] as, for example, the owner's written consent and the defendant's ownership.[4]

II. Fraudulently Marking and Altering of the Marks of Cattle.

§ 454. In general — (Common law). — In some localities owners of cattle liable to be mixed with those of other owners have a practice of putting on their own a uniform mark to distinguish them. And the statutes in some of our states authorize the recording of this mark. Then, if a man effaces from another's cattle the mark, or alters it, or puts on them his own mark, intending, by the help of this device, to convert them to his own use, evidently, as a question of just legal principle, though the author does not call to mind any case directly to the point, he commits either actual or attempted larceny at the common law. And,—

§ 455. Statutes. — Further to protect the owners in their property, the statutes of some of our states have made it a distinct offense for one, with a fraudulent intent specified, to mark, or alter the mark, of an animal of another. The statutory terms are not absolutely uniform.[5]

§ 456. Ordinary rules. — The cases under these statutes are governed by the rules of law and procedure ordinarily prevailing in other classes of criminal cases;[6] as,—

§ 457. Ownership. — The offense may be committed on an animal the ownership whereof is unknown.[7] Where it is known

[1] Darnell *v.* S., 43 Tex. 147.

[2] Smith *v.* S., 43 Tex. 433. And see Crim. Pro., I, § 438*b*.

[3] Crim. Pro., I, §§ 631–642.

[4] Covington *v.* S., 6 Tex. Ap. 512; Long *v.* S., 6 Tex. Ap. 642. And see Wills *v.* S., 40 Tex. 69.

[5] Morgan *v.* S., 13 Fla. 671; S. *v.* Nichols, 12 Rich. 672. As to the Mississippi statute, see Murrah *v.* S., 51 Miss. 652; [Fossett *v.* S., 11 Tex. Ap. 40. Under the Texas statute value must be alleged and proven. Melton *v.* S., 20 Tex. Ap. 202; Diaz *v.* S. (Tex. Cr. R.), 53 S. W. R. 632. But not in Arkansas. Houston *v.* S. (Ark.), 53 S. W. R. 44.]

[6] Reynolds *v.* S., 24 Ga. 427; S. *v.* King, 84 N. C. 737; S. *v.* Nichols, 12 Rich. 672; Murrah *v.* S., 51 Miss. 675; West *v.* S., 32 Tex. 651; S. *v.* Davis, 2 Ire. 153; [Bradley *v.* P., 8 Col. 599, 9 Pac. R. 783; P. *v.* Swazey, 6 Utah, 93, 21 Pac. R. 409; Terr. *v.* Blevins (Ariz.), 41 Pac. R. 442; Adams *v.* S., 16 Tex. Ap. 162; Pullen *v.* S., 11 Tex. Ap. 89.]

[7] S. *v.* Haws, 41 Tex. 161.

to the grand jury it should be alleged, and the proofs should sustain the averment.[1] An allegation that the animal belonged to "an estate" was held to be insufficient.[2]

§ 458. "Fraudulently" — ("Wilfully and feloniously"). Under a statute making it punishable "if any person shall *fraudulently* alter or change the mark or brand of any animal," an indictment which omitted the word "fraudulently" was held to be insufficient, though in place of it the pleader had inserted the two words "wilfully and feloniously." For, said Randall, C. J., "the gist of the offense is the intent to defraud the owner."[3]

§ 459. Averment of mark.— According to the one decision which we have, in charging the offense of altering a mark, it is not necessary to say what was the mark before the alteration. But it is enough, for example, to allege that the defendant "unlawfully, knowingly and wilfully did alter the mark of a certain cow, the property of Martha Benson."[4]

§ 460. Proving mark.— On this question, probably different results come from different terms of statutes. In Texas, the owner's mark, to be admissible in evidence, must be recorded.[5] It may, in North Carolina, be proved by parol.[6]

§ 461. "Altering" brand.— A brand, it has been held, is "altered" when a new one is put on the animal without defacing the old.[7] Or the offense may be committed by clipping the hair at the original brand.[8]

[1] Mayes *v.* S., 33 Tex. 340; [Foster *v.* S. (Tex. Ap.), 12 S. W. R. 506; Hawkins *v.* S. (Tex. Cr. R.), 20 S. W. R. 830; Reed *v.* S., 32 Tex. Cr. R. 139, 22 S. W. R. 402.]

[2] P. *v.* Hall, 19 Cal. 425.

[3] Morgan *v.* S., 13 Fla. 671. And compare with Crim. Pro., I, § 613. See also S. *v.* Roberts, 3 Brev. 139; Rex *v.* Ogden, 6 Car. & P. 631.

[4] S. *v.* O'Neal, 7 Ire. 251. [See also S. *v.* Stelly, 48 La. An. 1478, 21 S. R. 89; Shiver *v.* S. (Fla.), 27 S. R. 36.]

[5] Allen *v.* S., 42 Tex. 517; [Elsner *v.* S., 22 Tex. Ap. 687, 3 S. W. R. 474; Murray *v.* Trinidad Nat. Bank, 5 Col. 359, 38 Pac. R. 615. But an unrecorded brand is admissible in evidence to identify an animal. Coffelt *v.* S., 19 Tex. Ap. 436; Tittle *v.* S., 30 Tex. Ap. 597, 17 S. W. R. 1118; S. *v.* Cardelli, 19 Nev. 319, 10 Pac. R. 433. And an unrecorded mark is admissible in proof of ownership. Dreyer *v.* S., 11 Tex. Ap. 631; Wyers *v.* S., 22 Tex. 258, 3 S. W. R. 722; P. *v.* Bollinger, 71 Cal. 17, 11 Pac. R. 799.]

[6] S. *v.* King, 84 N. C. 737.

[7] Atzroth *v.* S., 10 Fla. 207.

[8] Slaughter *v.* S., 7 Tex. Ap. 123.

III. Violations of Estray Laws.

§ 462. Elsewhere.—Something concerning the larceny of estrays is given in "Criminal Law."[1]

§ 463. Protection of owners.—The protection of owners, in respect of their stray animals, is variously provided for by the statutes in most, or perhaps all, of our states. And,—

§ 464. Taking up and using.—In some of our states, the taking up and using of an estray, without complying with the estray laws, is made by statutes a crime.[2] In Texas, the punishment depends in some degree on the value of the animal. Therefore an indictment on the statute must allege its value.[3] But it need not set forth its age, color, sex or brands.[4] For an animal to be an estray, the owner must be unknown to the person taking it up;[5] but it is no objection that he is afterward known, or known to the grand jury finding the indictment.[6]

[1] Crim. Law, II, §§ 876, 882, note.

[2] S. *v.* Armontrout, 21 Tex. 472; P. *v.* Martin, 52 Cal. 201; S. *v.* Moreland, 27 Tex. 726; S. *v.* Anderson, 34 Tex. 611; S. *v.* Carabin, 33 Tex. 697; S. *v.* Dunham, 34 Tex. 675; S. *v.* Meschac, 30 Tex. 518; Ashcroft *v.* S., 32 Tex. 108; Davis *v.* S., 2 Tex. Ap. 162, in which cases appear various points not stated in the text. As to the suspension of the Texas statute during the secession war, see S. *v.* Spillers, 30 Tex. 517; Nichols *v.* S., 30 Tex. 515; [Thompson *v.* S., 37 Tex. Cr. R. 654, 40 S. W. R. 997; Houser *v.* Scott, 65 Ga. 425; Greene *v.* S., 79 Ind. 537; O'Malley *v.* McGinn, 53 Wis. 353, 10 N. W. R. 515.]

[3] S. *v.* McCormack, 22 Tex. 297; *ante*, § 427.

[4] S. *v.* Crist, 32 Tex. 99.

[5] Roberts *v.* Barnes, 27 Wis. 422; [Lowe *v.* S., 11 Tex. Ap. 253. See Burton *v.* S., 21 Tex. Ap. 554, 1 S. W. R. 450.]

[6] S. *v.* Fletcher, 35 Tex. 740.

CHAPTER XXXIII.

STATUTORY HOMICIDES.

§ 465, 466. Introduction.
467–470. Making the civil wrong indictable.
471–477. Felonious, purely or partly statutory.

§ 465. Elsewhere.— In the several chapters on homicide in "Criminal Law" and "Criminal Procedure,"[1] statutory homicides in general are explained in connection with those at the common law. Indeed, the old common law having simply drawn the bound between the indictable and unindictable taking of human life, the division into murder and manslaughter was made by statutes now worn into the common law and become parcel of it, and the later divisions into degrees are statutory; all of which are elucidated in those other connections. Something also is there said of the various changes in the bounds of indictable life-taking, created by statutes in a few of our states.

§ 466. Here, and how divided.— We shall in this chapter simply add a few explanations and enlargements of the subject; as to, I. Statutes making the civil wrong indictable; II. Felonious homicides purely and partly statutory.

I. Statutes Making the Civil Wrong Indictable.

§ 467. In general.— In some of the states there are statutes which give to the surviving representatives of passengers and others killed by the negligence of railroad corporations an indictment for the recovery of a penalty.[2] Thereupon its allegations must follow the rules of criminal pleading; as, for

[1] Crim. Law, II, § 613 *et seq.*; Crim. Pro., II, §§ 495–663. And see the title "Dueling" in those volumes.

[2] Crim. Law, I, § 531, and cases there cited; S. *v.* Maine Cent. R. R. Co., 60 Me. 490; [S. *v.* Boston & Maine R. R. Co., 58 N. H. 410; S. *v.* Grand Trunk Ry. Co., 65 N. H. 663, 23 Atl. R. 525; Com. *v.* Boston & Maine R. R. Co., 133 Mass. 383. For United States statute against negligence by steamboat captains and masters, see U. S. *v.* Holtzbauer, 40 Fed. R. 76. And see Thomas *v.* P., 2 Colo. App. 513, 31 Pac. R. 349.]

example, where by the statute the penalty goes to the "widow" if no children, and to the children if no widow, if both to her and them equally," it should aver that the deceased left a widow or heirs, or both, and state their names.[1] But, if the penalty goes to the executor, those names need not be averred; his, must be. The names of the servants of the corporation are not required.[2] As to the —

§ 468. **Procedure.**— In other respects, and in general, where the law provides an indictment for the enforcement of a civil right, the procedure, as we saw in another connection,[3] conforms rather to the common course in the civil than in the criminal department. So, therefore, it does in these cases;[4] as, for example,—

§ 469. **New trial.**— Contrary to the course in the purely criminal law, new trials may be granted in cases of this class, very much on the principles which prevail in civil causes, to the government or plaintiff after the acquittal of the defendant, though the court may be more reluctant than in cases purely civil.[5]

§ 470. **"Passenger."** — Within these statutes, it was held by the majority of the court that, where a railway train passed, without fully stopping, the station to which a passenger was ticketed, and, while it was in motion, he got safely off, and in going to the depot was killed by another train approaching, he had ceased to be a "passenger," and so the corporation was relieved from criminal responsibility.[6] This decision would be more clearly right if the cars had stopped, as they ought, at the station, or if the passenger had left them before arriving there, or if he had got off when he could not in safety. Under the facts, it violates a rule of our jurisprudence by permitting the

[1] S. *v.* Grand Trunk R. R. Co., 60 Me. 145.

[2] Com. *v.* Boston, etc. R. R. Co., 11 Cush. 512, 517, 518.

[3] Crim. Law, I, §§ 33, 1074–1076. [See also Com. *v.* Coburn, 132 Mass. 555; Com. *v.* Boston & Maine R. R. Co., 133 Mass. 383; Com. *v.* Boston & Lowell R. R. Co., 134 Mass. 211; Com. *v.* Brockton St. R. R. Co., 143 Mass. 501, 10 N. E. R. 506.]

[4] Crim. Law, I, § 531.

[5] Crim. Law, I, § 993; Reg. *v.* Russell, 3 Ellis & B. 942; 3 Russ. Crimes (5th Eng. ed.), 320; referring also to Reg. *v.* Chorley, 12 Q. B. 515, and Reg. *v.* Leigh, 10 A. & E. 398; [S. *v.* Maine Central R. R. Co., 77 Me. 244.]

[6] Com. *v.* Boston, etc. R. R. Co., 129 Mass. 500, [37 Am. R. 382.]

corporation to set up its own wrong in excuse for the non-fulfillment of its undertaking to deliver the passenger at the depot.

II. Felonious Homicides Purely and Partly Statutory.

§ 471. Created by common-law name or description.— Within a principle already explained,[1] if a statute simply makes indictable "murder," or "manslaughter," employing thus the common-law term, the offense it creates does not differ from murder or manslaughter at the common law.[2] And the indictment for it is the same as at the common law, except in the conclusion "against the form of the statute."[3] Nor is it otherwise, though the statute, instead of using the common-law name, describes the offense by its common-law definition.[4] Again,—

§ 472. Varying from common law.— Where a statutory homicide varies in its bounds from the common-law offense, the judicious pleader, whose aim is accuracy, will bring his allegations within the statutory words. Yet as less than the best may be good, and the substance of the statutory language will suffice,[5] the mere common-law forms will in this class of cases be sometimes adequate; because, within limits explained in "Criminal Procedure,"[6] an indictment on a statute departing from the statutory words may be tolerated. But the allegations of the common law will not be sufficient, nor do our constitutional guaranties permit the legislature to make them such, under every statute.[7] This question will vary with the statute, and practically with differing opinions of judges. It would not be a judicious use of the limited space available in this volume to trace minutely the somewhat tortuous line of adjudications which the books reveal on this question; but the following, in brief, may assist one wishing to trace the line for himself.

[1] *Ante*, § 416.

[2] S. *v.* Mullen, 14 La. An. 570; [S. *v.* McDonald, 14 Utah, 173, 46 Pac. R. 872; U. S. *v.* King, 34 Fed. R. 302.]

[3] Crim. Pro., I, § 610.

[4] Sutcliffe *v.* S., 18 Ohio, 469, [51 Am. D. 459.] And see Territory *v.* Bannigan, 1 Dak. 451, [46 N. W. R. 597; Dwyer *v.* S., 12 Tex. Ap. 535; Davis *v.* P., 151 U. S. 262, 14 S. Ct. 328, 38 L. ed. 153.]

[5] S. *v.* Moses, Minor, 393; P. *v.* Murray, 10 Cal. 309; [Graves *v.* S., 45 N. J. L. 203; Brannigan *v.* P., 3 Utah, 488, 24 Pac. R. 767; S. *v.* Arnold, 107 N. C. 861, 11 S. E. R. 990; Bird *v.* S., 18 Fla. 493; S. *v.* Fooks, 29 Kan. 425.]

[6] Crim. Pro., I, §§ 611, 612.

[7] Conner *v.* Com., 13 Bush, 714. See Crim. Pro., II, §§ 582, 583.

§ 473. New York.— The Revised Statutes of New York defined murder and manslaughter in terms differing somewhat from those of the common law, and made four degrees of the latter.[1] Later statutes added two degrees of the former.[2] In the interval between these two legislative steps, it was held that an indictment for murder, drawn after the common-law model, and concluding against the form of the statute, was sufficient.[3] And since it was divided into two degrees, the same form of the indictment has been adjudged adequate to sustain a conviction of murder in either the first or second degree.[4] Now,—

§ 474. As to which.— The latter doctrine, both as it prevails in New York and in some of the other states, is explained in "Criminal Procedure."[5] The reader will there see that it is subversive both of the common-law rules of criminal pleading and of our constitutional guaranties, that the arguments against it were never even attempted to be answered by any judge or jurist who took the pains to understand them, and that it furnishes a wild and weird illustration of the confusion which comes from courts shutting their eyes and leaping in the dark after each other's ill-considered decisions. As to the former doctrine,— namely, that the allegations in common-law murder sufficiently charge murder under the Revised Statutes of New York,— it appears to be founded on the idea that the statute merely gives shape and form to the common law, or merely defines it; and so an averment within the terms of the one comes also within those of the other.[6] Whether this conclusion is correct in principle or not will depend on a comparison, not proposed here to be made, of the statute and the common law, in connection with the rules of pleading on statutes. If we accept it as correct,[7] it is not necessarily a guide under statutes differently expressed.

[1] See Crim. Law, II, §§ 720, 721.

[2] Dolan *v.* P., 64 N. Y. 485.

[3] P. *v.* Enoch, 13 Wend. 159, [27 Am. D. 197;] Lake *v.* P., 1 Park. Cr. 495. See P. *v.* White, 24 Wend. 520.

[4] Fitzgerrold *v.* P., 37 N. Y. 413, dissenting opinion by Bacon, J., 685; Kennedy *v.* P., 39 N. Y. 245; Keefe *v.* P., 40 N. Y. 348. And see Dolan *v.* P., 64 N. Y. 485.

[5] Crim. Pro., II, §§ 560–596.

[6] P. *v.* Enoch, 13 Wend. 159, 27 Am. D. 197, before cited; [P. *v.* Willett, 102 N. Y. 251, 6 N. E. R. 301; P. *v.* Osmond, 138 N. Y. 80, 33 N. E. R. 739; P. *v.* Meyer, 162 N. Y. 357, 56 N. E. R. 758.]

[7] "The propriety of the decision itself is not beyond question." Paine, J., in S. *v.* Duval, 26 Wis. 415, 420.

§ 475. **Ohio.**— In Ohio, an indictment upon the statute for manslaughter, framed after the approved common-law precedents, is good, because the common law and the statute, in defining this offense, coincide.[1] But they do not coincide in their definitions of murder. In the words of Bartley, C. J., "murder in Ohio is different from murder by the common law of England, not simply in the fact of the two degrees into which it is divided, but especially and most essentially in the fact that a *purpose or intent to kill* is made by the statute an essential and distinguishing feature in murder, both of the first and also of the second degree. It follows that an indictment for murder, under the statute of this state, must contain a direct averment of a purpose or intent to kill, in the description of the crime charged." So that the common-law allegations of murder are not sufficient to set out the offense in either degree under the Ohio statutes.[2]

§ 476. **Other states.**— The doctrines thus brought to view, and illustrated by the statutes and decisions in New York and Ohio, have their applications also in some of the other states. Further as to which a mere reference to decisions will suffice.[3]

§ 477. **Statutory manslaughter — Degrees in manslaughter.**— On these subjects we have some statutes and few adjudications. Therefore only a reference to cases will be given.[4]

[1] Sutcliffe *v.* S., 18 Ohio, 469, 51 Am. D. 459.

[2] Fouts *v.* S., 8 Ohio St. 98, 111, 112; Hagan *v.* S., 10 Ohio St. 459; Kain *v.* S., 8 Ohio St. 306; Robbins *v.* S., 8 Ohio St. 131; Loeffner *v.* S., 10 Ohio St. 598. And see Wareham *v.* S., 25 Ohio St. 601, 606.

[3] Cordell *v.* S., 22 Ind. 1; S. *v.* Murphy, 21 Ind. 441; Finn *v.* S., 5 Ind. 400; Dukes *v.* S., 11 Ind. 557, [71 Am. D. 370;] Conner *v.* Com., 13 Bush, 714; U. S. *v.* Warner, 4 McLean, 463; S. *v.* Duvall, 26 Wis. 415; Perry *v.* S., 44 Tex. 473; P. *v.* Dolan, 9 Cal. 576; P. *v.* Wallace, 9 Cal. 30; P. *v.* Coleman, 10 Cal. 334; S. *v.* Feaster, 25 Mo. 324; Jordan *v.* S., 22 Ga. 545; [P. *v.* McArrow (Mich.), 79 N. W. R. 944; Kibler *v.* Com., 94 Va. 804, 26 S. E. R. 858; S. *v.* Ellington (Idaho), 43 Pac. R. 60; Smith *v.* S., 50 Conn. 193; P. *v.* De La Cour Soto, 63 Cal. 165; S. *v.* Sloan, 65 Wis. 647; Packer *v.* P., 8 Col. 361, 8 Pac. R. 564; Leschi *v.* Terr., 1 Wash. Terr. 13; Lewis *v.* S. (Fla.), 28 S. R. 397.]

[4] U. S. *v.* Warner, 4 McLean, 463; Thomas *v.* S., 38 Ga. 117; Walters *v.* Com., 44 Pa. St. 135; P. *v.* Butler, 3 Park. Cr. 377; Reed *v.* S., 8 Ind. 200; Welch *v.* S., 50 Ga. 128, [15 Am. R. 690;] Bruner *v.* S., 58 Ind. 159; [Williams *v.* S. (Tex. Cr. R.), 54 S. W. R. 759; P. *v.* Willett, 102 N. Y. 251, 6 N. E. R. 301; P. *v.* Buddensieck, 103 N. Y. 487, 9 N. E. R. 44, 57 Am. R. 766; P. *v.* Giblin, 115 N. Y. 196, 21 N. E. R. 1062, 4 L. R. A. 757; P. *v.* Constantino, 153 N. Y. 24, 47 N. E. R. 87; P. *v.* Maine, 64 N. Y. S. 579.]

CHAPTER XXXIV.

STATUTORY RAVISHINGS AND CARNAL ABUSE.

§§ 478, 479. Introduction.
480–482. Statutory modifications of rape.
483–491. Statutory carnal abuse.
492–499. Attempts.

§ 478. Common-law and statutory rape, distinguished.— The offense of rape, as an English author would view it, is, at least in part, statutory. But the early statutes are old, and they are common law with us; so that, when we speak of common-law rape, we mean rape as defined by them.[1]

§ 479. Elsewhere — Here — How chapter divided.— Rape and carnal abuse, as common-law offenses within this distinction, are treated of in "Criminal Law" and "Criminal Procedure."[2] We shall here consider the American statutes and their effect as to: I. Statutory modifications of the common-law rape; II. The statutory carnal abuse of children; III. Attempts.

I. Statutory Modifications of the Common-law Rape.

§ 480. Generally — "Against will" — "Not consent."— Generally our statutes against rape are in the terms of those old English ones which are common law with us. So that the offense under them does not differ from the common-law rape.[3] Still they oftener have the words "against her will" than the old statutory expression "where she did not consent,"— a distinction explained in "Criminal Law."[4] When they have, probably the indictment ought to contain, as in practice it commonly does, the same words, "against her will," instead of "without her consent,"[5] a question explained in "Criminal

[1] Crim. Law, II, § 1108.

[2] Crim. Law, II, § 1107 *et seq.*; Crim. Pro., II, § 947 *et seq.*

[3] *Ante*, § 471; Com. *v.* Sugland, 4 Gray, 7; Anderson *v.* S., 34 Ark. 257.

[4] Crim. Law, II, §§ 1108–1115. In Texas the statutory expression is "without her consent." Williams *v.* S., 1 Tex. Ap. 90, 91, [28 Am. R. 399.]

[5] And see Anderson *v.* S., *supra;*

Procedure."[1] For though the former are a permissible substitute for the latter,[2] it is not so plain that the latter are such for the former.[3]

§ 481. "Daughter or sister," or "other woman," distinguished.— An Ohio statute made it, in one section, rape, and punishable in a particular way, for a man to have "carnal knowledge of his daughter or sister, forcibly and against her will;" and, in the next section, rape, punishable less heavily, to have "carnal knowledge of any other woman, or female child, than his daughter or sister as aforesaid, forcibly and against her will."[4] And the court observed that here "are distinct and separate crimes, and not merely different grades of the same crime;" adding, and apparently holding, that, "in charging the latter crime, it is essential for the indictment to state that the woman or female child upon whom the crime is charged to have been committed is not the daughter or sister of the accused."[5] Whether this decision is sound or not, certainly not all tribunals will follow it. For it is a principle pervading the entire criminal law, that the prosecuting power can call an offender to account or not, or take notice of a particular element of his wrong or not,[6] as it chooses. So that, where the injured female is the "daughter or sister," the grand jury is not compellable to take notice of the fact. They may frame the indictment as though she was not, and the conviction will be for the milder offense. For a defendant cannot escape by showing that he is more guilty than he is charged with being. Then, where the woman is not the "daughter or sister," this fact is simply matter of defense against the higher charge. And it is a rule of criminal pleading that matter of defense, though inserted in a statute, need not be negatived in the indictment thereon.[7] Within this principle,—

§ 482. Age.— Where a statute makes punishable any person "who shall ravish and carnally know any female of the age

Greer *v.* S., 50 Ind. 267, [19 Am. R. 709;] S. *v.* Erickson, 45 Wis. 86; [Langan *v.* S., 27 Tex. Ap. 498, 11 S. W. R. 521.]

[1] Crim. Pro., II, §§ 949, 951.

[2] Id., § 951.

[3] Crim. Law, II, § 1114 and note.

[4] Swan, Stats. 269; Warren, Crim. Law (3d ed.), 246.

[5] Howard *v.* S., 11 Ohio St. 328. [*Contra*, Jones *v.* S., 54 Ohio St. 1, 42 N. E. R. 699.]

[6] Crim. Law, I, §§ 784, 786, 791 *et seq.*

[7] Crim. Pro., I, §§ 614–618, 638.

of ten years or more by force and against her will, or shall unlawfully and carnally know and abuse any woman child under the age of ten years," an indictment which is silent as to the age is good under the former clause.[1] And, as general doctrine, the female's age in rape, not speaking of the carnal abuse of a woman child, need not be averred.[2] Nor, indeed, though she is below the statutory age, is the forcible ravishment of her the less rape.[3] Nor need the age of the defendant be set out, though the statutory words are "any person of the age of fourteen years and upward, who shall have carnal knowledge." If he is below fourteen, it is simply matter for defense.[4]

II. The Statutory Carnal Abuse of Children.

§ 483. Elsewhere.— In "Criminal Law" we saw what is the common law on this subject.[5]

§ 484. Incapacity for consent in rape.— Some of our American courts, deriving from nature and from our common law (which, we saw elsewhere, rests on early English statutes[6]) the doctrine that a girl under ten (or possibly under twelve[7]) is incapable of consenting to the carnal act, have held it to be rape, in the ordinary sense, for a man to have carnal intercourse with such a girl, though outwardly, and in the common meaning of the expression, she consents. And they have even permitted the jury to infer, from an exceptional want of physical development at a somewhat greater age, the like incapacity, with the like consequence.[8] On this question, we have the analogies

[1] Com. *v.* Sugland, 4 Gray, 7; [S. *v.* 29 Cal. 575, 576; Com. *v.* Scannel, 11 Gaul, 50 Conn. 578; Nicholas *v.* S., 23 Tex. App. 317, 5 S. W. R. 239.]

[2] Crim. Pro., II, § 954; [S. *v.* Haddon (S. C.), 27 S. E. R. 194; McLaughlin *v.* Com. (Ky.), 35 S. W. R. 1030; Cornelius *v.* S., 13 Tex. Ap. 349; P. *v.* Draper, 28 Hun, 1.]

[3] Crim. Law, II, § 1118; Reg. *v.* Dicken, 14 Cox, C. C. 8; S. *v.* Worden, 46 Conn. 349; S. *v.* Storkey, 63 N. C. 7; O'Meara *v.* S., 17 Ohio St. 515; Charles *v.* S., 6 Eng. 389; Reg. *v.* Neale, 1 Car. & K. 591; Vasser *v.* S., 55 Ala. 264.

[4] Crim. Pro., II, § 954; P. *v.* Ah Yek, Cush. 547; [Mitchell *v.* P., 24 Col. 532, 52 Pac. R. 671; S. *v.* Sullivan, 68 Vt. 540, 35 Atl. R. 479; Wood *v.* S., 12 Tex. Ap. 174.]

[5] Crim. Law, II, § 1133.

[6] Id., §§ 1108–1115, 1133.

[7] [S. *v.* Miller, 42 La. An. 1186, 8 S. R. 309, 21 Am. St. R. 418.]

[8] Stephen *v.* S., 11 Ga. 225, 238; Gosha *v.* S., 56 Ga. 36; Joiner *v.* S., 62 Ga. 560, 562; McMath *v.* S., 55 Ga. 303; S. *v.* Tilman, 30 La. An. 1240, [31 Am. R. 236;] Dawson *v.* S., 29 Ark. 116, 120; Williams *v.* S., 47 Miss. 609, 612; Anschicks *v.* S., 6 Tex. Ap. 524. See

of the law which makes it rape to penetrate a woman too profoundly asleep or insane to give consent.[1] But the indictment on those English statutes, parts of our common law, which punished the carnal knowledge of consenting girls, was distinct from that for ordinary rape, and it charged that the girl was below the age, for example, of ten years.[2] One cannot well see how, from such a source, can be drawn the doctrine that, in point of law, the child is incapable of consenting in ordinary rape, under another statute. All will recognize the fact that, as an intellectual and moral process of the mind and will, she may consent, though the prompting may be something else than lust. Therefore the better doctrine in principle is believed to extend no further than as stated in another place,[3] that, in rape proper, less positive opposition will be required from an immature girl than from an adult.[4]

§ 485. Our statutes — (Name of offense).— Most of our statutes either include the carnal abuse of female children under the name of "rape," or so connect it in a single sentence with rape proper that the courts call it by this name.[5] Specimen enactments are: "If any person carnally know a female of the age of twelve years or more, against her will, by force, or carnally know a female child under that age, he shall be, at the discretion of the jury, punished by death, or confined in the penitentiary not less than ten nor more than twenty years."[6] "Every person who is convicted, in due course of

Reed's Ga. Crim. Law, 332–334; [Jones v. S. (Ga.), 34 S. E. R. 174; Davis v. S., 31 Neb. 247, 47 N. W. R. 854; S. v. Houx, 109 Mo. 654, 19 S. W. R. 35, 32 Am. St. R. 654.]

[1] Crim. Law, II, §§ 1121–1123.

[2] 3 Chit. Crim. Law, 814, 815. Still, the statute which made punishable the carnal act with a woman-child was simply silent as to the consent. It is 18 Eliz., ch. 7, § 4,—"carnally know and abuse any woman-child under the age of ten years." Crim. Law, II, § 1112. [For the Criminal Law Amendment Act, 1885 (48 and 49 Vict., ch. 69, § 5), in relation to carnal knowledge, see Reg. v. Williams, 1 Q. B. 320; Reg. v. Waite, 17 Cox, C. C. 554; Reg. v. Wealand, 16 Cox, C. C. 402; Reg. v. West, 1 Q. B. 174; Reg. v. Paul, 17 Cox, C. C. 111; Reg. v. Bostock, 17 Cox, C. C. 700; Reg. v. Tyrrell, 17 Cox, C. C. 716.]

[3] Crim. Law, II, § 1124.

[4] P. v. Special Sessions, 18 Hun, 330, 332; Reg. v. Woodhurst, 12 Cox, C. C. 443.

[5] S. v. Johnston, 76 N. C. 209; Mayo v. S., 7 Tex. Ap. 342; Mosely v. S., 9 Tex. Ap. 137; Givens v. Com., 29 Grat. 830; Greer v. S., 50 Ind. 267, [19 Am. R. 709;] Lawrence v. Com., 30 Grat. 845.

[6] Givens v. Com., *supra*.

law, of ravishing and carnally knowing any female of the age of ten years or more, by force and against her will, or who is convicted in like manner of unlawfully and carnally knowing and abusing any female child under the age of ten years, shall suffer death."[1] The statutes differ, as do these two, in some making the age ten and others twelve. And there are some other differences. The punishments are not generally so heavy as the above.

§ 486. Indictment.— One cannot be convicted of this offense on an indictment in the ordinary form as for a rape on an adult.[2] There must be an allegation of the age,[3] which means the age at the time of the commission of the offense, not at the time of the finding of the indictment.[4] Such averments as "with force," "against her will," and "ravish" are unnecessary;[5] though, if inserted, they may be treated as surplusage.[6] In other respects the statutory words should be pur-

[1] S. *v.* Dancy, 83 N. C. 608. [See Blanks *v.* Com. (Ky.), 48 S. W. R. 161.]

[2] Greer *v.* S., 50 Ind. 267, [19 Am. R. 709;] Vasser *v.* S., 55 Ala. 264. And see Williams *v.* S., 1 Tex. Ap. 90, [28 Am. R. 399; Warner *v.* S., 54 Ark. 660, 17 S. W. R. 6; Bonner *v.* S., 65 Miss. 293, 3 S. R. 663. But there may be a joinder of two counts in the same indictment for the two offenses, or the two offenses may even be joined in one count. Nicholas *v.* S., 23 Tex. Ap. 317, 5 S. W. R. 239; Sharp *v.* S., 15 Tex. Ap. 174; Taylor *v.* S., 24 Tex. Ap. 299, 6 S. W. R. 42; S. *v.* Houx, 109 Mo. 654, 19 S. W. R. 35, 32 Am. St. R. 686.]

[3] *Ante*, § 484; Com. *v.* Sugland, 4 Gray, 7; Mosely *v.* S., 9 Tex. Ap. 137; Rex *v.* Wedge, 5 Car. & P. 298; Reg. *v.* Nicholls, 10 Cox, C. C. 476; S. *v.* Storkey, 63 N. C. 7; O'Meara *v.* S., 17 Ohio St. 515; Reg. *v.* Martin, 9 Car. & P. 215. See Reg. *v.* Shott, 3 Car. & K. 206; Bowles *v.* S., 7 Ohio (2d pt.), 243.

[4] Monoughan *v.* P., 24 Ill. 340.

[5] S. *v.* Black, 63 Me. 210; S. *v.* Smith, Phillips (N. C.), 302; S. *v.* Jarger, 66 Mo. 173. [Nor will evidence of consent, unchastity, or defendant's intention not to use force, be received. P. *v.* Knight (Cal.), 43 Pac. R. 6; P. *v.* Rangold, 112 Cal. 369, 44 Pac. R. 107; P. *v.* Roach (Cal.), 61 Pac. R. 574; S. *v.* Ernest, 150 Mo. 347, 51 S. W. R. 688; S. *v.* Duffey, 128 Mo. 549, 31 S. W. R. 98; P. *v.* Goullette, 82 Mich. 36, 45 N. W. R. 1124; P. *v.* Schoonmaker, 117 Mich. 190, 75 N. W. R. 439; S. *v.* Bowser, 21 Mont. 133, 53 Pac. R. 439; Myers *v.* S., 54 Neb. 297, 74 N. W. R. 605; Proper *v.* S., 85 Wis. 615, 55 N. W. R. 1035; S. *v.* Frazier, 54 Kan. 719, 39 Pac. R. 819; Gonzales *v.* S. (Tex. Cr. R.), 31 S. W. R. 371; Rodger *v.* S., 30 Tex. Ap. 510, 17 S. W. R. 1077; Exon *v.* S. (Tex. Cr. R.), 33 S. W. R. 336; Buchanan *v.* S. (Tex. Cr. R.), 52 S. W. R. 769; Coates *v.* S., 50 Ark. 330, 7 S. W. R. 304; S. *v.* McCaffrey, 63 Iowa, 479, 19 N. W. R. 331; Com. *v.* Murphy, 165 Mass. 66, 42 N. E. R. 504, 52 Am. St. R. 496, 30 L. R. A. 734; Porter *v.* P., 158 Ill. 370, 41 N. E. R. 886; S. *v.* Smith, 9 Houst. 588, 33 Atl. R. 441.]

[6] McComas *v.* S., 11 Mo. 116. And see S. *v.* Erickson, 45 Wis. 86; [S. *v.* Horne, 20 Oreg. 485, 26 Pac. R. 665;

sued according to the rules governing other indictments on statutes,[1] and no more will be required.[2]

§ 487. "Carnally know" — "Abuse." — Plainly, if the statute has the words, in the alternative, "carnally know *or* abuse," either of them in the indictment, or both connected by *and*, will suffice.[3] "Abuse," in this connection, means an injury to the genital organs and no other.[4] The expression "carnally know," therefore, referring to a girl of this tender age, includes all that is meant by "abuse," and more. So that, under the English statute of 24 and 25 Vict., ch. 100, § 50, the words of which are "carnally know *and* abuse," it is adjudged sufficient for the indictment to say simply "carnally know."[5]

§ 488. What the carnal knowledge. — The carnal knowledge required in this offense is the same as in rape proper, explained in another connection.[6] There must be *res in re*, but to no particular depth, and the hymen need not be broken.[7] "I shall leave it," said Parke, B., "to the jury to say whether, at any

S. *v.* Mahoney (Mont.), 61 Pac. R. 647; S. *v.* Grossheim, 79 Iowa, 75, 44 N. W. R. 541; S. *v.* Eberline, 47 Kan. 155, 27 Pac. R. 839; Gibson *v.* S., 17 Tex. Ap. 574.]

[1] Crim. Pro., I, §§ 611, 612. [Where the statute is against carnal knowledge of a female under the age of fifteen years, "other than the wife" of the perpetrator, the indictment must negative the fact that the female was the wife of defendant. Rice *v.* S., 37 Tex. Cr. R. 36, 38 S. W. R. 801; Dudley *v.* S., 37 Tex. Cr. R. 543, 40 S. W. R. 269. See also Parker *v.* Terr. (Okl.), 59 Pac. R. 9. But if the girl was over the age of fifteen years, the indictment need not contain the negative. Cardenas *v.* S. (Tex. Cr. R.), 40 S. W. R. 980.]

[2] S. *v.* Black, *supra*. And see O'Rourke *v.* S., 8 Tex. Ap. 70. Where the words of the statute were "shall have carnal knowledge of any female child under the age of ten years, either with or without her consent," it was adjudged sufficient to allege that the defendant, on, etc., at, etc., "did unlawfully and feloniously have carnal knowledge of a female child, named A., she, the said A., then being under ten years of age, to wit, of the age," etc. P. *v.* Mills, 17 Cal. 276. And see P. *v.* Ah Yek, 29 Cal. 575; [King *v.* S., 120 Ala. 329, 25 S. R. 178; McGuff *v.* S., 88 Ala, 147, 7 S. R. 85, 16 Am. St. R. 25; Inman *v.* S. (Ark.), 47 S. W. R. 558; Asher *v.* Terr., 7 Okl. 188, 54 Pac. R. 445; Young *v.* Terr. (Okl.), 58 Pac. R. 724; Holton *v.* S., 28 Fla. 303, 9 S. R. 716; S. *v.* Hairston, 121 N. C. 579, 28 S. E. R. 492; P. *v.* Maxon, 10 N. Y. S. 593; Bissette *v.* S., 101 Ind. 85.]

[3] *Ante*, § 244. And see Dawkins *v.* S., 58 Ala. 376, [29 Am. R. 754.]

[4] Dawkins *v.* S., 58 Ala. 376, [29 Am. R. 754. See Fields *v.* S., 39 Tex. Cr. R. 488, 46 S. W. R. 814.]

[5] Reg. *v.* Holland, 16 Law T. (N. S.) 536, 15 W. R. 879, 10 Cox, C. C. 478. [See Buchanan *v.* S. (Tex. Cr. R.), 52 S. W. R. 769.]

[6] Crim. Law, II, §§ 1127–1132.

[7] Brauer *v.* S., 25 Wis. 413; [P. *v.* Courier, 79 Mich. 366, 44 N. W. R. 571.]

time, any part of the virile member of the prisoner was within the labia of the pudendum of the prosecutrix; for, if ever it was, no matter how little, that will be sufficient to constitute a penetration."[1] The jury may infer the penetration from circumstances, without direct proof.[2] A court that deems emission essential in rape will hold it to be so also in carnal abuse,[3] unless the statute provides the contrary.[4]

§ 489. What the "abuse."— The meaning of the words "carnal abuse" we have already seen.[5] Most of the American statutes, and the English, connect them to "carnal knowledge" by the copulative "and;" so that, without the carnal knowledge, there is no more than an attempt, whatever the "abuse" which comes short. But evidently, where, as in some of our states, the disjunctive "or" occurs in the statute, there may be the complete offense though the effort at penetration was unsuccessful.[6]

§ 490. Mistake of girl's age.— While, within principles explained in another connection, no one is ever punishable for any act in violation of law whereto, without his fault or carelessness, he was impelled by an innocent mistake of facts,[7] this rule does not free a man from the guilt of this offense by reason of his believing, on whatever evidence, that the girl is above the statutory age.[8] His intent to violate the laws of morality and the good order of society, though with the consent of the girl, and though in a case where he supposes he shall escape punishment, satisfies the demands of the law,[9] and he must take the consequences.

§ 491. Proof of girl's age.— The age, which, we have seen,[10] must be averred, must also be proved.[11] The girl may be a wit-

[1] Reg. *v.* Lines, 1 Car. & K. 393.

[2] Brauer *v.* S., *supra*.

[3] S. *v.* Gray, 8 Jones (N. C.), 170; [Reg. *v.* Marsden, 2 Q. B. 149.]

[4] Waller *v.* S., 40 Ala. 325.

[5] *Ante*, § 487.

[6] Dawkins *v.* S., 58 Ala. 376, [29 Am. R. 754. See Chambers *v.* S., 46 Neb. 447, 64 N. W. R. 1078.]

[7] Crim. Law, I, §§ 301–310. And see particularly the long note at § 303*a*.

[8] Lawrence *v.* C., 30 Grat. 845, one judge dissenting; S. *v.* Newton, 44 Iowa, 45; [P. *v.* Ratz, 115 Cal. 132, 46 Pac. R. 915; S. *v.* Baskett, 111 Mo. 271, 19 S. W. R. 1097; S. *v.* Houx, 109 Mo. 654, 19 S. W. R. 35, 32 Am. St. R. 686.]

[9] Crim. Law, I, §§ 327, 330–334.

[10] *Ante*, § 486.

[11] Crim. Pro., II, § 976; Rex *v.* Wedge, 5 Car. & P. 298; Reg *v.* Weaver, Law R. 2 C. C. 85, 12 Cox, C. C. 537; [S. *v.* Houx, 109 Mo. 654, 19 S. W. R. 35, 32 Am. St. R. 686.]

ness to her own age.[1] Or her mother may testify to it.[2] Or the records of births and of baptisms may be resorted to, with accompanying evidence of identity.[3] Or, in the absence of better proof, there may be introduced family discussions,[4] and even expert evidence.[5]

III. Attempts.

§ 492. Statutory, in rape proper.— Though the attempt to commit a rape, whether under a statute or the common law, is a common-law misdemeanor,[6] some of our states have likewise statutes under which it is punishable. The indictment must, as in other cases,[7] substantially cover the essential terms of the statute.[8] But,—

§ 493. "Commit."— The omission of the word "commit," which is in the California enactment, has been adjudged not to be fatal.[9] And —

§ 494. Actual violence.— Where the statutory terms were, "with actual violence make an assault upon the body of any female with intent to commit a rape," it was held sufficient to allege that the defendant, with force and arms, did make an assault on B., a single woman, and her did then and there beat, wound and ill-treat, with intent violently, and against her will, her feloniously to ravish and carnally know. The idea of "actual" violence was sufficiently conveyed without the word.[10]

[1] Weed *v.* S., 55 Ala. 13; Hill *v.* Eldridge, 126 Mass. 234; [C. *v.* Hollis, 170 Mass. 433, 49 N. E. R. 632; S. *v.* Bowser, 21 Mont. 133, 53 Pac. R. 179; Dodge *v.* S., 100 Wis. 294, 75 N. W. R. 954.]

[2] Reg. *v.* Nicholls, 10 Cox, C. C. 476; [Lawrence *v.* S., 35 Tex. Cr. R. 114, 32 S. W. R. 539.]

[3] Rex *v.* Wedge, *supra;* Reg. *v.* Weaver, *supra.* [The physician who attended her birth; and he may refresh his memory by reference to his cash book. P. *v.* Vann (Cal.), 61 Pac. R. 776.]

[4] Reg. *v.* Hayes, 2 Cox, C. C. 226; Bain *v.* S., 61 Ala. 75.

[5] S. *v.* Smith, Phillips (N. C.), 302. And see S. *v.* Griffith, 67 Mo. 287; 1 Greenl. Ev., §§ 104, 116, 493.

[6] Crim. Law, I, §§ 727, 728, 733, 736, 746, 762, 772; II, § 1136.

[7] *Ante*, § 486.

[8] Crim. Pro., II, § 976. And see Greer *v.* S., 50 Ind. 267, [19 Am. R. 709; Hall *v.* S., 40 Neb. 320, 58 N. W. R. 929; S. *v.* Harney, 101 Mo. 470, 14 S. W. R. 657; Proctor *v.* Terr. (Okl.), 60 Pac. R. 275; Com. *v.* Hackett, 170 Mass. 194, 48 N. E. R. 1087.]

[9] P. *v.* Girr, 53 Cal. 629.

[10] S. *v.* Wells, 31 Conn. 210. [See also Hanes *v.* S. (Ind.), 57 N. E. R. 704; Rookey *v.* S., 70 Conn. 104, 38 Atl. R. 911; S. *v.* Carnazy, 106 Iowa, 483, 76 N. W. R. 805; S. *v.* Frazier, 53 Kan. 87, 36 Pac. R. 58, 42 Am. St. R. 274; S. *v.* Daly, 16 Oreg. 240, 18 Pac. R. 357.]

§ 495. In carnal abuse — (Consent).— The carnal act, committed on a female child, is carnal abuse where she consents,[1] but it is ordinary rape where she does not.[2] Still, in the former case, the same as in the latter, there may be an indictable attempt;[3] as, for example, where the man's effort at penetration fails.[4] But,—

§ 496. Assault with intent.— While the common form of attempt to commit the ordinary rape is by an assault with such intent,[5] and on an indictment for rape there may be a conviction of assault if no technical rule prevents,[6] in matter of principle, and by the better judicial determinations, there cannot be, under the common-law rules, an assault with intent to have the criminal carnal knowledge of a girl with her consent; because, by the common law, violence consented to is not an assault,[7] and the statute which makes her consent immaterial in defense of the carnal knowledge does not extend also to the assault.[8] Still, in respect of the evidence, on the question of an assault, youth, inexperience and subjection in the child will be taken into the account; and often a very small circumstance will be permitted

[1] *Ante*, §§ 485, 486; Lawrence *v.* Com., 30 Grat. 845; P. *v.* McDonald, 9 Mich. 150; Givens *v.* Com., 29 Grat. 830.

[2] *Ante*, § 482; S. *v.* Worden, 46 Conn. 349; [S. *v.* Jackson (N. J. L.), 46 Atl. R. 764.]

[3] Crim. Law, I, § 762; Reg. *v.* Beale, Law R. 1 C. C. 10; Williams *v.* S., 47 Miss. 609; S. *v.* Johnston, 76 N. C. 209, 211; Givens *v.* Com., *supra*.

[4] *Ante*, §§ 488, 489; [Glover *v.* Com., 86 Va. 382, 10 S. E. R. 420; Allen *v.* S., 36 Tex. Cr. R. 381, 37 S. W. R. 429.]

[5] Crim. Law, I, §§ 733, 736, 746, 766.

[6] Reg. *v.* Guthrie, Law R. 1 C. C. 241. That is, where the indictment contains, as it commonly does, an allegation of assault. See Reg. *v.* Allen, 2 Moody, 179, 9 Car. & P. 521; [S. *v.* Hearsey, 50 La. An. 373, 23 S. R. 372; S. *v.* Sullivan, 68 Vt. 540, 35 Atl. R. 479; Golden *v.* S., 104 Ga. 549, 30 S. E. R. 749; Gaskin *v.* S., 105 Ga. 631, 31 S. E. R. 740; P. *v.* Stewart, 97 Cal. 238, 32 Pac. R. 8; P. *v.* Gardner, 98 Cal. 127, 32 Pac. R. 880. See Reagan *v.* S., 28 Tex. Ap. 227, 12 S. W. R. 601, 19 Am. St. R. 833; McAvoy *v.* S. (Tex. Cr. R.), 51 S. W. R. 928; Ford *v.* S. (Tex. Cr. R.), 53 S. W. R. 846.]

[7] Crim. Law, I, § 260; II, §§ 35, 36; [S. *v.* Wheat, 63 Vt. 673, 22 Atl. R. 720.]

[8] Rex *v.* Cockburn, 3 Cox, C. C. 543; S. *v.* Pickett, 11 Nev. 255, [21 Am. R. 754:] Reg. *v.* Roadley, 14 Cox, C. C. 463; Reg. *v.* Guthrie, Law R. 1 C. C. 241; Reg. *v.* Martin, 2 Moody, 123, 9 Car. & P. 213; Reg. *v.* Johnson, Leigh & C. 632, 10 Cox, C. C. 114; Reg. *v.* Day, 9 Car. & P. 722; Reg. *v.* Read, 2 Car. & K. 957, 1 Den. C. C. 377, 3 Cox, C. C. 266; Smith *v.* S., 12 Ohio St. 466, [80 Am. D. 355; Whitcher *v.* S., 2 Wash. 286, 26 Pac. R. 268; Warren *v.* S., 38 Tex. Cr. R. 152, 41 S. W. R. 635; Harden *v.* S., 39 Tex. Cr. R. 426, 46 S. W. R. 803; Morgan *v.* S. (Tex. Cr. R.), 50 S. W. R. 718. But see note 5, p. 418, *infra*.]

to overcome the apparent consent.[1] And a consent procured by fraud is no defense; so that, when a man who had venereal disease, and knew it, induced a girl of thirteen, ignorant of his condition, to consent to a connection by which she was infected, this was ruled to a jury to be an indecent assault.[2] *A fortiori*, a consent obtained by intimidation will be no defense.[3] And,—

§ 497. Statutory changes.—In England, a statute passed in 1880[4] makes it "no defense to a charge or indictment for an indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency." Moreover,—

§ 498. Contrary doctrine.—Some of our American courts, without express statutory aid, have held that the girl's legal incapacity to consent to the carnal act extends also to render her incapable of consenting to the violence which, in the absence of her consent, would by all be deemed to constitute an indecent assault. So that, by these opinions, there may be a conviction for assault with intent to commit carnal abuse.[5] Still,—

§ 499. Punishable as attempt.—Though, by what we have seen to be the better doctrine, the law does not term this act an assault, by reason of the girl's consent, it is, in states where there are common-law crimes, indictable as an attempt to commit the substantive offense.[6] But in a state where there are

[1] Crim. Law, II, § 36; Reg. *v.* Day, 9 Car. & P. 722; Reg. *v.* McGavaran, 6 Cox, C. C. 64.

[2] Reg. *v.* Bennett, 4 Fost. & F. 1105.

[3] Reg. *v.* Woodhurst, 12 Cox, C. C. 443.

[4] 43 and 44 Vict., ch. 45, § 2.

[5] P. *v.* McDonald, 9 Mich. 150, 152, 153; S. *v.* Dancy, 83 N. C. 608; S. *v.* Johnston, 76 N. C. 209; Hays *v.* P., 1 Hill (N. Y.), 351; Singer *v.* P., 13 Hun, 418; Brown *v.* S., 6 Bax. 422; [P. *v.* Laurintz, 114 Cal. 628, 46 Pac. R. 613; S. *v.* Wray, 109 Mo. 594, 19 S. W. R. 86; S. *v.* Grosheim, 79 Iowa, 75, 44 N. W. R. 541; Polson *v.* S., 135 Ind. 519, 35 N. E. R. 901; S. *v.* Sargent, 32 Oreg. 110, 49 Pac. R. 889; Farrell *v.* S., 54 N. J. L. 416, 24 Atl. R. 723; *In re* Lloyd, 51 Kan. 501, 33 Pac. R. 307. See Comer *v.* S. (Tex. Cr. R.), 20 S. W. R. 547; Callison *v.* S., 37 Tex. Cr. R. 211, 39 S. W. R. 300; Croomes *v.* S. (Tex. Cr. R.), 51 S. W. R. 924. The last case distinctly discredits Harden *v.* S. (cited p. 417, note 8) as misconstruing the act of 1895. See Stephens *v.* S., 107 Ind. 185, 8 N. E. R. 94, holding that consent is a defense in assault with intent, and Murphy *v.* S., 120 Ind. 115, 22 N. E. R. 106, overruling that case.]

[6] *Ante*, § 495; Reg. *v.* Martin, 2 Moody, 123, 9 Car. & P. 213; Reg. *v.*

no common-law crimes it is not so indictable; and, in the absence of a statute to meet the case, the offender must escape.[1]

Beale, Law R. 1 C. C. 10; Reg. *v.* Ryland, 11 Cox, C. C. 101. [As to distinctions between attempt and assault with intent, see Taylor *v.* S., 22 Tex. Ap. 529, 3 S. W. R. 753, 58 Am. R. 656; Milton *v.* S., 23 Tex. Ap. 204, 4 S. W. R. 574; McAdoo *v.* S., 35 Tex. Cr. R. 603, 34 S. W. R. 955, 60 Am. St. R. 61; Dockery *v.* S., 35 Tex. Cr. R. 487, 34 S. W. R. 281; S. *v.* Smith, 9 Houst. 588, 33 Atl. R. 441. See also Brown *v.* S., 27 Tex. Ap. 330, 11 S. W. R. 412; Jenkins *v.* S., 34 Tex. Cr. R. 201, 29 S. W. R. 1078.]

[1] Smith *v.* S., 12 Ohio St. 466, [80 Am. D. 355.]

CHAPTER XXXV.

STATUTORY ASSAULTS AND BATTERIES.

§ 500. In general.— Under statutes in most of our states, the assault or battery which they create or define does not differ from the same at the common law. And then plainly enough the indictment is good which follows the common-law form, except in concluding against the statute. But,—

§ 501. Statutes differing from common law.— In two or three of our states, and perhaps more, there are statutes considerably departing from the common-law definitions of these offenses. Thus,—

§ 512.[1] **Indiana.**— In Indiana, "an assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another," etc.[2] "Every person who in a rude, insolent or angry manner shall unlawfully touch another shall be deemed guilty of an assault and battery," etc.[3] Here the departures from the common law are considerable. For example, under the common law, any unlawful touching of one against his will and with intent to injure constitutes a battery;[4] but not so under this statute. The statutory battery occurs only where the touching is rude, or is insolent, or is angry.[5] Again, the present ability to inflict an injury is not necessary to an assault at the common law,[6] but it is indispensable in this statutory assault.[7] Therefore —

§ 513. Indictment in Indiana.— The courts of this state hold the common-law form of the indictment to be inadequate under this statute. "Since the legislature," said Downey, J.,

[1] §§ 502–511 omitted from this edition.

[2] Act of Dec. 2, 1865, 3 Ind. St. 258; S. *v.* Hubbs, 58 Ind. 415.

[3] 2 Gav. & H. 459, § 7; S. *v.* Wright, 52 Ind. 307. Compare these definitions with Crim. Law, II, § 23 and note, § 70.

[4] Crim. Law, II, § 72.

[5] S. *v.* Wright, *supra;* Howard *v.* S., 67 Ind. 401; Slusser *v.* S., 71 Ind. 280.

[6] Crim. Law, II, § 32.

[7] Howard *v.* S., *supra;* Cutler *v.* S., 59 Ind. 300. [See also S. *v.* Godfrey, 17 Oreg. 300, 20 Pac. R. 625, 11 Am. St. R. 830; Thomas *v.* S., 99 Ga. 38, 26 S. E. R. 748.]

"has furnished a definition of an assault, and thus placed it in the same category with other defined offenses, we must apply, in prosecutions for that offense, the same rule which is applied to prosecutions for other offenses; that is, that the offense must be described according to its statutory definition by stating all the facts necessary to show that the act is in violation of the statute."[1] For example, the present ability must be alleged.[2] And a battery must be averred to have been rude, or insolent, or angry,— a part of the statute which cannot be omitted.[3] In general, it will suffice to follow simply the statutory terms.[4] Now,—

§ 514. On principle,— this Indiana doctrine as to the allegation would seem just in a state into whose jurisprudence the common law did not enter as an element. But the common law has made it a sufficient allegation of the act in this offense, that, as to the assault, the defendant "did make an assault" on a person named; and, as to the battery, "did beat, wound and ill-treat" him.[5] This form of the allegation, dispensing with the particulars and not following a definition, the common law has, to repeat, made adequate. And there is in principle no different or greater reason why the allegation should be required to pursue the terms of this statutory definition, where the offense is under it, than the terms of the common-law definition where the offense is at common law. To say that the defendant "did make an assault" would mean that he did what the law deems to be such; and, even under the common law, the allegation would differ in its meaning in our different states according to the varying opinions of the tribunals. In Indiana it would signify an assault as defined by the statute under the interpretation of the courts. And this kind of doctrine pervades our American procedure. Where the common law requires the indictment to follow a definition,

[1] Adell *v.* S., 84 Ind. 543, 545, 546.

[2] S. *v.* Hubbs, 58 Ind. 415, 416; Howard *v.* S., 67 Ind. 401.

[3] S. *v.* Wright, 52 Ind. 307; McCulley *v.* S., 62 Ind. 428; Slusser *v.* S., 71 Ind. 280; [Knight *v.* S., 84 Ind. 73; Parker *v.* S., 118 Ind. 328, 20 N. E. R. 833; Carr *v.* S., 135 Ind. 1, 34 N. E. R. 533, 41 Am. St. R. 408, 20 L. R. A. 868.]

[4] Malone *v.* S., 14 Ind. 219; S. *v.* Bougher, 8 Blackf. 307. And see Long *v.* S., 46 Ind. 582; S. *v.* Prather, 54 Ind. 63; [S. *v.* Kinder, 109 Ind. 226, 9 N. E. R. 917.]

[5] Crim. Pro., II, §§ 55, 56.

or otherwise specifically set out the act, the question is of another sort,— already considered.[1]

§ 515. In Texas,— there is a similar statute. By it, the ability to commit a battery was once, as in Indiana, an element in assault;[2] but it has been eliminated by a subsequent revision.[3] The author has not observed that the Indiana form of the indictment has been required;[4] and indeed the common-law form appears to have been adjudged sufficient.[5] It is not deemed important to enter further into the particulars of this enactment.[6]

[1] *Ante*, § 471 *et seq.*

[2] McKay *v.* S., 44 Tex. 43; Jarnigan *v.* S., 6 Tex. Ap. 465; Spears *v.* S., 2 Tex. Ap. 244.

[3] Kief *v.* S., 10 Tex. Ap. 286. See Gann *v.* S. (Tex. Cr. R.), 40 S. W. R. 725.

[4] Atkins *v.* S., 11 Tex. Ap. 8, 12; McGee *v.* S., 5 Tex. Ap. 492.

[5] S. *v.* Hartman, 41 Tex. 562.

[6] Johnson *v.* S., 43 Tex. 576; Donaldson *v.* S., 10 Tex. Ap. 307; Chamberlain *v.* S., 2 Tex. Ap. 451; Bingham *v.* S., 6 Tex. Ap. 169; Hudson *v.* S., 6 Tex. Ap. 565, 32 Am. R. 593; Lewallen *v.* S., 6 Tex. Ap. 475; Young *v.* S., 7 Tex. Ap. 75; Cato *v.* S., 4 Tex. Ap. 87; McGregor *v.* S., 4 Tex Ap. 599; Schenault *v.* S., 10 Tex. Ap. 410; Bowden *v.* S., 2 Tex. Ap. 56. [See S. *v.* Cox, 43 Mo. Ap. 328; Wagner *v.* S., 43 Neb. 1, 61 N. W. R. 85; S. *v.* Harris, 120 N. C. 577, 26 S. E. R. 744.]

BOOK VI.

OFFENSES MORE PURELY STATUTORY.

CHAPTER XXXVI.

POLYGAMY.

§ 577, 578. Introduction.
579–597. Law of the offense.
598–613. The procedure.

§ 577.[1] Name of offense — (Bigamy polygamy). — The offense now to be treated of, consisting of a formal entering into of a marriage while a former one remains undissolved, is by some termed bigamy. In the canon law a bigamist was one who married a second time, whether the former consort were living or not, or married a widow; and there were seven distinct connections by which it might be committed, so as to create an incapacity for orders.[2] It is better, therefore, in writing of the different offense now to be explained to employ the equally appropriate word polygamy.[3]

§ 578. How chapter divided. — We shall consider, I. The law of the offense; II. The procedure.

I. Law of the Offense.

§ 579. Under unwritten law. — By the common law it was not punishable to marry a second time during the life of the matrimonial partner, or to cohabit under such second marriage.[4] Yet it was a canonical offense.[5] And,—

§§ 516–576 omitted from this edition.

[2] Poynter, Mar. & Div. 142; 4 Bl. Com. 163, note.

[3] Shelford, Mar. & Div. 224; 1 East, P. C. 464; 20 How. St. Tr. 358, note; 1 Bishop, Mar., Div. & S., § 714; Gise v. Com., 81 Pa. St. 428, 432. [See act of congress, March 22, 1882 (22 Stat. 30, ch. 47, § 1), where, in amending the former act (R. S. 5432), the word "bigamy" was stricken out and "polygamy" substituted.]

[4] Crim. Law, I, §§ 501, 502.

[5] Poynter, Mar. & Div. 144. East says that until 1604 it was of "doubt-

Early statute.— In 1604 it was by 1 Jac. 1, ch. 11, made a felony when committed "within his majesty's dominions of England and Wales." The statute exempted out of its operation four classes of persons,— those whose husband or wife should have remained seven years beyond sea, or the same period within his majesty's dominions not known by the other to be living; persons "divorced by any sentence had, etc., in the ecclesiastical court;"[1] persons whose marriages should be declared void by such court; and lastly, those who, when married, were "within age of consent."

§ 580. As common law with us.— The date of this statute is two years anterior to the earliest colonial settlement in this country,— that at Jamestown, Virginia, in 1606.[2] In substance, it supplied a need which was the same in the colonies as in the mother country. But by its terms it was local to England and Wales, and the efficacy of a part of its provisions depended on the action of ecclesiastical courts, which were never established with us; so that, on general reasoning, it is difficult to place it among the laws which came to us from the mother country. Still it was so accepted in the Maryland colony, there having been prosecutions under it as early as 1682. Afterward, in 1706, a colonial statute expressly made it of force;[3] and thus it became law in the District of Columbia.[4] Elsewhere, in our states, we appear to have no judicial recognition of it. For example, it is not mentioned by the judges among the British statutes in force in Pennsylvania.[5]

§ 581. Later English legislation — has cured some defects in this early statute. The present one is 24 and 25 Vict., ch. 100, § 57; but it differs in nothing essential from 9 Geo. 4, ch. 31, § 22, which it supersedes. Its terms are, quoting from the statute of George, that "if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second

ful temporal cognizance;" but so early as Stat. 4 Edw. 1, ch. 5, *de bigamis*, it was treated as a capital offense, and ousted of clergy by that statute. 1 East, P. C. 464.

[1] Rex *v.* Lolley, Russ. & Ry. 237.

[2] Bishop, First Book, § 56.

[3] Kilty, Rep. Stats. 170; Barber *v.* S., 50 Md. 161, 168. It is modified, but not repealed, by the act of 1809, chapter 138. Id., at p. 169.

[4] U. S. *v.* Jennegen, 4 Cranch, C. C. 118; Crim. Law, I, § 203. [But repealed by act of congress of March 22, 1882 (R. S., § 5352); Knight *v.* U. S., 6 Ap. D. C. 1.]

[5] Report of Judges, 3 Binn. 599, 622, 623.

marriage shall have taken place in England or elsewhere, every such offender, and every person counseling, etc., shall be guilty of felony, and being convicted thereof shall, etc.; and any such offense may be dealt with, inquired of, tried, determined, and punished in the county where the offender shall be apprehended or be in custody, as if the offense had been actually committed in that county: provided always, that nothing herein contained shall extend to any second marriage contracted out of England by any other than a subject of his majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past and shall not have been known by such person to be living within that time, or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

§ 582. **American legislation** — on this subject has substantially copied the later English. There may be minor diversities, and it is not absolutely identical in our states. There is no need to give specimen statutes here, but something will be seen of them as we proceed.[1]

§ 583. **"Divorce."** — This word, in the statute of James, was held to mean divorces from bed and board as well as from the bond of matrimony; "notwithstanding," observes Hawkins, "there be not the word *divortiamus*, but only the word *separamus*, in the sentence; because the statute, being penal, shall be construed favorably, and such separations are taken for divorces in common understanding."[2] Later enactments, in both countries, are in terms to avoid this construction.

§ 584. **"Within age of consent."** — What is the age of consent to marriage the author has explained elsewhere.[3] This exception, in the statute of James, was held to protect as well the party above the age as within it; "because the power of disagreeing to such marriage is equal on both sides."[4]

[1] [The crime was a misdemeanor in North Carolina before the passage of section 988 of the code, making it a felony. S. *v.* Burns, 90 N. C. 707.]

[2] 1 Hawk. P. C. (Curw. ed.), p. 686, § 5.

[3] 1 Bishop, Mar., Div. & S., §§ 560–586. And see Walls *v.* S., 32 Ark. 565, 570; Beggs *v.* S., 55 Ala. 108; Cooley *v.* S., 55 Ala. 162.

[4] 1 Hawk. P. C. (Curw. ed.), p. 686, § 6.

§ 585. Place of first marriage.— Marriage being both a domestic institution, and also within the jurisdiction of the law of nations and therefore international, so that the courts of every country take cognizance of the marriages in every other, the place where the first marriage was celebrated, whether at home or abroad, is immaterial;[1] "because," says Hawkins, "it is the latter marriage that makes the offense."[2] But,—

§ 586. Place of second marriage.— Since the offense consists of the second marriage, it, like any other criminal act,[3] must transpire within the locality of the indictment;[4] as, says Hale, if "A. takes B. to husband in England, and after takes C. to husband in Ireland, she is not indictable in England; because the offense was committed out of this kingdom."[5] So that, with us, where nothing in the statute otherwise provides, there can be no criminal prosecution out of the state and county wherein the second marriage was solemnized.[6] But this conclusion has been, in most localities, avoided by legislative devices. Thus,—

§ 587. Punishing marriage celebrated abroad.— In England the modern statutes expressly make it immaterial, as we have seen,[7] "whether," in the case of a British subject, "the second marriage shall have taken place in England or elsewhere." And to obviate the common-law want of jurisdiction they permit the offense to be dealt with "in the county where the offender shall be apprehended or be in custody." Therefore, where the two marriages of an Englishman occurred in Scotland, it was held that he was properly convicted in England under this provision.[8] Obviously this statute, thus limited to British subjects, is proper and just, and conformable to the law of nations. Were it not thus limited in terms, the courts

[1] 1 Bishop, Mar., Div. & S., §§ 833–838; Anonymous, J. Kel. 79; Com. *v.* Johnson, 10 Allen, 196; Com. *v.* Kenney, 120 Mass. 387; Reg. *v.* Savage, 13 Cox, C. C. 178.

[2] 1 Hawk. P. C. (Curw. ed.), p. 687, § 7.

[3] Crim. Pro., I, §§ 45–67.

[4] Anonymous, J. Kel. 79; U. S. *v.* Jernegan, 4 Cranch, C. C. 1; P. *v.* Mosher, 2 Park. Cr. 195; Putnam *v.* Putnam, 8 Pick. 433; 1 Hawk. P. C. (Curw. ed.), p. 687, § 7.

[5] 1 Hale, P. C. 692.

[6] S. *v.* Barnett, 83 N. C. 615; Walls *v.* S., 32 Ark. 565; Beggs *v.* S., 55 Ala. 108; Scoggins *v.* S., 32 Ark. 205; Williams *v.* S., 44 Ala. 24.

[7] *Ante*, § 581.

[8] Reg. *v.* Topping, Dears. 647, 7 Cox, C. C. 103, 36 Eng. L. & Eq. 614.

would limit it by interpretation;[1] for, by the law of nations, one government cannot punish the subjects of another for what they do on foreign soil.[2] The author has not observed much of this sort of provision in our American legislation. And perhaps, in some of the states, it would be constitutionally objectionable,[3] particularly as respects the —

Place of trial.— The Arkansas court has held that, under the constitution of the state, the legislature can direct this offense to be prosecuted only in the county of the polygamous second marriage, not in another wherein the arrest took place.[4] And in New York, where the statute, after providing a punishment for "every person having a husband or wife living who shall marry any other person," added that the "indictment may be founded . . . in the county in which such person shall be apprehended; and the like proceedings, trial, judgment and conviction may be had in such county as if the offense had been committed therein;"[5] the court, construing the provision, deemed it to be a mere regulation of the venue. So that, when a man who had a wife living in Pennsylvania married another woman in Canada, and came and cohabited with her in New York, his case was adjudged, by a tribunal not of the last resort, yet doubtless correctly, not to be within the statute.[6] But —

§ 588. Continuing to cohabit.— The difficulty may be met, and in the greater number of our states it is, by making a continuance of cohabitation under the void second marriage a separate offense, or separate form of offense. For example, the Tennessee enactment declares punishable every person who, "being married, shall marry another person, the former husband or wife then living, or continue to cohabit with such second husband or wife in this state." So that, while the constitution secures to those indicted under the former clause the right to decline trial in any county other than the one in which the

[1] *Ante*, § 141.

[2] Crim. Law, I, §§ 109–123 and notes, particularly the note to § 115, par. 7–9; P. *v.* Mosher, 2 Park. Cr. 195.

[3] As to the power of a state to punish what is done outside of its territory, see Crim. Law, I, §§ 152, 153.

[4] Wall *v.* S., 32 Ark. 565. See *v.* Sweetsir, 53 Me. 438. And compare with Crim. Pro., I, §§ 47, 50, 64–67.

[5] 2 R. S. 687, 688, §§ 8, 10; 2 Edm. Stats. 709, 710.

[6] P. *v.* Mosher, 1 Park. Cr. 195. For another view of the proper proceeding on facts like these, see *post*, § 593. [And see P. *v.* Chase, 27 Hun, 256.]

second marriage took place,[1] the latter clause is violated in whatever county there is a cohabitation under the forbidden marriage, and there the trial may be.[2]

§ 589. Validity of first marriage.— The first marriage, whether domestic or foreign,[3] must be, within the contemplation of the domestic law, valid; and it is immaterial to this proposition whether it is valid or void by the foreign law.[4] There are various circumstances in which a marriage may be good in the place of its celebration abroad, and void in another country or state wherein its validity is drawn in question; and the reverse.[5] Yet, for reasons explained by the present author in another work, a first marriage defective in the peculiar way termed voidable by the special rules which we brought from England as a part of our unwritten law is sufficient as the foundation of an indictment for this offense of contracting a second marriage while it is undissolved.[6]

§ 590. Validity of second marriage.— The second marriage is, of course, void.[7] Still the Irish court held that it must be such as, but for the impediment of the first, would be good.[8] This doctrine is repudiated in England; as, for example, if, were the first marriage not subsisting, the second would be void by reason of too near an affinity, the offense of polygamy is not the less committed. The verb "to marry," and its par-

[1] *Ante*, § 587; Crim. Pro., I, § 50.

[2] Finney *v.* S., 3 Head, 544. To the like effect in Alabama, Brewer *v.* S., 59 Ala. 101. And see *ante*, § 260*a*; S. *v.* Sloan, 55 Iowa, 217; Com. *v.* Bradley, 2 Cush. 553; S. *v.* Palmer, 18 Vt. 570.

[3] *Ante*, § 585.

[4] Madison's Case, 1 Hale, P. C. 693; S. *v.* Moore, 3 West. Law Jour. 134; Halbrook *v.* S., 34 Ark. 511, [36 Am. R. 17;] S. *v.* Goodrich, 14 W. Va. 834; Weinberg *v.* S., 25 Wis. 370; Hayes *v.* P., 25 N. Y. 390, [82 Am. D. 364;] Reg. *v.* Willshire, 6 Q. B. D. 366, 14 Cox, C. C. 541; Reg. *v.* Cresswell, 1 Q. B. D. 446, 13 Cox, C. C. 126; Hull *v.* S., 7 Tex. Ap. 593; King *v.* S., 40 Ga. 244; Reg. *v.* Wilson, 3 Fost. & F. 119; Oneale *v.* Com., 17 Grat. 582; P. *v.* Baker, 76 N. Y. 78, [32 Am. R. 274;] Shafher *v.* S., 20 Ohio, 1; [S. *v.* Nadal, 69 Iowa, 478, 29 N. W. R. 451; S. *v.* Sherwood, 68 Vt. 414, 35 Atl. R. 352; Green *v.* S., 21 Fla. 403, 58 Am. R. 670.]

[5] 1 Bishop, Mar., Div. & S., chapter beginning at § 825; 2 id., a series of chapters beginning at § 1; and §§ 1514–1595.

[6] 1 Bishop, Mar., Div. & S., §§ 255, 259, 272; Beggs *v.* S., 55 Ala. 108; Cooley *v.* S., 55 Ala. 162; P. *v.* Baker, *supra;* Rex *v.* Lolley, Russ. & Ry. 237; [S. *v.* Cone, 86 Wis. 498, 57 N. W. R. 50; P. *v.* Beevers, 99 Cal. 286, 33 Pac. R. 844.]

[7] 1 Bishop, Mar., Div. & S., §§ 262, 288, 290, 717–719; Johnson *v.* S., 61 Ga. 305.

[8] Reg. *v.* Fanning, 17 Irish Com. Law, 289, 10 Cox, C. C. 411.

ticiple, in the phrase "if any person being *married* shall *marry* another," etc.,[1] cannot have the same meaning in both places;[2] but it denotes a valid marriage in the one, and a void form in the other. The latter is a departure from its common signification. And, in such a case, "the true rule of construction," said Cockburn, C. J., speaking for the whole court, "appears to us to be, not to limit the latitude of departure so as to adhere to the nearest possible approximation to the ordinary meaning of the term, or to the sense in which it may have been used before, but to look to the purpose of the enactment, the mischief to be prevented, and the remedy which the legislature intended to apply. . . . The ground on which such a marriage is very properly made penal is, that it involves an outrage on public decency and morals, and creates a public scandal, by the prostitution of a solemn ceremony which the law allows to be applied only to a legitimate union, to a marriage at best but colorable and fictitious, and which may be made, and too often is made, the means of the most cruel and wicked deception. It is obvious that the outrage and scandal involved in such a proceeding will not be less because the parties to the second marriage may be under some special incapacity to contract marriage. The deception will not be the less atrocious because the one party may have induced the other to go through a form of marriage known to be generally binding, but inapplicable to their particular case."[3]

[1] *Ante*, § 581.

[2] *Ante*, § 95*a*.

[3] Reg. *v.* Allen, Law R. 1 C. C. 367, 374, 375, 12 Cox, C. C. 193. The learned judge said in conclusion: "In thus holding, it is not at all necessary to say that forms of marriage unknown to the law, as was the case in Burt *v.* Burt, 2 Swab. & T. 88, 20 L. J. (N. S.) P. & M. 133, would suffice to bring a case within the operation of the statute. We must not be understood to mean that every fantastic form of marriage to which parties might think proper to resort, or that a marriage ceremony performed by an unauthorized person, or in an unauthorized place, would be a marrying within the meaning of the 57th section of 24 & 25 Vict., ch. 100. It will be time enough to deal with a case of this description when it arises. It is sufficient for the present purpose to hold, as we do, that, where a person already bound by an existing marriage goes through a form of marriage known to and recognized by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is not the less within the statute by reason of any special circumstances, which, independently of the bigamous character of the marriage, may constitute a legal disability in the particular parties, or make

§ 591. Limit of doctrine.—It had before been ruled to a jury, in England, to be no defense that the parties had undertaken to conceal their second marriage by having the banns published in a wrong name; though, had there been no impediment, the irregularity would, under a statute, have rendered the marriage void.[1] Further as to the scope of this doctrine we appear to have no English determinations.

§ 592. With us,—so far as adjudication has spoken, it accords rather with the English than with the Irish exposition. Thus, in Michigan, a second marriage between a negro man and a white woman was adjudged to be within the statute against polygamy, though marriages of this sort are by another statute forbidden and declared void.[2] But,—

Formalities at second marriage.—If what was done in the way of celebrating the second marriage was such as in no sense and under no circumstances to constitute matrimony, and was not meant by either of the parties to be such, the crime of polygamy is not committed,—a doctrine the exact limits of which are not quite apparent.[3] In a state where mutual consent alone constitutes matrimony,[4] as with the first marriage, so with the second, no added formalities need be shown.[5] Likewise in localities where marriage is good, though celebrated by an unauthorized person, a polygamous marriage of the like kind will sustain an indictment.[6] Or, if a married man, meaning seduction, conceals from his victim the fact of his prior marriage, and thus enters into what would be a valid marriage were it not for the impediment, he commits polygamy.[7] And it is the same whatever be the defect in the ceremony, if it is not such as in other cases would make the marriage invalid.[8]

the form of marriage resorted to specially inapplicable to their individual case." Page 376. The point adjudicated in this case had before been held by a single judge. Reg. *v.* Brawn, 1 Car. & K. 144.

[1] Rex *v.* Penson, 5 Car. & P. 412. And see Rex *v.* Allison, Russ. & Ry. 109; Reg. *v.* Rea, Law R. 1 C. C. 365, 12 Cox, C. C. 190; Reg. *v.* Asplin, 12 Cox, C. C. 391; Rex *v.* Edwards, Russ. & Ry. 288.

[2] P. *v.* Brown, 34 Mich. 339, [22 Am. R. 531.]

[3] Kopke *v.* P., 43 Mich. 41.

[4] 1 Bishop, Mar., Div. & S., §§ 295, 320, 410.

[5] Hayes *v.* P., 5 Park. Cr. 325, 25 N. Y. 390, [82 Am. D. 364; U. S. *v.* Tenny (Ariz.), 11 Pac. R. 472; P. *v.* Beevers, 99 Cal. 286, 33 Pac. R. 44.]

[6] Robinson *v.* Com., 6 Bush, 309.

[7] Hayes *v.* P., 25 N. Y. 390.

[8] Carmichael *v.* S., 12 Ohio St. 553.

§ 593. Further of informal marriages.— In those states wherein mere mutual consent constitutes true matrimony, various questions will arise unknown in England and in the other states. But it is believed that the author's expositions in "Marriage and Divorce" will suffice for them.

§ 594. Relations of competent party — (Principal of second degree).— Most of our statutes, like the English,[1] declare punishable only the previously-married party, being silent as to the other. Nor, plainly, by their construction, is the other to be punished if ignorant of the impediment.[2] But we have seen[3] that the common-law principle which imputes criminality to the participants in a crime extends to statutory offenses; therefore it has been adjudged that a third person, an unmarried man, who is present abetting a friend in the commission of polygamy, may be convicted thereof as principal in the second degree.[4] Consequently, in reason, if the competent party to a second marriage knew of the impediment in the other, he would be punishable as an aider in the other's crime, unless the statute was in terms to exclude this consequence.[5] In the facts of most cases, the competent party was the dupe of the incompetent, so that this question does not often arise. In the only case raising it, now before the author, the indictment was on 9 Geo. 4, ch. 31, § 22,[6] which expressly makes punishable persons "counseling, aiding or abetting such offender," the allegation was of "counseling," and both the parties to the polygamous marriage were convicted.[7]

§ 595. "Beyond seas."— The meaning of the expression "beyond seas" is explained in another connection.[8] By the terms of the statute of James,[9] its penalties did not extend "to any person or persons whose husband or wife shall be continually remaining beyond the seas by the space of seven years together." Consequently, in a case of such absence continued

[1] *Ante*, § 581.

[2] Crim. Law, I, §§ 301, 303; Reg. *v.* Brawn, 1 Car. & K. 144.

[3] *Ante*, §§ 135, 136.

[4] Boggus *v.* S., 34 Ga. 275.

[5] *Ante*, § 145. And see, as illustrative, Hatfield *v.* Gano, 15 Iowa, 177.

[6] *Ante*, § 581.

[7] Reg. *v.* Brawn, *supra;* briefly alluded to, as to this point, in Reg. *v.* Allen, Law R. 1 C. C. 367, 370. See, for an illustrative case, under 25 Edw. 3, stat. 5, ch. 2, Crim. Law, I, § 659; referring to 1 East, P. C. 65; 1 Hale, P. C. 89, 128; 3 Inst. 1, 2, 9; Eden, Penal Law (3d ed.), 125.

[8] *Ante*, § 261*b*.

[9] *Ante*, § 579.

seven years, a second marriage was not punishable, while yet for civil purposes it was void, though the absent party was, and was known by the other to be, alive.[1] Some of our American statutes contain the like exception, yet so qualified as not to protect wilful offenders. Thus, in Massachusetts, the penal consequences "shall not extend to any person whose husband or wife has been continually remaining beyond sea, or has voluntarily withdrawn from the other and remained absent for the space of seven years together, the party marrying again not knowing the other party to be living within that time." And the last clause was held to qualify the first as well as the intermediate one; so that, where a man emigrated from England to Massachusetts leaving a wife behind, and here married another a year or so afterward, he was adjudged to have committed polygamy, though the first wife had always been beyond sea, for he knew her to be living within seven years.[2]

§ 596. Knowledge of being alive.—The modern form of the enactment is in most localities substantially the same which we have just seen it to be in Massachusetts. In England it is, as to the knowledge, "and shall not have been known by such person to be living within that time."[3] Now, by the rule of statutory interpretation that a defendant, to avail himself of a provision in his favor, need only bring himself within its words, however much he may violated its spirit,[4] if one on trial did not in fact "know" the former husband or wife to be living, though he might have known had he chosen to inquire, he is within the exception of the statute and is to be acquitted.[5] Thus it is where the full statutory absence of, for example, seven years has elapsed. But,—

§ 596*a*. Mistaken information of death.—Where the absence has continued a less time than the statutory seven years, other considerations govern the case. It is not, to any extent, within the exception, if, after a period however brief, the ab-

[1] 1 Hale, P. C. 693; 1 East, P. C. 466.

[2] Com. *v.* Johnson, 10 Allen, 196.

[3] Stat. 24 & 25 Vict., ch. 100, § 57; *ante*, § 581.

[4] *Ante*, §§ 190*e*, 193, 196, 220, 230.

[5] Reg. *v.* Briggs, Dears. & B. 98, 2 Jur. (N. S). 1195, 26 Law J. (N. S.) M. C. 7, 7 Cox, C. C. 175. Perhaps a nice criticism may show that this case does not support my text; and, indeed, the judges did not reason out the point in the way I have done. Yet the doctrine of the text is certainly correct in principle, and in a sense it is sustained by this case, though not as absolutely as one might wish.

sent party dies. The other is thereby made single, and he may marry, not by virtue of this exception in the statute of polygamy, but, quite aside from it, by the same natural and legal right under which he contracted the first marriage.[1] And, if information of the death comes to him, and, acting cautiously and circumspectly, he, without any fault, believing it, marries, while yet the information was erroneous and there was no death, the case has no more relevancy to the statutory exception than if the information were correct. He is to be judged by the rule of the unwritten law, which pervades the entire system of our criminal jurisprudence, that, in the absence of carelessness or other fault, men are exempt from criminal liability who act uprightly on what appear to them to be the facts, equally when the appearances are found afterward to be false as when they are true.[2]

[1] 1 Bishop, Mar., Div. & S., §§ 9, 11, 890.

[2] Crim. Law, I, §§ 301, 303, and particularly the long note at § 303*a*. It will be seen, at the place thus referred to, that the question has been a good deal muddled in some of the cases. Compactly to repeat some of the things there said. and to add others, it may be stated here that, not speaking now of the reasoning, the conclusion of the text is the same which has been arrived at by the Scotch courts. McDonald's Case, 1 Broun, 238; 1 Alison, Crim. Law, 535, 536, 541. The question has been considered in a number of English cases, and the opinions therein have greatly preponderated in favor of this view. On the side which sustains it we have Reg. *v.* Turner, 9 Cox, C. C. 145; Reg. *v.* Jones, 11 Cox, C. C. 358; Reg. *v.* Horton, 11 Cox, C. C. 670; Reg. *v.* Moore, 13 Cox, C. C. 544; [Reg. *v.* Tolson, 16 Cox, C. C. 629.] In which cases it has been deemed by a considerable number of judges to be a good defense that, at the time of the second marriage, the party marrying *bona fide* and on reasonable ground believed the former consort to be dead, though the period of seven years had not fully run. On the other side, in two cases,—Reg. *v.* Gibbons, 12 Cox, C. C. 237, and Reg. *v.* Bennett, 14 Cox, C. C. 45,—the judges who tried them laid it down to the jury that a belief of the death of the absent party constituted no defense unless the absence had continued seven years. So far as the mere words of these cases go, they are directly in conflict with the others; though, looking into the facts, there may perhaps be distinctions, as see the foot-notes to the case last cited. It is to be further noted of them, as circumstances not inspiring confidence in their conclusions, that the judges seemed utterly oblivious to the familiar rule of statutory interpretation (*ante*, §§ 131–144), that legislative acts are to be construed in connection with, and as limiting and limited by, the unwritten law. And, looking *only* at the statute, as they should not, and taking *no* cognizance of the doctrines of the common law, which they should, they were so confident in their own superior wisdom as to refuse, to convicted men, the boon of laying the question before

§ 596b. Further of intent.— To constitute this crime, an intent to do what the law forbids is necessary, but no other evil

the judges *in banc*, though they knew that other judges were of opinion contrary to their own. A frame of mind like this is not judicial. In Massachusetts a woman was adjudged a polygamist for marrying when her husband, who had been absent less than seven years, was believed to be dead. Com. *v.* Mash, 7 Met. 472. As to which case see also Crim. Law, I, § 303*a*, note, par. 13–16. But this sort of doctrine appears not to prevail to any considerable extent in our other states. And see the note in Crim. Law, *supra*, and specially, on this question, Dotson *v.* S., 62 Ala. 141, [34 Am. R. 2;] Squire *v.* S., 46 Ind. 459; Arnold *v.* S., 53 Ga. 574; [Reynolds *v.* S. (Neb.), 78 N. W. R. 483; Com. *v.* Hayden, 163 Mass. 453, 40 N. E. R. 846, 47 Am. St. R. 468, 28 L. R. A. 318.] In Dotson *v.* S., Brickell, C. J., states the question with great precision, as follows: "The rule of the common law, of very general application, is that there can be no crime when the criminal mind or intent is wanting. When that is dependent on a knowledge of particular facts, ignorance or mistake as to these facts, *honest and real*, not superinduced by the fault or negligence of the party doing the wrongful act, absolves from criminal responsibility. Gordon *v.* S., 52 Ala. 308, [23 Am. R. 575;] Squire *v.* S., 46 Ind. 459. The principle is thus stated by Bishop: 'The wrongful intent being of the essence of every crime, the doctrine necessarily follows that, whenever a man is misled without his own fault or carelessness, concerning facts, and, while so misled, acts as he would be justified in doing were the facts as he believes them to be, he is legally innocent, the same as he is innocent morally.' 1 Bishop, Crim. Law, § 303. The belief must be *honest and real*, not *feigned;* and whether it is *honest* or *feigned* the jury must determine, in view of all the evidence. Whether there was fault or carelessness in acquiring knowledge of the facts is also a matter for their determination. No man can be acquitted of responsibility for a wrongful act unless he employs 'the means at command to inform himself.' Not employing such means, though he may be mistaken, he must bear the consequences of his negligence. If he relies on information obtained from others, he should have some just reason to believe that from them he could obtain information on which he may safely rely. It does not appear [in the case before the court] that the persons informing the appellant of the death of his first wife had any opportunities of knowing the fact he did not have; nor on what their knowledge of the fact was based. Nor was it shown that he made inquiries of persons who, from their relationship or acquaintance with the wife, would have known whether she was living or dead. Bigamy is a violation of positive law, disturbs the peace of families, offends the good order of society, and involves the legitimacy of children, the descent and succession to estates. A degree of diligence commensurate with the importance of the act — a second marriage, having had a former wife, not so long absent and unheard of that the law presumed her death — the appellant should have exercised." P. 144. So, plainly, a mere absence, continued for a less time than the statute prescribes, could never afford justification, acceptable to the law, for the belief, however sincere, that death had taken place. Such belief, being made by the statute illegal, would be void.

intent is.[1] And as a part of the rule, every person is conclusively presumed to know the law,[2] yet not the facts.[3] In the case supposed in the last section, the person accused meant to do the exact thing which the law and good morals approved, not what either forbade. If he failed therein his mistake was of fact, which excuses. But one who does what the law condemns, however his conscience may approve and his religious faith require,— as, for example, a sincere member of the Mormon church, who marries a second wife while living with the first,— commits this offense; nor is he protected by our written constitutions. The statute is valid.[4]

§ 597. Words of statute.— The exact words of the particular statute should be attended to. Thus,—

"*Voluntarily withdrawn.*" — The exceptive clause in the Massachusetts statute requires the absent party to have "voluntarily withdrawn" from the other, as well as remained away seven years.[5] One, therefore, who for seven years has deserted an adhering consort cannot in Massachusetts avail himself of this exception.[6] Again,—

False rumor, etc.— The Pennsylvania act of March 13, 1815, excused the married party whose consort should have been absent two years, in marrying again, *upon any false rumor in appearance well founded* of his death. And it was ruled that, to justify a wife in a second marriage, there must be a general report of the husband having died at some particular *place*, and by some particular *means* — as, by shipwreck — which the *report* specifies.[7]

But a belief founded on independent facts and circumstances is of a different character. As to this, the statute is silent, and hence the rules of the common law must be the guide.

[1] Dotson *v.* S., 62 Ala. 141, [34 Am. R. 2. It is no defense that defendant believed or was advised that an agreement with his wife to live separate annulled the marriage. S. *v.* Zichfeld, 23 Nev. 304, 46 Pac. R. 802, 62 Am. St. R. 800, 34 L. R. A. 784; P. *v.* Weed, 29 Hun, 628; s. c., 96 N. Y. 625; S. *v.* Hughes, 58 Iowa, 165, 11 N. W. R. 706; Medrano *v.* S., 32 Tex. Cr. R. 214, 22 S. W. R. 684, 40 Am. St. R. 774; S. *v.* Sherwood, 68 Vt. 414, 35 Atl. R. 352.]

[2] Crim. Law. I, §§ 294–300; Davis *v.* Com., 13 Bush, 318.

[3] Crim. Law, I, §§ 301–309.

[4] Id., I, §§ 309, 344, 345; Reynolds *v.* U. S., 98 U. S. 145; U. S. *v.* Reynolds, 1 Utah, 226. And see U. S. *v.* Miles, 2 Utah, 19; Miles *v.* U. S., 103 U. S. 304.

[5] *Ante*, § 595.

[6] See the adultery case of Com. *v.* Thompson, 11 Allen, 23, [87 Am. D. 685.]

[7] Com. *v.* Smith, Oyer and Ter-

[**§ 597a. Polygamy under the Edmunds-Tucker Act.**— The act of congress passed March 22, 1882, known as the Edmunds-Tucker Law (22 Stat. 30, ch. 47), by its third section provides "that if any male person, in a territory or other place over which the United States has exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor." The same act, by its first section, amended the former statute against bigamy by substituting the word "polygamy" for "bigamy," and including in its provisions "any man who thereafter simultaneously, or on the same day, marries more than one woman, in a territory," etc. Under this act sexual intercourse is not necessary to the offense of cohabitation,[1] and the offense is committed even though the cohabitation be in secret.[2] Holding a woman out to the world as lawful wife is cohabiting with her.[3] The offense of cohabitation is a continuous offense and does not consist of an isolated act.[4] The statute is silent as to what shall constitute a marriage. The statute of the territory may be resorted to in a prosecution under the act.[5]]

II. The Procedure.

§ 598. Course of discussion.— We shall consider, first, the indictment; secondly, the evidence.

First. **The indictment:**—

Conforming to statute.— Since the statutes of our states differ in their terms, an obvious proposition is that the indictment should conform to the particular statute on which it is drawn.[6]

miner, Philadelphia, May, 1816, before Rush, President (pamphlet, p. 229), 1 Whart. Dig. (6th ed.) 1177.

[1] [Cannon *v.* U. S., 116 U. S. 55, 6 S. Ct. 278, 29 L. ed. 561; U. S. *v.* Musser, 4 Utah, 153, 7 Pac. R. 389; U. S. *v.* Smith, 5 Utah, 232, 14 Pac. R. 291; also 5 Utah, 273, 15 Pac. R. 1.]

[2] [U. S. *v.* Peay, 5 Utah, 263, 14 Pac. R. 342. See U. S. *v.* Clark, 6 Utah, 120, 21 Pac. R. 463, and U. S. *v.* Langford, 2 Idaho, 519, 21 Pac. R. 409.]

[3] [U. S. *v.* Snow, 4 Utah, 280, 9 Pac. R. 501; U. S. *v.* Higgerson, 46 Fed. R. 751; U. S. *v.* Harris, 5 Utah, 436, 7 Pac. R. 75.]

[4] [*Ex parte* Snow, 120 U. S. 274, 7 S. Ct. 556, 30 L. ed. 658. But see U. S. *v.* Eldredge, 5 Utah, 161, 13 Pac. R. 673; also 5 Utah, 189, 14 Pac. R. 42.]

[5] [U. S. *v.* Tenney (Ariz.), 8 Pac. R. 295; U. S. *v.* Tenney (Ariz.), 11 Pac. R. 472; U. S. *v.* Simpson, 4 Utah, 227, 7 Pac. R. 257.]

[6] [As to the indictment under the Edmunds-Tucker Act (see *ante*, § 597*a*), see U. S. *v.* Tenney (Ariz.), 11 Pac. R. 472; U. S. *v.* Tenney (Ariz.),

English.— On the before-recited enactment of 9 Geo. 4, ch. 31, § 22,[1] a common English form sets out that, at a time and place named, the defendant married one B., and then and there had her for his wife; and afterward, while he was so married, at a time and place specified, he "feloniously and unlawfully did marry and take to wife one C., his former wife being then alive, against," etc.[2]

§ 599. Venue — (And time).— As in other cases, the venue is essential; together with the time, at least, of the marriage which constitutes the offense, and, by some opinions, of both marriages.[3] Therefore,—

Apprehension — Custody.— If the jurisdiction is based on the fact of the prisoner's having been apprehended in the county of the indictment,[4] or his being in custody there,[5] this matter must be alleged.

§ 600. Different terms of statute — (Indiana).— The Indiana statute is in different words from the English and most other of the American ones. It makes punishable any person who, "being married, shall marry again, the former husband or wife being alive, and the bond of matrimony still undissolved, and no leal presumption of death having arisen." And it is a good form, according to the practice in this state, to say that, at a time and place named, the defendant, being married to B., and she being alive, and the bond of matrimony being still undissolved, and no legal presumption of B.'s death having arisen, did unlawfully and feloniously marry another woman, to wit, one C., contrary, etc.[6] Now,—

8 Pac. R. 295; U. S. *v.* Kuntze, 2 241]; Williams *v.* S., 44 Ala. 24; Com. *v.* Bradley, 2 Cush. 553; Com. *v.* Godsoe, 105 Mass. 464.

[4] Rex *v.* Fraser, 1 Moody, 407.

[5] Reg. *v.* Whiley, 2 Moody, 186. And see Crim. Pro., I, § 62, note.

[6] Bicknell, Crim. Pr. 483, referring, for the statute, to Felony Act, § 46, 2 G. & H. 452; for correctness of the form, to Hutchins *v.* S., 28 Ind. 84. Compare with May *v.* S., 4 Tex. Ap. 424. [See S. *v.* Sherwood, 68 Vt. 414, 35 Atl. R. 352.]

[1] *Ante*, § 581.

[2] Archb. Crim. Pl. & Ev. (10th Lond. ed.) 629.

[3] Davis *v.* Com., 13 Bush, 318; S. *v.* Johnson, 12 Minn. 476, [93 Am. D.

§ 601. Allegation of first marriage — (English practice). It is perceived that the above English form sets out the time and place of the first marriage, and the Indiana does not. All the English forms which the author has observed are in this respect like the above.[1] Probably the question was never raised in an English court, while yet the necessity of the allegation has been taken for granted. Consistently with either view, it has been deemed that a variance between allegation and proof in the name of the first wife would be fatal.[2] Chitty[3] says: "The indictment must state both marriages, and an averment must also be introduced that the former consort was alive at the time of the second marriage.[4] To this statement no venue need be inserted.[5] The first marriage may be laid in the county where it actually took place, though the venue is laid in another."[6]

[1] See, among other places, 3 Chit. Crim. Law, 718–722; Cro. C. C. (10th ed. by Ryland), 97; Matthews, Crim. Law, 525; 5 Burn, Just. (28th ed.) 254; Rex *v.* Edwards, Russ. & Ry. 283. The oldest form I have seen is in the very entertaining case of Mary Moders, who was indicted on Jac. 1, ch. 11 (*ante*, § 579), in 1663, and acquitted. It is as follows: "That she the said Mary Moders, late of London, Spinster, otherwise Mary Stedman, the wife of Tho. Stedman, late of the City of Canterbury in the county of Kent, Shoemaker, May 12, in the reign of his now majesty the sixth. at the Parish of St. Mildred's in the City of Canterbury, in the county aforesaid, did take to husband the aforesaid Thomas Stedman, and him the said Thomas Stedman then and there had to husband. And that she the said Mary Moders, alias Stedman, April 21, in the 15th year of his said majesty's reign, at London, in the Parish of Great St. Bartholomew's, in the ward of Farringdon without, feloniously did take to husband one John Carleton, and to him was married, the said Tho. Stedman her former husband being then alive, and in full life: against the form of the statute in that case provided, and against the peace of our said sovereign lord the king, his crown and dignity," etc. The prisoner had no counsel, and no question was made as to the sufficiency of the indictment. Rex *v.* Moders, 6 How. St. Tr. 278. In the celebrated case of the Duchess of Kingston, the indictment in the first count simply charged that the defendant, "being then married, and then the wife of the said Augustus John Harvey," did contract the second marriage. But the second count set out the first marriage substantially as in the case of Mary Moders. Rex *v.* Kingston, 20 How. St. Tr. 355, 371.

[2] Reg. *v.* Gooding, Car. & M. 297. But see Collum *v.* S., 10 Tex. Ap. 708.

[3] 3 Chit. Crim. Law, 719, note.

[4] 1 East, P. C. 469; [Hiler *v.* P., 156 Ill. 511, 41 N. E. R. 181, 47 Am. St. R. 221; Pritchard *v.* P., 149 Ill. 50, 36 N. E. R. 103; Parker *v.* S., 77 Ala. 47, 54 Am. R. 43; McAfee *v.* S., 38 Tex. Cr. R. 124, 41 S. W. R. 627.]

[5] Stark. 62.

[6] Stark. 434, note.

§ 602. With us.— A part of our American courts hold it to be necessary to allege the time and place of the first marriage, and to whom. It was so laid down in Vermont, as to time and place, even in a case where the event transpired in another state; because it is a rule, said Redfield, C. J., "that every traversable fact must be directly alleged, with time and place. The first marriage, in prosecutions for bigamy, is always traversable."[1] The same, as to time, place and the name of the first husband or wife, was held in Kentucky,[2] overruling a former decision to the contrary.[3] On the other hand, the North Carolina court has adjudged it to be unnecessary to state the place of the first marriage.[4] And it is held in Indiana that neither the place and time, nor the maiden name of the first wife, need be given, but the general allegation that the defendant "did unlawfully, feloniously and knowingly, *being married*, marry," etc., is sufficient.[5]

[1] S. *v.* La Bore, 26 Vt. 765, 767.

[2] Davis *v.* Com., 13 Bush, 318.

[3] Com. *v.* Whaley, 6 Bush, 266.

[4] S. *v.* Bray, 13 Ire. 289; [S. *v.* Davis, 109 N. C. 780, 14 S. E. R. 55.]

[5] Hutchins *v.* S., 28 Ind. 34. Said Fraser, J.: "It is objected that the indictment ought to have alleged the time and place of the first marriage, by whom it was solemnized, and the maiden name of the first wife. And so it is said are the forms, which are some evidence of what the law is. In Vermont these allegations were held to be necessary. It was there said: 'This is merely formal, and of the least possible importance; but, unless all form is to be disregarded, which we could not do without a statute to that effect, after having so long regarded it as essential, then this indictment is fatally defective.' S. *v.* La Bore, 26 Vt. 765. Undoubtedly there could be no reason, save that of form, for such particularity; and the Vermont case, which, so far as we are aware, is the only one where it is adjudged to be necessary [the Kentucky case is of later date], puts it upon that ground exclusively. But our statute dispenses with needless forms, and therefore makes this indictment sufficient. 2 G. & H., p. 463, §§ 59, 60. The absence of the averments alluded to cannot, it is very certain, 'prejudice the substantial rights of the defendant upon the merits.' It was adjudged in North Carolina, even in the absence of such a statute as ours, that it was not necessary to aver the time and place of the marriage. S. *v.* Bray, 13 Ire. 289. Mr. Wharton, in his precedents (2d ed. 993), gives a form drawn by the attorney-general of Pennsylvania, in 1790, in which the existence of the first marriage is alleged almost exactly as in the case before us. Indeed, as the first marriage is not criminal, but its existence a mere condition which makes the second marriage a crime, it is of itself a fact, and there is, as was admitted by the Vermont court, no substantial reason why the averment of it should ever have been required except in general terms." See also on this question, Sauser *v.* P., 8 Hun, 302; S. *v.* Armington, 25 Minn. 29; [S. *v.* Hughes, 58 Iowa, 165, 11 N. W.

In nice legal principle,—as derivable from the common law alone, since the offense consists of the second marriage and the first is only matter of inducement,[1] the general averment, without the particulars of time, place and venue, would seem to be enough as to such first marriage. True, as said in the Vermont case, the fact is traversable, it must be proved, and hence it must be alleged. But how minute must the allegation be? The common law furnishes various parallels. Thus, in larceny, the ownership of the property stolen, which, like the first marriage in polygamy, is matter of inducement, while still it is an indispensable element in the crime, for no man can steal his own goods, must be averred in the indictment and proved at the trial.[2] But by universal usage the averment is only in the like general terms with that of the first marriage in the Indiana forms. It does not state when, where and by conveyance from whom the ownership was acquired. Yet, looking beyond the common law into our written constitutions, we find there what might not improperly lead to the opposite conclusion. The first marriage is practically one-half of the case, and is often the most nice and delicate part. Commonly it can be proved only by exhibiting the particulars. And, in reason, under a constitution declaring, as some of ours do, that "no subject shall be held to answer for any crime or offense until the same is fully and plainly, substantially and formally, described to him," there is fair ground for rejecting a mere general allegation of half of the case, as not complying with this requirement, and for holding the meaning to be, that what is *special to the particular instance*, in distinction from the crime in general, must be set out. On the whole, this is a sort of question on which uniformity of judicial opinion is hardly to be expected.

§ 602a. Lawful.— In Georgia it is necessary to allege that the first marriage was "lawful," or to set forth facts equivalent to this allegation.[3] But the code has the expression "the lawful husband or wife being alive."[4] In the absence of these or

R. 706; S. *v.* Nadal, 69 Iowa, 478, 29 N. W. R. 451; S. *v.* Hughes, 35 Kan. 626, 12 Pac. R. 28, 57 Am. R. 195; Com. *v.* McGrath, 140 Mass. 296, 6 N. E. R. 515; Watson *v.* S., 13 Tex. Ap. 76; Nelms *v.* S., 84 Ga. 466, 10 S. E. R. 1087, 20 Am. St. R. 377; Faustre *v.* Com., 92 Ky. 34, 17 S. W. R. 189; Cathron *v.* S., 40 Fla. 468, 24 S. R. 496.]

[1] *Ante*, § 422.

[2] Crim. Pro., II, §§ 718–726, 752.

[3] King *v.* S., 40 Ga. 244.

[4] Reed's Ga. Crim. Law, 52.

other like special terms, the word is unnecessary; for the mere simple averment of a marriage means a lawful one.[1]

§ 603. Second marriage.— The second marriage must be charged with the particulars of time and place.[2] And, added to this, on principle,[3] and by the common practice,[4] should be the name of the person to whom. Unless to cover a statutory word there is no necessity to aver that it was "unlawful;" the fact of the first marriage being set out, its unlawfulness appears.[5] In Vermont, under a statute[6] making punishable one who, having "a former husband or wife living, shall marry another person, or shall continue to cohabit with such second husband or wife in this state," it is held that an indictment on the latter clause, where the second marriage was celebrated in another state, must charge it to have been unlawful in the state of its celebration.[7] The Minnesota court has held the contrary.[8]

[1] Kopke *v.* P., 43 Mich. 41.

[2] *Ante*, § 599. [See also Cartnon *v.* S., 40 Fla. 468, 24 S. W. R. 496; *In re* Watson, 19 R. I. 342, 33 Atl. R. 878; Tucker *v.* P., 117 Ill. 88, 7 N. E. R. 51. But where the marriage took place in another state a particular place need not be alleged. C. *v.* McGrath, 140 Mass. 396, 6 N. E. R. 515; S. *v.* Nodal, 69 Iowa, 478, 29 N. W. R. 451.]

[3] Crim. Pro., I, §§ 104, 570, 571.

[4] *Ante*, §§ 598, 600.

[5] Kopke *v.* P., 43 Mich. 41; S. *v.* Johnson, 12 Minn. 476, [93 Am. D. 241.] See Com. *v.* Richardson, 126 Mass. 34, [30 Am. R. 647.]

[6] *Ante*, § 588.

[7] S. *v.* Palmer, 18 Vt. 570. Williams, C. J., said: "The second marriage being in the state of New Hampshire, of whose laws we cannot judicially take notice, the respondent committed no offense against the laws of this state by such marriage; and, unless that marriage was unlawful by the laws of New Hampshire, Jane Cheney became his lawful wife, and perhaps the woman to whom he was formerly married, by the same law, ceased to be his wife. It could be no offense in him to cohabit, in this state, with the woman to whom he was lawfully married. There should, therefore, have been an allegation that the second marriage, in New Hampshire, was unlawful, or the respondent committed no offense by continuing to cohabit with the woman in this state. . . . If the second marriage had been in this state, inasmuch as it was illegal, the former wife being living and the lawful wife of the person charged, the illegality of the second marriage would have been apparent, and the court could have judicially recognized its illegality." Page 578. The answer to this view is, that if the polygamous marriage was lawful in New Hampshire, it would not be so in Vermont; for the courts of no Christian nation would accept as good a foreign polygamous marriage, though it was valid at the place of its celebration. 1 Bishop, Mar., Div. & S., §§ 860, 861. Again, by the doctrine commonly received, the Vermont court would presume polygamy not allowable in New Hampshire. Id., §§ 411–418.

[8] S. *v.* Johnson, 12 Minn. 476.

The true view, to which, perhaps, an examination of the cases will show them not to be adverse, is that in some way the second marriage must appear to be unlawful. But if a first marriage is charged, and then a second while the first subsists, the latter is invalid with us, and the case is brought within the statute, whether it was lawful or unlawful at the place of its celebration.[1]

§ 604. Variance.— The marriage should not be alleged in a way to create a variance.[2] Where the name of the second wife was given in the indictment as Elizabeth Chant, *widow*, and at the trial it appeared she was not a widow, the variance was held to be fatal; though without this descriptive word the averment would have been equally good.[3]

§ 604a. Forbidden marriage after divorce.— What is not polygamy should not be indicted as such. In some of our states a statute makes punishable the party who, after being divorced at the suit of the other, marries again.[4] Still such person has ceased to be a husband or wife,[5] and his marriage in violation of the inhibition is not polygamy, however the legislature may term it. The indictment against him should be drawn, not as for polygamy, but upon the special statutory provision.[6]

§ 605. Negativing exceptions and provisos.— The rules for negativing exceptions and provisos in indictments on statutes are stated in "Criminal Procedure,"[7] and they need not be here repeated. Now,—

§ 606. Continued.— Doubtless, within these rules, an indictment on a statute in the Indiana form[8] requires negatives.[9] But one on the English and most of the American statutes does

[1] 1 Bishop, Mar., Div. & S., §§ 860, 861; Hyde *v.* Hyde, Law R. 1 P. & M. 130; *ante*, § 585.

[2] Crim. Pro., I, §§ 484*a*–488*e*; *ante*, § 601; S. *v.* Armington, 25 Minn. 29; U. S. *v.* Miles, 2 Utah, 19; S. *v.* Williams, 20 Iowa, 98.

[3] Rex *v.* Deeley, 1 Moody, 303, 4 Car. & P. 579.

[4] 1 Bishop, Mar., Div. & S., § 703.

[5] 2 id., §§ 1477–1480, and the places there referred to.

[6] *Post*, § 666; Com. *v.* Richardson, 126 Mass. 34, [30 Am. R. 647;] Com. *v.* Lane, 113 Mass. 458, [18 Am. R. 509.] See Baker *v.* P., 2 Hill (N. Y.), 325; [Niese *v.* Terr. (Okl.), 60 Pac. R. 300; P. *v.* Faber, 92 N. Y. 146, 44 Am. R. 357. Such a decree has no extra-territorial force. P. *v.* Chase, 27 Hun, 310.]

[7] Crim. Pro., I, §§ 631–642; [S. *v.* Gallagher, 20 R. I. 266, 38 Atl. R. 655; S. *v.* Jenkins, 139 Mo. 535, 41 S. W. R. 220; S. *v.* Melton, 120 N. C. 591, 20 S. E. R. 933.]

[8] *Ante*, § 600.

[9] Bicknell, Crim. Pr. 86, 433, referring to Brutton *v.* S., 4 Ind. 601.

not, the matter of their exceptions and provisos being in the nature of defense.[1] "If it is reasonable," said Lord Denman, C. J., in England, "that the indictment should negative the dissolution of the marriage, it may as well be required that the prosecutor should deny that the statute was repealed."[2] And, in North Carolina, to charge that the first wife was alive at the time of the second marriage is adjudged sufficient; it need not be added that the first marriage was then subsisting. "All the precedents produced are so, except that of the Duchess of Kingston's Case."[3]

§ 607. Secondly. The evidence:—

Burden of proof.— In a sense explained in another connection,[4] the burden of proof is on the prosecuting power to establish every particular of its accusation. But this proposition complicates itself with the doctrine of presumptions. Further as to which,—

Alive.— The state must satisfy the jury beyond a reasonable doubt, either by direct evidence or through the aid of presumptions, that, at the time of the second marriage, the first husband or wife was alive.[5] Something as to the presumptions under this head we shall see further on.[6]

Seven years' absence and knowledge thereof.— When the state has thus shown that, at the time of the second marriage, the first wife, for example, was alive, the defendant may rebut this *prima facie* case by proof of her seven years' absence.[7] Then, if the state contends that, nevertheless, he knew her to be alive within this period, it must prove his knowledge; he is not required negatively to establish his want thereof.[8] And the jury are to determine, under all the evidence, what the real fact as to his knowledge was.[9]

[1] Crim. Pro., I, § 638; S. *v.* Abbey, 29 Vt. 60, [67 Am. D. 754;] S. *v.* Williams, 20 Iowa, 98; Com. *v.* Whaley, 6 Bush, 266; S. *v.* Johnson, 12 Minn. 476, [93 Am. D. 241;] Stanglein *v.* S., 17 Ohio St. 453; Fleming *v.* P., 27 N. Y. 329; Com. *v.* Jennings, 121 Mass. 47, [23 Am. R. 249;] Kopke *v.* P., 43 Mich. 41; Barber *v.* S., 50 Md. 161.

[2] Murray *v.* Reg., 7 Q. B. 700, 706.

[3] S. *v.* Norman, 2 Dev. 222.

[4] Crim. Pro., I, §§ 1048–1051.

[5] Reg. *v.* Lumley, Law R. 1 C. C. 196, 198; Squire *v.* S., 46 Ind. 459; Hull *v.* S., 7 Tex. Ap. 593; [Parker *v.* S., 77 Ala. 471, 54 Am. R. 48.]

[6] *Post*, § 611.

[7] Hull *v.* S., 7 Tex. Ap. 593, 594.

[8] Reg. *v.* Heaton, 3 Fost. & F. 819; Reg. *v.* Ellis, 1 Fost. & F. 309; Reg. *v.* Curgenwen, 10 Cox, C. C. 152; s. c. *nom.* Reg. *v.* Curgerwen, Law R. 1 C. C. 1; [P. *v.* Meyer, 8 N. Y. St. R. 256.]

[9] Reg. *v.* Cross, 1 Fost. & F. 510;

§ 608. **Divorce.**— When the indicted party relies on a dissolution of the first marriage by divorce, he should prove it;[1] or at least bring forward circumstances raising a presumption of it, as explained by the author elsewhere.[2] The validity of a decree being a question of law, one's knowledge whereof is conclusively presumed,[3] a divorce invalid in law will not avail him.[4] But since men who are duly cautious and otherwise mentally free from blame may lawfully act on facts as they appear,[5] the erroneous belief of a divorce, founded on a proper inquiry conducted with due care, may be shown in defense the same as though it truly existed.[6]

§ 609. **Proof of first marriage.**— In another work the author has explained at large the proof of marriage in all issues, including polygamy.[7] It is unnecessary, therefore, to enter fully into the subject here.

Fact of marriage.[8] — It is commonly said that, in this issue of polygamy, a fact of marriage, in distinction from the sort of presumptive one which suffices in civil causes, must be shown.[9] But an examination of the question discloses the principle to be, that, while commonly in civil causes the proof of marriage is based on the presumption of morality and obedience to law, whereby, if parties are or have been cohabiting as husband and wife, they are deemed to be honestly and innocently so, therefore married; whereas, when this presumption is attempted to be invoked in a polygamy case, it comes into conflict with the like presumption as to the second marriage and living together; and so, as presumption nullifies presumption, other proof is re-

see Reg. *v.* Jones, Car. & M. 614; Arnold *v.* S., 53 Ga. 574; S. *v.* Barrow, 31 La. An. 691; [Parker *v.* S., *supra*.]

[1] S. *v.* Barrow, *supra;* Com. *v.* Boyer, 7 Allen, 306; Hull *v.* S., 7 Tex. Ap. 593.

[2] 1 Bishop, Mar., Div. & S., §§ 977–983.

[3] Crim. Law, I, §§ 294–300.

[4] Davis *v.* Com., 13 Bush, 318; Rex *v.* Lolley, Russ. & Ry. 237.

[5] Crim. Law, I, §§ 301–310.

[6] Squire *v.* S., 46 Ind. 459. [But as to Arkansas, see Russell *v.* S. (Ark.), 49 S. W. R. 821. Yet by the same case such honest belief may be shown in evidence as affecting the defendant's sentence of imprisonment.]

[7] 1 Bishop, Mar., Div. & S., §§ 921–1182.

[8] Id., §§ 1021–1064.

[9] Morris *v.* Miller, 4 Burr. 2057; s. c. *nom.* Morres *v.* Miller, 1 W. Bl. 633; Birt *v.* Barlow, 1 Doug. 170; Hemmings *v.* Smith, 4 Doug. 33; S. *v.* Hodgskins, 19 Me. 155, [36 Am. D. 742.] And see Reg. *v.* Savage, 13 Cox, C. C. 178; Jackson *v.* S., 8 Tex. Ap. 60; Steward *v.* S., 7 Tex. Ap. 326; Gaines *v.* Hennen, 24 How. (U. S.) 553.

quired. And the other proof may be presumptive — that is, founded on other presumptions — as well as direct.[1] This conclusion is, in some of our states, aided by statutes which have expressly made circumstantial evidence sufficient in issues of this sort and in others.[2]

§ 610. Common proofs.— Commonly the proofs of marriage in polygamy cases are[3] —

Record.— The marriage record, or in some circumstances the certificate of the officiating person, supplemented by evidence of the identity of the parties.[4] These proofs are, *prima facie*, sufficient.[5] Again,—

Persons present.— The testimony of the officiating clergyman, or of other persons present at the nuptials, is a common method of proof. In special circumstances, the absence of the record may create suspicion; but, in matter of law, it is never indispensable.[6] In aid of the proof of identity, a photographic likeness of the absent party to the marriage may be shown to the witness.[7]

[1] Consult 1 Bishop, Mar., Div. & S., §§ 931–943, 1039–1046; Reg. *v.* Wilson, 3 Fost. & F. 119; Buchanan *v.* S., 55 Ala. 154; Murphy *v.* S., 50 Ga. 150; Com. *v.* Jackson, 11 Bush, 679, [21 Am. R. 225;] Brown *v.* S., 52 Ala. 338; Langtry *v.* S., 30 Ala. 536; Reg. *v.* Cresswell, 1 Q. B. D. 446, 13 Cox, C. C. 126; Reg. *v.* Willshire, 6 Q. B. D. 366, 14 Cox, C. C. 541; Scoggins *v.* S., 32 Ark. 205; Wood *v.* S., 62 Ga. 406; [Reg. *v.* Kay, 16 Cox, C. C. 292.]

[2] 1 Bishop, Mar., Div. & S., §§ 543–545; S. *v.* Armington, 25 Minn. 29; Com. *v.* Johnson, 10 Allen, 196; Case *v.* Case, 17 Cal. 598.

[3] [Under the Edmunds-Tucker Act (see *ante*, §§ 597*a*, 598*a*), see U. S. *v.* Simpson, 4 Utah, 227, 7 Pac. R. 257; U. S. *v.* Tenny (Ariz.), 11 Pac. R. 472; U. S. *v.* Peay, 5 Utah, 263, 14 Pac. R. 342; U. S. *v.* Langford, 2 Idaho, 519, 21 Pac. R. 409; U. S. *v.* Harris, 5 Utah, 436, 17 Pac. R. 75.]

[4] 1 Bishop, Mar., Div. & S., §§ 986–1020; Rex *v.* James, Russ. & Ry. 17; Jones *v.* Jones, 45 Md. 144, 160; S. *v.* Potter, 52 Vt. 33; S. *v.* Colby, 51 Vt. 291; Jackson *v.* P., 2 Scam. 231; Moore *v.* C., 9 Leigh, 639; Maxwell *v.* Chapman, 8 Barb. 579; [Reg. *v.* Simpkins, 15 Cox, C. C. 323; P. *v.* Perriman, 72 Mich. 184, 40 N. W. R. 425; Crane *v.* S., 94 Tenn. 86, 28 S. W. R. 317; S. *v.* Ulrich, 110 Mo. 350, 19 S. W. R. 656; P. *v.* Crawford, 69 Hun, 160, affirmed 133 N. Y. 535, 30 N. E. R. 1148; Faustre *v.* Com., 92 Ky. 34, 17 S. W. R. 189; Patterson *v.* S., 17 Tex. Ap. 102; Foster *v.* S., 31 Tex. Cr. R. 409; Tucker *v.* P., 122 Ill. 583, 13 N. E. R. 809; S. *v.* Melton, 120 N. C. 591, 26 S. E. R. 933; S. *v.* Davis, 109 N. C. 780, 14 S. E. R. 55.]

[5] Reg. *v.* Hawes, 1 Den. C. C. 270.

[6] 1 Bishop, Mar., Div. & S., §§ 1047–1054; Rex *v.* Moders, 6 How. St. Tr. 273; Reg. *v.* Manwaring, Dears. & B. 132, 37 Eng. L. & Eq. 609; s. c. *nom.* Reg. *v.* Mainwaring, 7 Cox, C. C. 192; S. *v.* Goodrich, 14 W. Va. 834; Bird *v.* S., 21 Grat. 800; S. *v.* Clark, 54 N. H. 456.

[7] Reg. *v.* Tolson, 4 Fost. & F. 103.

Foreign marriage.— Sometimes, where the marriage is foreign, special considerations may arise. But, on these questions, it is best the reader should consult the other work.[1]

Defendant's admissions.— By the almost universal doctrine, though there is some dissent, the defendant's admission or confession of the marriage, whether domestic or foreign, is good evidence of it in this issue.[2]

§ 611. Presumption of life.— Though the prosecuting power must prove that at the time of the second marriage the former husband or wife was living,[3] it may resort to presumption in aid of the evidence. If, at a previous time not too remote, such party is shown to have been alive, the jury may infer — for the question is for them — the continuance of the life down to the time of the second marriage.[4] Of course, if the existence of such life could be established at no later period than seven years before the second marriage, the evidence would amount to nothing; if, within the seven years, the presumption of its con-

[1] 1 Bishop, Mar., Div. & S., §§ 1065–1137; Reg. *v.* Povey, Dears. 32, 6 Cox, C. C. 83; S. *v.* Goodrich, 14 W. Va. 834; Weinberg *v.* S., 25 Wis. 370; Com. *v.* Kenney, 120 Mass. 387; Reg. *v.* Griffin, 14 Cox, C. C. 308; P. *v.* Calder, 30 Mich. 85; P. *v.* Lambert, 5 Mich. 349, [72 Am. D. 49;] S. *v.* Kean, 10 N. H. 347, [34 Am. D. 162;] Oneale *v.* Com., 17 Grat. 582; [Canale *v.* P., 177 Ill. 219, 52 N. E. R. 310.]

[2] 1 Bishop, Mar., Div. & S., §§ 1057–1063, 1127; Miles *v.* U. S., 103 U. S. 304, 311; U. S. *v.* Miles, 2 Utah, 19; Oneale *v.* Com., 17 Grat. 582; S. *v.* Seals, 16 Ind. 352; Squire *v.* S., 46 Ind. 459; Cameron *v.* S., 14 Ala. 546, [48 Am. D. 111;] Halbrook *v.* S., 34 Ark. 511, [36 Am. R. 17;] Com. *v.* Henning, 10 Phila. 209; Langtry *v.* S., 30 Ala. 536; Cook *v.* S., 11 Ga. 53, [56 Am. D. 410;] Murphy *v.* S., 50 Ga. 150; Reg. *v.* Creamer, 10 L. Canada, 404; Com. *v.* Jackson, 11 Bush, 679, [21 Am. R. 225;] Williams *v.* S., 54 Ala. 131, [25 Am. D. 665;] Reg. *v.* Newton, 2 Moody & R. 503; s. c. *nom.* Reg. *v.* Simmonsto, 1 Car. & K. 164; Rex *v.* Trueman, 1 East, P. C. 470; Reg. *v.* Flaherty, 2 Car. & K. 782. *Contra*, P. *v.* Humphrey, 7 Johns. 314; Gahagan *v.* P., 1 Park. Cr. 378; [S. *v.* Melton, 120 N. C. 591, 26 S. E. R. 933; S. *v.* Plym, 43 Minn. 385, 45 N. W. R. 848; S. *v.* Hughes, 35 Kan. 626, 12 Pac. R. 28, 57 Am. R. 195; Parker *v.* S., 77 Ala. 47, 54 Am. R. 43; Tucker *v.* P., 122 Ill. 583, 13 N. E. R. 809; Lowery *v.* P., 173 Ill. 46, 50 N. E. R. 165, 64 Am. St. R. 50; Adkisson *v.* S., 34 Tex. Cr. R. 296, 30 S. W. R. 357; S. *v.* Jenkins, 139 Mo. 535, 41 S. W. R. 220; Com. *v.* Caponi, 155 Mass. 534, 30 N. E. R. 82; Com. *v.* Hayden, 163 Mass. 453, 40 N. E. R. 846, 47 Am. St. R. 468, 28 L. R. A. 318. See also S. *v.* Gonce, 79 Mo. 600; Dumas *v.* S., 14 Tex. Ap. 464, 46 Am. R. 241.]

[3] *Ante*, § 607.

[4] 1 Bishop, Mar., Div. & S., § 953; Reg. *v.* Lumley, Law R. 1 C. C. 196, 11 Cox, C. C. 274; Squire *v.* S., 46 Ind. 459; Reg. *v.* Willshire, 6 Q. B. D. 366, 14 Cox, C. C. 541; Gorman *v.* S., 23 Tex. 646; Hull *v.* S., 7 Tex. Ap. 593. And see Mitchell *v.* S., 63 Ga. 222; [Reg. *v.* Jones, 15 Cox, C. C. 284; Parker *v.* S., 77 Ala. 47, 54 Am. R. 43.]

tinuance would come in conflict with that of the defendant's innocence, and, other things being equal, the latter should be preferred.[1] If the second marriage and the life of the first matrimonial partner were shown to be very near together,— as, for example, if the former were within a month or two of the latter,— the jury would be quite justified in finding that the life was continuing; but not, in the absence of special circumstances, if the period was two years,[2] and there might not improperly be an acquittal where it was no more than one year. Still this question will depend much on the varying circumstances of cases; it is purely of fact for the jury, yet of a sort particularly open to be supervised by the court, and new trials granted when they appear from the verdict to have proceeded on misapprehension.[3]

§ 612. Proof of second marriage.— No special difficulties attend the proof of the second marriage. It, only, and not also cohabitation under it, is required to be shown; for, without cohabitation, the crime is complete.[4] What is above said of proving the first marriage, together with some elucidations under our first sub-title,[5] will suffice for the second, except as to the —

§ 613. Injured parties as witnesses.— The first, or true, husband or wife cannot, for familiar reasons, be a witness, unless by force of some authorizing statute.[6] And "this rule," says Leach, one of the editors of Hawkins, "has been so strictly taken that even an affidavit to postpone the trial, made by the first wife, has been rejected."[7] Nor does the defending husband's consent render her competent.[8] Under the common-law rules she cannot, as in assault and battery by the husband on her,[9] be a witness by reason of her personal protection re-

[1] Bishop, Mar., Div. & S., and the cases, *supra*.

[2] Squire *v.* S., *supra*. And see Gorman *v.* S., *supra;* [Com. *v.* McGrath, 140 Mass. 296, 6 N. E. R. 515; Com. *v.* Caponi, 155 Mass. 534, 30 N. E. R. 82.]

[3] See the elucidations in 1 Bishop, Mar., Div. & S., §§ 949–955, and particularly § 953.

[4] Gise *v.* Com., 81 Pa. St. 428; Beggs *v.* S., 55 Ala. 108; Scroggins *v.* S., 32 Ark. 205; S. *v.* Patterson, 2 Ire. 346, [38 Am. D. 699; Nelms *v.* S., 84 Ga. 461, 10 S. E. R. 1087, 20 Am. St. R. 377; Com. *v.* Lucas, 158 Mass. 81, 32 N. E. R. 1033; Cox *v.* S., 117 Ala. 104, 23 S. R. 806, 41 L. R. A. 760; P. *v.* Mendenhall (Mich.), 78 N. W. R. 325; S. *v.* Nadal, 69 Iowa, 478, 29 N. W. R. 451.]

[5] *Ante*, §§ 586, 588, 590–593. [See Johnson *v.* S., 60 Ark. 308, 30 S. W. R. 31.]

[6] Crim. Pro., I, §§ 1151–1155.

[7] 1 Hawk. P. C. (Curw. ed.) 687, § 8.

[8] Wilson *v.* Hill, 2 Beasley, 143.

[9] Crim. Pro., I, § 1153; II, § 69.

quiring it.[1] But under a statute permitting the husband or wife to testify against the other in a criminal proceeding for a crime by one against the other, she has been adjudged competent.[2] Nor, at common law, can she be a witness to prove her marriage void;[3] or, *a fortiori*, good.[4] But a mere *de facto* wife, not lawfully married, is always a good witness.[5] Hence, for most purposes in these cases, the second, or *de facto*, husband or wife may be called.[6] But such a witness, whose marriage *de facto* is conceded, cannot testify to the nullity of the contested first marriage; for the result of the evidence would be, and it could be only, to establish its own inadmissibility. Whence also it results that such party cannot be admitted as a witness to testify the other way; that is, in favor of the marriage. For a witness is sworn to speak the truth, whatever it may be. Therefore, alike in reason, and in the language of Woods, J., in the supreme court of the United States, as "the result of the authorities, . . . as long as the fact of the first marriage is contested, the second wife cannot be admitted to prove it. When the first marriage is duly established by other evidence to the satisfaction of the court, she may be admitted to prove the second marriage, but not the first."[7] It is perceived, therefore, that on this issue, differing from the ordinary case in which a tendered witness is objected to as being the husband or wife of one of the parties,[8] the course of the hearing seems, in some degree, to supply the place of the preliminary examination by the court as to his competency; hence there may be apparent differences in the rules as to admitting the witness.

[1] S. *v.* McDavid, 15 La. An. 403.

[2] S. *v.* Sloan, 55 Iowa, 217, 219, 220. See S. *v.* Nash, 10 Iowa, 81. Compare with P. *v.* Houghton, 24 Hun, 501,] and Kelly *v.* Drew, 12 Allen, 107, [90 Am. D. 138.]

[3] Reg. *v.* Madden, 14 U. C. Q. B. 588, 591; Peat's Case, 2 Lewin, 111. And see Peat's Case, 2 Lewin, 288.

[4] Williams *v.* S., 44 Ala. 24; Griggs' Case, T. Raym. 1. See Broughton *v.* Harpur, 2 Ld. Raym. 752; Redgrave *v.* Redgrave, 38 Md. 93; S. *v.* Brown, 67 N. C. 470.

[5] Crim. Pro., I, § 1154; S. *v.* Brown, 28 La. An. 279; [Reg. *v.* Ayley, 15 Cox, C. C. 328.]

[6] 1 Hawk. P. C. (Curw. ed.), § 8; S. *v.* McDavid, 15 La. An. 403; S. *v.* Patterson, 2 Ire. 346, [38 Am. D. 699;] Johnson *v.* S., 61 Ga. 305; Furney *v.* S., 3 Head, 544.

[7] Miles *v.* U. S., 103 U. S. 304, 315.

[8] As, for example, in Wakefield's Case, 2 Lewin, 279; Walter *v.* P., 32 N. Y. 147; Kelly *v.* Drew, 12 Allen, 107; Reg. *v.* Young, 5 Cox, C. C. 296.

CHAPTER XXXVII.

THE FORCIBLE ABDUCTION OF WOMEN.

§ 614, 615. Introduction.
616–621. Law of the offense.
622–624. The procedure.

§ 614. Abduction—Seduction—(Distinctions).—The wrong meant by the word "abduction," without the adjective, "may either be by fraud and persuasion, or open violence."[1] Hence, with entire propriety, some of the English authors treat, under the title Abduction, of the offenses included both in this chapter and the next.[2] We, in this country, have little to do with forcible abduction, as an offense distinct from kidnaping; so, for convenience, the preliminary explanations relating to it are placed in this chapter by themselves.

§ 615. How chapter divided.— We shall consider, I. The law of the offense; II. The procedure.

I. The Law of the Offense.

§ 616. Old English statutes.—By 3 Hen. 7, ch. 2, A. D. 1486,[3] it was recited "that women — as well maidens as widows and wives, having substances, etc.— have, for the lucre of such substances, been oftentimes taken by misdoers, contrary to their will, and after married to such misdoers, or to others by their assent, or defiled." Thereupon it enacted "that what person or persons from henceforth that taketh any woman so against her will unlawfully,—that is to say, maid, widow or wife,— that such taking, procuring and abetting to the same, and also receiving wittingly the same woman so taken against her will, and knowing the same, be felony," etc. And 39 Eliz., ch. 9,

[1] 3 Bl. Com. 139.

[2] Archb. Crim. Pl. & Ev. (19th Lond. ed.) 756–761; 1 Russ. Crimes (5th ed.), 883–898. The late editions of Hawkins have the separate title "Seduction." 1 Hawk. P. C. (Curw. ed.) 125–138.

[3] For this statute, and expositions thereon, see 1 Hawk. P. C. (Curw. ed.), p. 123 *et seq.* And see Crim. Law, I, § 555.

deprived the principals and procurers of clergy.[1] The substance of this statute, with some alterations, is now comprised in 24 and 25 Vict., ch. 100, § 53.

§ 617. Interpretations.— The word "so," in the body of the above statute, was construed to make the preceding recitation a part of it.[2] The taking must be for lucre,[3] and the woman must either be an heir apparent or have property.[4] Also force must be used, either at the taking or at the marriage or defilement, but not necessarily at both.[5] Both the force and the marriage or defilement must occur in the county of the indictment;[6] the mere taking there, without one or the other of these, not sufficing.[7] Yet, within this distinction, a force begun in one county may be continuing in another, where the marriage or defilement transpires, and therefore sufficient.[8] When the offense has been thus completed, it will not be purged by a subsequent consent of the woman.[9] Her receivers are principals; those who receive the takers of her are only accessories after the fact.[10]

§ 618. Whether common law with us.— As to whether this statute is common law in our states, we have no decisions.[11] The Pennsylvania judges, in their report of English statutes in force, do not include this one;[12] and Kilty mentions it among the acts not found applicable in Maryland.[13] As an abstract

[1] Baker's Case, 12 Co. 100.

[2] Bruton *v.* Morris, Hob. 182, 183; Case of Stealing Women, 12 Co. 20.

[3] 4 Bl. Com. 208. And see Reg. *v.* Barratt, 9 Car. & P. 387.

[4] Baker's Case, 12 Co. 100; 1 Hawk. P. C. (Curw. ed.), p. 124, § 4.

[5] 4 Bl. Com. 208, 209.

[6] 1 Stark. Crim. Plead. (2d ed.) 2; 1 East, P. C. 453; Fulwood's Case, Cro. Car. 488.

[7] Baker's Case, 12 Co. 100; Case of Stealing Women, 12 Co. 20.

[8] Fulwood's Case, Cro. Car. 488.

[9] Reg. *v.* Swanson, 7 Mod. 101, 102. And see Crim. Law, I, § 733.

[10] Baker's Case, 12 Co. 100; Case of Stealing Women, 12 Co. 20.

[11] Crim. Law, I, § 555.

[12] Report of Judges, 3 Binn. Ap. 595, 617.

[13] Kilty, Rep. of Stat. 67. He says: "This offense was generally known in England under the term of stealing an heiress. The statute must be considered in connection with 39 Eliz., ch. 9, which took away the benefit of clergy. The question as to the extension of these statutes, if considered independent of what is to be inferred from the records of the courts, would be open to considerable doubt; for, although the felony was created and made more penal by acts of parliament, yet they were enacted long before the settlement of the province, and, although the provisions are highly penal, the offense may be viewed as one of a heinous nature, and as being liable to be perpetrated in this country as well as in England. But I have not been able to discover

question, this statute was as applicable to our colonies as to the mother country. But because of the poverty of the early settlers there was no temptation to commit the offense, and the occasion for its enforcement could not arise. This sort of want of occasion is not generally deemed to exclude from our law a provision of the English. Still, on the whole, the chances of inducing a court to accept this enactment as a part of our law would be problematical.

§ 619. Aside from this statute,— this offense may, where sufficient force is employed, amount to common-law kidnaping; or, if not technically such, to false imprisonment, or other analogous misdemeanor.[1] And an unsuccessful attempt to commit it is indictable. Thus, an English case lays it down, that attempting to carry away forcibly a woman of great fortune is a great misdemeanor at the common law; for "sure," says Lord Holt, "this concerns all the people in England who would dispose of their children well."[2]

§ 620. At present in England,— this whole ground is so covered by statutes as to leave little occasion for resort to the unwritten law.[3]

§ 621. With us,— it is so to a slight extent; so slight that whatever of written law we have relating to it will be considered in our next chapter.

II. The Procedure.

§ 622. Indictment.— The indictment, to follow in substance Chitty's exposition,[4] sets forth that the woman had lands, or goods, or was heir apparent; and was married or defiled. And it avers the place and manner of the taking;[5] also that it was

any instance of a prosecution under these statutes, either in the province or in the state, and the most certain conclusion seems to be that they were not in force therein. There were some cases of prosecutions under the statute 4 and 5 Phil. & M., ch. 8 [considered under the title Seduction, *post*, §§ 627, 628], for what is termed an inferior degree of the same kind of offense."

[1] Crim. Law, I, § 555; II, §§ 746–751.

[2] Rex *v.* Pigot, Holt, 758.

[3] Stat. 24 & 25 Vict., ch. 100, §§ 53–55; ch. 95, repealing prior statutes. See Greaves, Crim. Law Acts, 78; Reg. *v.* Burrell, Leigh & C. 354; Reg. *v.* Timmins, Bell, C. C. 276.

[4] 3 Chit. Crim. Law, 818, note. And see Reg. *v.* Swendsen, 14 How. St. Tr. 559; Reg. *v.* Bayton, 14 How. St. Tr. 597.

[5] Fulwood's Case, Cro. Car. 484.

for lucre.[1] "But it is not necessary to state that it was done with an intention to marry or defile; because this is not required by the words of the act, nor would the absence of it lessen the injury.[2] It seems, however, to be both safe and usual to insert it."[3]

§ 623. **Woman as witness.**— The marriage effected by force does not make the woman a wife, unless afterward, by voluntary cohabitation or otherwise, she ratifies it.[4] Therefore she may be a witness against the man at his trial.[5] Therefore, also,—

On attempt to debauch.— On an information for attempting to debauch a young lady, she was very properly admitted to testify in the defendant's favor.[6]

§ 624. **In conclusion,**— these cases, like others, will present general questions of pleading and evidence, not best to be entered into a connection like this.[7]

[1] Bruton *v.* Morris, Hob. 182; 1 Hawk. P. C. (7th ed.), ch. 41, § 5.

[2] Fulwood's Case, Cro. Car. 488; 1 Hawk. P. C. (7th ed.), ch. 41, § 6.

[3] 1 Hale, P. C. 660.

[4] 1 Bishop, Mar., Div. & S., § 538 *et seq.*

[5] Wakefield's Case, 2 Townsend, St. Tr. 112, 2 Lewin, 279; 1 Bishop, Mar., Div. & S., § 512 and note; Fulwood's Case, 1 Hale, P. C. 650, 661, Cro. Car. 488; Rex *v.* Fezas, 4 Mod. 8; Brown's Case, 1 Vent. 243. Speaking of the last cited case, Lord Hale says: "But had she freely without constraint lived with him that thus married her any considerable time, her examination in evidence might be more questionable." 1 Hale, P. C. 661. This would make the marriage good by reason of the subsequent consent thereby implied. 1 Bishop, Mar., Div. & S., § 545. Still, it might be a question whether she should not be received as a witness under the same policy of the law which permits a wife to testify to a battery inflicted on her by the husband. And see the observations and ruling of Hullock, B., who so held in Wakefield's Case, *supra*, at pp. 287, 288, of Lewin.

[6] Gray's Case, Skin. 81.

[7] See Reg. *v.* Barratt, 9 Car. & P. 387; S. *v.* Tidwell, 5 Strob. 1.

CHAPTER XXXVIII.

SEDUCTION OF WOMEN.

§ 625, 626. Introduction.
627–643. Law of the offense.
644–652. The procedure.

§ 625. Conspiracy, distinguished.— We are not to treat in this chapter of conspiracies. But it may be borne in mind that a conspiracy to bring about the carnal defilement of a young woman, or even, if she is under guardianship or the legal restraint of parents, being a minor, to procure her marriage without the consent of those entitled to forbid the nuptials, is, both in England and this country, indictable at the common law.[1]

§ 626. What for this chapter and how divided.— Having in the last chapter considered only forcible abduction, we shall in the present take into view most of what is ordinarily contemplated under the joint heads of Abduction and Seduction; as to, I. The law of the offense; II. The procedure.

I. The Law of the Offense.

§ 627. Old English statute.— In 1557 the statute of 4 and 5 Phil. and M. (ch. 8), after a long recitation of grievances in section 1, made it, in section 2, punishable "to take or convey away, or cause to be taken or conveyed away, any maid or woman-child unmarried, being under the age of sixteen years, out of or from the possession, custody or governance, and against the will, of the father of such maid or woman-child, or of such person or persons to whom the father of such maid or woman-child by his last will and testament or by any other act in his

[1] Crim. Law, II. § 235; Twitchell *v.* Com., 9 Pa. St. 211; Anderson *v.* Com., 5 Rand. 627, [16 Am. D. 776;] Respublica *v.* Hevice, 2 Yeates, 114; Mifflin *v.* Com., 5 Watts & S. 461, [40 Am. D. 527;] Rex *v.* Thorp, 5 Mod. 221; Reg. *v.* Blacket, 7 Mod. 39; Reg. *v.* Mears, 1 Eng. L. & Eq. 581, 2 Den. C. C. 79, Temp. & M. 414; Rex *v.* Ossulston, 2 Stra. 1107. And see Crim. Law, I, §§ 501, 502, 767, 768; Grey's Case, 9 How. St. Tr. 127; s. c. *nom.* Gray's Case, Skin. 81; S. *v.* Savoye, 48 Iowa, 562.

life-time hath or shall appoint, assign, bequeath, give or grant the order, keeping, education or governance of such maid or woman-child; except such taking and conveying away as shall be had, made or done by or for such person or persons as without fraud or covin be or then shall be the master or mistress of such maid or woman-child, or the guardian in socage, or guardian in chivalry, of or to such maid or woman-child."[1]

§ 628. Whether common law with us.— The date of this enactment is prior to the earliest settlements in this country. It would seem, therefore, to be a part of our common law. Kilty says it was received in Maryland as such;[2] but the Pennsylvania judges, not inclined to include a large number of English statutes, omit this one in their report.[3] It was made specially of force in South Carolina; and it is held there not to be restricted to heiresses and persons of quality, who in the recitations of grievances in section 1 were particularized.[4] The Massachusetts commissioners on a penal code observe that its date "would render it a part of our common law, provided it should be deemed to be applicable to our laws and institutions and state of society; and it seems to be obviously so applicable."[5] It appears recently to have been assumed not to be of force in North Carolina.[6]

§ 629. How the earlier common law.— This offense, where there is no force and no conspiracy, but only the guile of a single person is resorted to, is, both on reason and authority, not indictable by the common law, aside from the statute.[7]

[1] See, for the entire provisions, including subsequent sections and the expositions, 1 Hawk. P. C. (Curw. ed.), p. 125 *et seq.* See also Rex *v.* Bastian, 1 Sid. 362; Rex *v.* Pierson, Andr. 310; Rex *v.* Cornforth, 2 Stra. 1162; Rex *v.* Lord Ossulston, 2 Stra. 1107; Reg. *v.* Hopkins, Car. & M. 254; Reg. *v.* Mankletow, Dears. 159.

[2] Kiley, Rep. Stats. 167; *ante*, § 618, note.

[3] Report of Judges, 3 Binn. 595, 621. See also Anderson *v.* Com., 5 Rand. 627, [16 Am. D. 776.]

[4] S. *v.* Findlay, 2 Bay, 418; s. c. *nom.* S. *v.* Findley, 1 Brev. 107; S. *v.* Tidwell, 5 Strob. 1.

[5] Sup. Report Penal Code, 12.

[6] S. *v.* Sullivan, 85 N. C. 506.

[7] Rex *v.* Marriot, 4 Mod. 144; S. *v.* Sullivan, 85 N. C. 506. See Rex *v.* Moor, 2 Mod. 128; 1 Deac. Crim. Law, 6; 1 East, P. C. 458, 459. The last three places referred to may have created some doubt of this proposition, but a consideration of the principles of our unwritten law of crimes leaves little room for any. See Crim. Law, I, §§ 546, 560–564, 581 *et seq.* In S. *v.* Sullivan, *supra*, Ruffin, J., said: "It is true that in a note to 2 Archbold's Criminal Practice, 301, to which our attention was called by the attorney-general, it is said that the abduc-

§ 630. Modern statutes — (Course of discussion).— The present statutes on this subject, in England and this country, are similar to the older. Yet they are numerous, and in some respects diverse. Assuming that the reader will have before him those of his own state, the author will here attempt some helpful expositions; which, however, can serve as safe guides only as examined in connection with the statutes.[1]

§ 631. Taking girl under sixteen out of custody.— The present English statute of 24 and 25 Vict., ch. 100, § 55, in like terms with the earlier one of 9 Geo. 4, ch. 31, § 20, and not greatly differing from 4 and 5 Phil. and M., ch. 8, makes it an indictable misdemeanor to take "any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her." It is silent as to the purpose of the taking.[2] A corresponding provision in Iowa has the words, "take or entice away an unmarried female under

tion, or the enticing or carrying away of any person by force or fraud, is an indictable offense at common law; and, as authority for the position, reference is made to 1 East, P. C. 458, and 1 Russell on Crimes, 569. But on looking to East we find no sort of sanction given to such a position. On the contrary, it is there said that by virtue of the general prohibitory clause of the statute of 4 & 5 Phil. & M., ch. 8, an indictment, for the abduction of a child will lie by the rule of the common law, which rule, as plained, is that, where a thing is prohibited to be done by a statute and a penalty is affixed to it by a separate and distinct clause, the prosecutor is not bound to pursue the latter remedy, but may proceed under the prior general clause by indictment for a misdemeanor. Not a single suggestion, however, is made that such indictment, in the absence of all statutory provision, can be maintained by force of the common law alone. And still less support is given to the proposition by Russell. He says that the only reported case of a prosecution at common law for such an offense is that against Lord Gray, to be found in 9 (3) State Trials, 127. [Grey's Case, 9 How. St. Tr. 127.] Upon examining into that case we find it to be, not an indictment for abduction at all, but an information lodged against that lord and five others, by which they were charged with a *conspiracy*, the unlawful purpose of which was to entice Lady Henrietta Berkley to quit her father's house and custody and live in secret adultery. And even in that case the court never proceeded to a judgment, but a *nolle prosequi* was entered after a verdict of guilty, as to all the defendants." Pages 507, 508.

[1] Concerning the Michigan statute, see P. *v.* Bristol, 23 Mich. 118.

[2] [See Reg. *v.* Webster, 15 Cox, C. C., for statute against knowingly suffering a girl under sixteen years of age to be on premises for the purpose of being carnally known. In that case the offense was held to have been committed, although the girl was prisoner's daughter, and the premises were his residence.]

the age of fifteen years, from her father or mother, guardian, or other person having the legal charge of her person, without their consent."[1] Now,—

§ 631a. Mistaking girl's age — (England).— The question whether or not, under these provisions, one who mistakenly believes the girl, in England, to be over sixteen, or, in Iowa, to be over fifteen, is punishable for the seduction, is similar to, yet not the same as, the one of mistaken death, discussed under the title "Polygamy."[2] It was in England, "on two several occasions," to copy the words of a former edition of this work,[3] "ruled by single judges at jury trials, that, if the girl is of precocious growth and appears to be over sixteen, or if she represents herself to be so, this will not avail the prisoner in his defense.[4] The reports of these cases do not show on what reasons the doctrine, assuming it to be sound, proceeds; but it occurs to the writer that there are sufficient reasons in the principles of the common law relating to the intent; though *this question lies very near the line dividing two dissimilar classes of cases, and it is not quite certain*, as we shall see, *that other English judges would decide the question in the same way*. It is a principle of the common law, in respect of crimes requiring only a general evil intent, and not a specific intent to do a particular forbidden thing, that, if a man contemplates one evil result, and his act unintended accomplishes another and a different one, he is punishable the same as though the act and intent had been the usual and natural accompaniments of each other. The intent was wrong and the act was wrong, an evil mind impelled the evil act, therefore he ought to be punished. And the doctrine goes to the extent that the intent need not be to do a thing which would be indictable if done; for, in many cases, not all, if what is meant is a mere civil or a mere moral wrong, yet an unintended wrong of the indictable sort follows, an indictment will lie.[5] Now, in the cases under consideration, the man meant to commit the civil and moral wrong of taking away an infant girl from under lawful guardianship; and though he might have supposed he should succeed in dodg-

[1] S. *v.* Ruhl, 8 Iowa, 447.

[2] *Ante*, § 596*a*.

[3] § 359 of the first edition, in a chapter not retained in this revision.

[4] Reg. *v.* Robins, 1 Car. & K. 456; Reg. *v.* Ollifer, 10 Cox, C. C. 402.

[5] Crim. Law, I, §§ 328–334.

ing the law, it is no stretch of legal doctrine to hold him to be guilty. The intent which impels the act is quite different from that which impels a man to sell what he has every reason to believe, and does believe, to be pure milk, or what on good ground he believes to be a harmless and unintoxicating beverage, or to enter into matrimony with one whom he thus believes to be lawfully entitled to marry." This extract from the author's previous edition was written and printed in the closing part of the year 1872. Early in 1875, a jury having found an indicted person guilty, with the qualification, if material in law, that on reasonable grounds he believed the girl to be over sixteen years of age, the question was submitted to the Court for Crown Cases Reserved. So difficult did it there appear, that it was referred to all the common-law judges of England, and sixteen heard and passed upon it. Fifteen were of the opinion above indicated and one dissented.[1]

§ 631b. Something of law books.— This question is, by the writer, brought forward in this way for the double purpose of explaining the doctrine and explaining something regarding the sort of legal treatise to which the present series of volumes belongs. Contrary to the views of the class of lawyers who, discerning no difference between adjudications in accord and in conflict with just legal doctrine, nor even taking cognizance of legal doctrine as existing otherwise than in the mere words of judges, deny the value of books of a higher order than digests, and relegate all legal questions to one flat, these volumes present, to the extent to which the author is able within the space at command, legal things as they truly are. What is plain is set down as such. What stands on the border lines of doctrines is so presented. What is adjudged past recall is not generally disturbed. And, to some extent, within what seems practical, where it is certain that a lawyer can change

[1] Reg. *v.* Prince, Law R. 2 C. C. 154, 13 Cox, C. C. 138. [The judges, if rightly interpreted in Reg. *v.* Tolson, 23 Q. B. D. 168, did not put this decision on its better and firmer ground, that stated in the text.] See also Reg. *v.* Booth, 12 Cox, C. C. 231; Reg. *v.* Mycock, 12 Cox, C. C. 28. [In Reg. *v.* Packer, 16 Cox, C. C. 57, where prisoner was charged with having abducted a girl under eighteen years of age, it was held a sufficient defense if at the moment of taking her out of custody he had reasonable cause to believe that she was of the age of eighteen years, although he did not inquire as to her age until after he had taken her out of such lawful custody, but before abduction was complete.]

the course of decision for the better if he will take the pains, and exercise skill enough to make the court understand the question, the path for him is indicated. But, on the other hand, it is not deemed the author's duty to impart either the disposition or the industry, or yet the legal capacity, to counsel or to court.

§ 632. Mistaking girl's age, continued — (Iowa).—The doctrine reached in England had already been held in Iowa. It was there adjudged inadmissible for the defendant to show, in answer to the charge, that, before the enticement, the girl told him she was over fifteen years of age. "It is not," said Wright, C. J., "like the case stated by appellant, and found in the books, of a married man, through a mistake of the person, having intercourse with a woman whom he supposed to be his wife, when she was not. In such a case there is no offense, for none was intended either in law or morals. In the case at bar, however, if the defendant enticed the female away for the purpose of defilement or prostitution, there existed a criminal or wrongful intent, even though she was over the age of fifteen. . . . The wrongful intent to do the one act is only transposed to the other. And though the wrong intended is not indictable, the defendant would still be liable if the wrong done is so. 1 Bishop, Crim. Law (1st ed.), §§ 247, 249, 252, 254, note 4. In this last section the rule is thus briefly stated: 'The wrong intended but not done, and the wrong done but not intended, coalesce, and together constitute the same offense, not always in the same degree, as if the prisoner had intended the thing unintentionally done.'"[1] Still,—

§ 632a. Mistake indicating innocence.— In this offense, the same as in any other, there may be a mistake of fact of a sort showing the accused to be, as to the intent, blameless; and then the excuse will be available in law. For example, under the English enactment, the purpose of carnal defilement is not essential to guilt; thereupon, in the language of Bramwell, B., "if the taker believed he had the father's consent, though wrongly, he would have no *mens rea;* so, if he did not know she was in any one's possession, nor in the care or charge of

[1] S. *v.* Ruhl, 8 Iowa, 447, 450, 451. [See P. *v.* Dolan, 96 Cal. 315, 31 Pac. R. 117. But see Mason *v.* S., 29 Tex. Ap. 24, 14 S. W. R. 71.] S. W. R. 463; Riley *v.* S. (Miss.), 18 S. R. 107; S. *v.* Johnson, 115 Mo. 480, 22

any one [or, more accurately, if, after due inquiry, he in good faith believed her not to be]. In those cases, . . . he would not know he was doing an act wrong in itself."[1] So, under the same statute, where one had promised a father on his death-bed to take care of an infant daughter, and after the father's death took her out of lawful custody, Cockburn, C. J., "told the jury that it was clear the prisoner had no right to act as he had done in taking the child out of Mrs. Barnes' custody. But inasmuch as no improper motive was suggested on the part of the prosecution, it might very well be concluded that the prisoner wished the child to live with him, and that he meant to discharge the promise which he alleged he had made to her father, and that he did not suppose he was breaking the law when he took the child away. This being a criminal prosecution, if the jury should take this view of the case, and be of opinion that the prisoner honestly believed that he had a right to the custody of the child, then, although the prisoner was not legally justified, he would be entitled to an acquittal upon this charge." And he was acquitted.[2]

§ 633. From whom taken, etc.—The several statutory words should be considered. Thus,—

"*Father*."— A bastard being, for most purposes, not recognized in the law as the child of its male parent,[3] the word "father" is not in all statutes interpreted to include such parent of a bastard.[4] But in some it is.[5] And though, between the two parents of such a child, the mother has the better claim to its custody,[6] yet the natural father, in the actual custody of an illegitimate girl, is a "father" within the statute now in contemplation, making the taking of her from his custody indictable.[7]

[1] Reg. *v.* Prince (stated *ante*, § 632), Law R. 2 C. C. 154, 175.

[2] Reg. *v.* Tinkler, 1 Fost. & F. 513. The case of Reg *v.* Hilbert, Law R. 1 C. C. 184, was decided wrongly, if it proceeded on the question now under discussion. Yet evidently the ground of the decision was that the girl was not taken out of the father's possession. Compare with Reg. *v.* Green, 3 Fost. & F. 274, therein cited.

[3] 1 Bl. Com. 459; Dorin *v.* Dorin, Law R. 7 H. L. 568; *In re* Ayles' Trusts, 1 Ch. D. 282; Dickinson's Appeal, 42 Conn. 491, [19 Am. R. 553.]

[4] Hard's Case, 2 Salk. 427.

[5] Rex *v.* Hodnett, 1 T. R. 96, 98; 1 Bishop, Mar., Div. & S., § 745.

[6] 2 Bishop, Mar., Div. & S., § 1172; *Ex parte* Knee, 1 New R. 148.

[7] Rex *v.* Cornforth, 2 Stra. 1162; Rex *v.* Sweeting, 1 East, P. C. 457.

"*Other person.*"—The words "or other persons having the legal charge of her person" in the Iowa statute do not require the one in possession to have the full measure of a parent's authority over the girl, or to have been formally appointed her guardian. Yet, on the other hand, a mere temporary charge, like that of a schoolmistress or governess, is not sufficient. If, for example, the parents are dead, those with whom she resides as a member of the family, wholly under their care and protection, have "the legal charge of her person" within the meaning of this statute, though holding no appointment of guardianship.[1] Within this general sort of doctrine are the not very distinct English cases.[2]

§ 634. The taking—(Consent of girl—Force—Enticement). Plainly, under the statute now in contemplation, the girl's consent affords no justification for the taking;[3] though, at one time in England, there seems to have been doubt on this question.[4] There need be no force, actual or constructive.[5] Yet there must be an enticement;[6] so that her voluntary going away, without prompting from the accused, is no offense, though he receives her.[7] Yet nothing more than enticement is required.[8]

[1] S. *v.* Ruhl, 8 Iowa, 447.

[2] Reg. *v.* Burrell, Leigh & C. 354; Reg. *v.* Tinkler, 1 Fost. & F. 513; Reg. *v.* Meadows, 1 Car. & K. 399. Archbold observes: "Upon the death of the father the mother retains her authority, though she marry again, unless the father has disposed of the custody of his child to others; the assent of the second husband is not material. Ratcliffe's Case, 3 Co. 37*a*, 39. . . . And it is not clear from the statute whether it would be an offense to take away a girl against the consent of her parent, but by the consent of one who has the temporary care of her. 1 East, P. C. 457." Archb. Crim. Pl. & Ev. (10th Lond. ed.) 477, 478.

[3] [Thwett *v.* S., 74 Ga. 821; S. *v.* Stone, 106 Mo. 1, 16 S. W. R. 890; S. *v.* Bobbst, 131 Mo. 328, 32 S. W. R. 1149; Scruggs *v.* S., 90 Tenn. 81, 15 S. W. R. 1074; S. *v.* Bussey, 58 Kan. 679, 50 Pac. R. 891.]

[4] Reg. *v.* Mankletow, Dears. 159, 6 Cox, C. C. 143; Reg. *v.* Biswell, 2 Cox, C. C. 279; Reg. *v.* Handley, 1 Fost. & F. 648; Reg. *v.* Baillie, 8 Cox, C. C. 238; Reg. *v.* Timmins, Bell, C. C. 276, 8 Cox, C. C. 401; Reg. *v.* Robb, 4 Fost. & F. 59.

[5] Reg. *v.* Mankletow, *supra;* Reg. *v.* Frazer, 8 Cox, C. C. 446; [Lampton *v.* S. (Miss.), 11 S. R. 656; S. *v.* Stone, 106 Mo. 1, 16 S. W. R. 890; P. *v.* Seeley, 37 Hun, 190.]

[6] Lewis *v.* P., 37 Mich. 518; S. *v.* Crawford, 34 Iowa, 40; Wilson *v.* S., 58 Ga. 328; [S. *v.* Bussey, 58 Kan. 679, 50 Pac. R. 891; S. *v.* Johnson, 115 Mo. 480, 22 S. W. R. 468.]

[7] Reg. *v.* Olifier, 10 Cox, C. C. 402. And see and compare Reg. *v.* Kipps, 4 Cox, C. C. 167; Reg. *v.* Biswell, 2 Cox, C. C. 279; Reg. *v.* Handley, 1 Fost. & F. 648.

[8] But see P. *v.* Parshall, 6 Park. Cr. 129.

Therefore to entice, on one occasion, a girl who goes away on another, and then to receive her, is to commit this offense, though the person doing it does not approve of her going at the time she does.[1]

§ 635. Consent of parent or guardian.— By the terms of these statutes, the consent of the person having the custody of the girl justifies the taking. But it was deemed, on an English trial, and it would appear correctly, that a consent obtained by fraud is, for this purpose, equivalent to none.[2] And Archbold adds that "it seems to be doubtful whether, if the parent once consent, but afterwards dissent, a subsequent taking away can be said to be against the will of the parent."[3] On principle, a parent, like any other person, has his day for repentance; and, if he revokes the authority before the taking, the case stands as though it had not been given. Parents who had encouraged the girl in a lax course of life, so that they might have foreseen what happened, were in one case deemed to have thereby consented.[4]

§ 636. "Possession" of parent or guardian.— If a girl, by a previous arrangement with a man, leaves her father's house and then joins him;[5] or, *a fortiori*, if he puts up a ladder to the window, and she comes down on it and goes away with him,[6] this is a taking of her out of his possession. And the result should, in reason, be deemed the same, if, on her daily route to school, he persuades her to go away with him. Surely a father, to protect his child, ought not to be obliged to keep his arms clasped constantly around her waist. Unhappily, there seems

[1] Reg. *v.* Robb, 4 Fost. & F. 59; Reg. *v.* Olifier, *supra*. [A *dictum* in Reg. *v.* Barrett, 15 Cox, C. C. 658, held that to support an indictment under 24 & 25 Vict., ch. 100, § 56, for unlawfully and fraudulently taking away a child under the age of fourteen years, etc., with intent to deprive the parent of the possession of such child, etc., evidence of fraud exercised upon the child's guardian was insufficient, but that fraud must be shown to have been exercised on the child herself. That *dictum* was overruled in Reg. *v.* Bellis, 17 Cox, C. C 660.]

[2] Reg. *v.* Hopkins, Car. & M. 254 [See Garrett *v.* S., 74 Ga. 191.]

[3] Archb. Crim. Pl. & Ev. (10th Lond. ed.) 478, referring to Calthrop *v.* Axtel, 3 Mod. 168; 1 East, P. C. 457.

[4] Reg. *v.* Primelt, 1 Fost. & F. 50.

[5] Reg. *v.* Mankletow, Dears. 159, 6 Cox, C. C. 143; [S. *v.* Chisenhall, 106 N. C. 676, 11 S. E. R. 518. See S. *v.* Round, 82 Mo. 679; P. *v.* Cook, 61 Cal. 478; S. *v.* Gordon, 46 N. J. L. 432.]

[6] Reg. *v.* Robins, 1 Car. & K. 456.

from some of the cases to be doubt whether this is the doctrine in England;[1] yet from others it appears to be.[2]

§ 637. How long and far away.—It is not necessary that the accused person should keep, or intend to keep, the girl permanently from her parents or guardian, or remove her beyond their immediate neighborhood.[3] Where she was taken from her father's house for an hour or two, and married, but not defiled, the absence was adjudged sufficient.[4] *A fortiori* it was so where the defendant had her three days, sleeping with her at night.[5]

[**§ 637a. Where a statute provides punishment for any guardian of any female ward under the age of eighteen years, or any other person to whose care and protection any such female shall have been confided, who shall defile her, by carnally knowing her while she remains in his care, custody or employment, a girl employed as a domestic servant[6] is within the statute, and previous unchastity[7] or consent[8] constitutes no defense.]

§ 638. "Under promise of marriage."— Some of the statutes, especially those which make an illicit intercourse indispensable, require the seduction to be effected "under promise

[1] Reg. *v.* Hibbert, Law R. 1 C. C. 184; Reg. *v.* Green, 3 Fost. & F. 274.

[2] Reg. *v.* Mankletow, Dears. 159, where Jervis, C. J., speaking for the whole court, said: "A manual possession is not necessary. If the girl were a member of the family, and under the father's control, there is a sufficient possession. If a girl leaves her father's house for a particular purpose, with his sanction, she cannot legally be said to be out of her father's possession." Page 165. And see Reg. *v.* Burrell, Leigh & C. 354; [Reg. *v.* Henkers, 16 Cox, C. C. 257.]

[3] Slocum *v.* P., 90 Ill. 274.

[4] Reg. *v.* Baillie, 8 Cox, C. C. 238.

[5] Reg. *v.* Timmins, Bell, C. C. 276, 8 Cox, C. C. 401. And see Reg. *v.* Hopkins, Car. & M. 254; [South *v.* S., 97 Tenn. 496. 37 S. W. R. 210. For constructions of Kentucky statute against detaining a woman against her will with intent to have carnal knowledge of her, see Malone *v.* Com., 91 Ky. 307, 15 S. W. R. 856; Couch *v.* Com. (Ky.), 29 S. W. R. 29; Riley *v.* Com. (Ky.), 55 S. W. R. 547; Paynter *v.* Com. (Ky.), 55 S. W. R. 687.]

[6] [S. *v.* Terry, 106 Mo. 209, 17 S. W. R. 288; S. *v.* Young, 99 Mo. 284, 12 S. W. R. 642; S. *v.* Strattman, 100 Mo. 540, 13 S. W. R. 814; S. *v.* Hill, 134 Mo. 663, 36 S. W. R. 228. See also S. *v.* Summar, 143 Mo. 220, 45 S. W. R. 254; S. *v.* Kavanaugh, 135 Mo. 111, 33 S. W. R. 33; S. *v.* Napper, 141 Mo. 401, 42 S. W. R. 957; S. *v.* Sibley, 131 Mo. 519, 33 S. W. R. 167; S. *v.* McClain, 137 Mo. 307, 38 S. W. R. 906.]

[7] [S. *v.* Summar, 143 Mo. 220, 45 S. W. R. 254; S. *v.* Sibley, 131 Mo. 519, 33 S. W. R. 167; S. *v.* Strattman, 100 Mo. 540, 13 S. W. R. 814.]

[8] [S. *v.* Rogers, 108 Mo. 202, 18 S. W. R. 976.]

of marriage."[1] By construction whereof, if the man is already married to another, and the woman knows it, so that she could not be influenced by his promise, the statutory wrong becomes impossible;[2] but otherwise if she does not know it,[3] because then the promise may influence her the same as though he was really free. And it will be even binding on him to the extent of furnishing her ground for an action for breach of promise.[4] Yet his liability to a civil action if he breaks his vow is not strictly necessary; as, if he is a minor arrived at puberty, he can commit this offense.[5] Or, if the marriage promise was the inducement to the girl to yield to him, rendering it void because founded on an immoral consideration,[6] it is still sufficient as foundation for this indictment.[7] Though the parties are already under marriage engagement, if the woman yields, not by reason of the man's promise of marriage, but simply for the gratification of a criminal desire, he does not commit the offense;[8] yet the subsistence of the engagement does not render

[1] N. Y. Stats of 1848, ch. 111; Callahan *v.* S., 63 Ind. 198; [S. *v.* Hemm, 82 Iowa, 609, 48 N. W. R. 971; S. *v.* Hamann (Iowa), 80 N. W. R. 1064; P. *v.* Samonset, 97 Cal. 448, 32 Pac. R. 520; S. *v.* Horton, 100 N. C. 443, 6 S. E. R. 238, 6 Am. St. R. 613; Phillips *v.* S., 108 Ind. 406, 9 N. E. R. 345; Rice *v.* Com., 102 Pa. St. 408.]

[2] Callahan *v.* S., *supra;* Wood *v.* S., 48 Ga. 192, [15 Am. R. 664.]

[3] P. *v.* Alger, 1 Park. Cr. 333. See S. *v.* Gates, 27 Minn. 52.

[4] Bishop, Con., § 693; Wild *v.* Harris, 7 C. B. 999; Millward *v.* Littlewood, 5 Exch. 775, 1 Eng. L. & Eq. 408; Kelley *v.* Riley, 106 Mass. 339, 342.

[5] Kenyon *v.* P., 26 N. Y. 203, [84 Am. D. 177.]

[6] Bishop, Con., § 495. [Promise to marry conditioned on pregnancy will support the charge. S. *v.* Hughes, 106 Iowa, 125, 76 N. W. R. 520, 68 Am. St. R. 288; S. *v.* Hemm, 82 Iowa, 609, 48 N. W. R. 971; P. *v.* Hustis, 32 Hun, 58. But the contrary view was taken in P. *v.* Van Alstyne, 144 N. Y. 361, 39 N. E. R. 343, and P. *v.* Duryea, 30 N. Y. S. 877, 81 Hun, 390, as well as in S. *v.* Adams, 25 Oreg. 172, 35 Pac. R. 36, 22 L. R. A. 840. See Spenrath *v.* S. (Tex. Cr. R.), 48 S. W. R. 192, and S. *v.* Cochran, 10 Wash. 562, 39 Pac. R. 155; O'Neill *v.* S., 85 Ga. 383, 11 S. E. R. 856.]

[7] Kenyon *v.* P., *supra;* Callahan *v.* S., 63 Ind. 198; Boyce *v.* People, 55 N. Y. 644. [As to repeating promise of marriage at the time of the seduction, see Bailey *v.* S., 36 Tex. Cr. R. 540. 38 S. W. R. 185; S. *v.* Brassfield, 81 Mo. 151, 5 Am. R. 234; McTyier *v.* S., 91 Ga. 254, 18 S. E. R. 140.]

[8] P. *v.* Clark, 33 Mich. 112; Bowers *v.* S., 29 Ohio St. 542; [Barnes *v.* S., 37 Tex. Cr. R. 320, 39 S. W. R. 684. Where consent was given under promise of marriage, the offense is seduction, although force was used to accomplish the act. P. *v.* De Fore, 64 Mich. 693, 31 N. W. R. 585, 8 Am. St. R. 863. The Texas statute requires, in addition to promise of marriage, some other means than mere appeal to the lust or passion of the woman. Putnam *v.* S., 29 Tex. Ap. 454, 16 S. W. R. 97, 25 Am. St. R. 788.]

his act the less a crime, if she submits from reliance thereon. In the words of Bleckley, J.: "To make love to a woman, woo her, make honorable proposals of marriage, have them accepted, and afterwards to undo her under a solemn repetition of the engagement vow, is to employ persuasion as well as promises of marriage."[1]

§ 639. "Previous chaste character." — Under some of the statutes, the woman, to bring the case within them, must be of "previous chaste character." The meaning is, not that her reputation must be good, but that she must possess actual personal virtue.[2] Therefore a single act or a series of acts of illicit connection by her may be shown on behalf of the defendant,[3] but not her bad reputation for chastity.[4] Nor, after her virtue is destroyed by the defendant, are the like acts of hers relevant in his defense.[5] The required chastity must exist at the time of the seduction;[6] and, though she has been unchaste, if she has reformed, she is chaste within the meaning of the statute.[7] In reason, therefore, a single incontinent act does not necessarily, in law, take away a woman's "previously chaste character;" for she may repent of it instantly, and not repeat it.

[1] Wilson *v.* S., 58 Ga. 328, 331; [Jones *v.* S., 90 Ga. 616, 16 S. E. R. 380.]

[2] [Mills *v.* Com., 93 Va. 815, 22 S. E. R. 86; P. *v.* Nelson, 153 N. Y. 90, 46 N. E. R. 1040, 60 Am. St. R. 592. But the woman is not unchaste because she was compelled to yield her virtue. P. *v.* Gibbs, 70 Mich. 425, 38 N. W. R. 257.]

[3] S. *v.* Shean, 32 Iowa, 88; Kenyon *v.* P., 26 N. Y. 203, [84 Am. D. 177;] Lyons *v.* S., 52 Ind. 426; P. *v.* Clark, 33 Mich. 112; [S. *v.* Wheeler, 94 Mo. 252, 7 S. W. R. 103; Davis *v.* S., 36 Tex. Cr. R. 548, 38 S. W. R. 174.]

[4] Kenyon *v.* P., *supra;* Kauffman *v.* P., 11 Hun, 82; P. *v.* Brewer, 27 Mich. 134. Yet reputation has been deemed admissible to support or discredit the testimony as to particular acts. S. *v.* Prizer, 49 Iowa, 531, [31 Am. R. 155;] S. *v.* Deitrick, 51 Iowa, 467; [Brown *v.* S., 72 Md. 468, 20 Atl. R. 186; Carroll *v.* S., 74 Miss. 688, 22 S. R. 295, 60 Am. St. R. 539; Powell *v.* S. (Miss.), 20 S. R. 4; P. *v.* Samonset, 97 Cal. 448, 32 Pac. R. 520; S. *v.* Lockerby, 50 Minn. 363, 52 N. W. R. 958, 36 Am. St. R. 656; Zabriskie *v.* S., 43 N. J. L. 640, 39 Am. R. 610. See S. *v.* Clark, 9 Oreg. 406.]

[5] Boyce *v.* P., 55 N. Y. 644; S. *v.* Deitrick, *supra.*

[6] S. *v.* Gates, 27 Minn. 52; [Smith *v.* Com. (Ky.), 32 S. W. R. 174; Suther *v.* S., 118 Ala. 88, 24 S. R. 43.]

[7] P. *v.* Clark, 33 Mich. 112; Carpenter *v.* P., 8 Barb. 603; Crozier *v.* P., 1 Park. Cr. 453; Kenyon *v.* P., 26 N. Y. 203, [84 Am. D. 177;] S. *v.* Carron, 18 Iowa, 372, 375, [87 Am. D. 401;] Andre *v.* S., 5 Iowa, 389, [68 Am. D. 708;] Boak *v.* S., 5 Iowa, 430; Bowers *v.* S., 29 Ohio St. 542, 545; S. *v.* Dunn, 53 Iowa, 526. See Safford *v.* P., 1 Park. Cr. 474; [S. *v.* Moore, 78 Iowa, 494, 43 N. W. R. 273; Wilson *v.* S., 73 Ala. 257.]

"*Virtuous*," — in a like connection in a statute, used with reference to an unmarried woman, implies something of purity of heart and feeling beyond the mere physical fact that she has not been defiled.[1]

"*Good repute*."— The statutory words in Ohio are "of good repute for chastity." Under them, specific incontinent acts cannot be shown, but the question is of the girl's general reputation[2] at the time of the seduction. This event may have made a good reputation bad; so that the inquiry cannot be what it is at the time of the trial.[3]

§ 640. The seducing.— In determining whether or not there is a sufficient seducing, the precise statutory terms should be regarded. Aside from such terms, the kind and extent of the seductive arts appear to depend less on absolute rule than on the circumstances of the particular case; among them, the character, age, intelligence and education of the woman. In general, if in fact they accomplished the object, they are sufficient in law.[4] For example, no more may be required than "the common blandishments of a lover."[5] But there must be a holding out of some sort of inducement.[6] And,—

"*Inveigle*."— Under the statutory word "inveigle," a woman is not inveigled away, if she leaves her home purely of her own volition, whatever is done afterward.[7]

[1] Wood *v.* S., 48 Ga. 192, [15 Am. R. 664; O'Neill *v.* S., 85 Ga. 383, 11 S. E. R. 856; Kellar *v.* S., 102 Ga. 506, 31 S. E. R. 292; S. *v.* Crowell, 116 N. C. 1052, 21 S. E. R. 502.]

[2] Bowers *v.* S., 29 Ohio St. 542; [S. *v.* Bryan, 34 Kan. 68, 8 Pac. R. 260; S. *v.* Atterbury, 59 Kan. 237, 52 Pac. R. 451; S. *v.* Sharp, 132 Mo. 165, 33 S. W. R. 795; S. *v.* Eckler, 106 Mo. 585, 17 S. W. R. 814, 27 Am. St. R. 372; Oliver *v.* Com., 101 Pa. St. 215, 47 Am. R. 704.]

[3] P. *v.* Brewer, 27 Mich. 134.

[4] S. *v.* Higdon, 32 Iowa, 262; S. *v.* Groome, 10 Iowa, 308; [S. *v.* Marshall, 137 Mo. 463, 39 S. W. R. 63; S. *v.* Hayes, 105 Iowa, 82, 74 N. W. R. 757.]

[5] Archb. Crim. Pl. & Ev. (10th Lond. ed.) 478, referring to Rex *v.* Twisleton, 1 Lev. 257, 1 Sid. 387, 2 Keb. 432; 1 Hawk. P. C. (7th ed.), ch. 41, § 10. ["*Artifices*," see S. *v.* Fitzgerald, 63 Iowa, 268, 19 N. W. R. 202; Hawn *v.* Banghart, 76 Iowa, 683, 39 N. W. R. 251, 14 Am. St. R. 261. For definitions of "deception," "temptation," "flattery" and "art," see Suther *v.* S., 118 Ala. 88, 24 S. R. 43.]

[6] P. *v.* Clark, 33 Mich. 112; [Smith *v.* S., 107 Ala. 139, 18 S. R. 306; Carney *v.* S., 79 Ala. 14; Powell *v.* S. (Miss.), 20 S. R. 4; Reg. *v.* Henkers, 16 Cox, C. C. 257.]

[7] Carpenter *v.* P., 8 Barb. 603. See further, as to the meaning of the word "inveigle," U. S. *v.* Aucarola, 17 Blatch. 423.

§ 641. "Purpose of prostitution" — ("Concubinage").— Some of the statutes require the enticing away to be "for the purpose of *prostitution*." Something more than a single illicit act, or series of such acts, with the one enticer, must be contemplated.[1] And we have intimations that the intent must be to make the woman a "prostitute;"[2] defined, in one of the cases, to be "a female given to indiscriminate lewdness for gain."[3] It would seem to the writer that, while this may be so in some connections in a statute, it is not necessarily so in all; and that a distinction may be taken between an act of prostitution and the condition of being a prostitute. Where, by the statute, the offense consisted in enticing "away any unmarried female of a chaste life and conversation from the parents' house . . . for the purpose of prostitution or concubinage," a married man was held to have committed it, who induced the daughter of a neighbor to come from her father's house to his three or four times a week and have connection with him, frequently in the presence of his wife, during a period of nearly nine months. The intent and enticing away, without the indecency following, would have completed the crime; and how much less, can be only matter of opinion.[4] Indeed, to satisfy the word "concubinage," in a statute similar to this, a single illicit act has been adjudged sufficient.[5]

[1] [The gist of the action is the taking away for the purpose of prostitution or concubinage, against the will of the person having legal charge of the girl; and her previous unchaste conduct furnishes no defense. P. *v.* Demourset, 71 Cal. 611, 12 Pac. R. 788; S. *v.* Johnson, 115 Mo. 480, 22 S. W. R. 463; S. *v.* Bobbst, 131 Mo. 328, 32 S. W. R. 1149.]

[2] S. *v.* Ruhl, 8 Iowa, 447; Com. *v.* Cook, 12 Met. 93; Carpenter *v.* P., 8 Barb. 603; S. *v.* Stoyell, 54 Me. 24; P. *v.* Parshall, 6 Park. Cr. 129. See Sheehey *v.* Cokley, 43 Iowa, 183, [22 Am. R. 236;] Osborn *v.* S., 52 Ind. 526.

[3] S. *v.* Stoyell, *supra*, by Appleton, C. J.; [*Ex parte* Estrado, 88 Cal. 316, 26 Pac. R. 209; P. *v.* Cook, 61 Cal. 478; P. *v.* Cummons, 56 Mich. 544, 23 N. W. R. 315; P. *v.* Stott, 4 N. Y. Cr. R. 306; P. *v.* Plath, 100 N. Y. 590, 3 N. E. R. 790, 53 Am. R. 236.]

[4] Slocum *v.* P., 90 Ill. 274; [Henderson *v.* P., 124 Ill. 607, 17 N. E. R. 68, 7 Am. St. R. 391; S. *v.* Richardson, 117 Mo. 586, 23 S. W. R. 769; S. *v.* Bobbst, 131 Mo. 328, 32 S. W. R. 1149. See U. S. *v.* Cloya, 35 Fed. R. 493; Jenkins *v.* S., 83 Tenn. 674; Scruggs *v.* S., 90 Tenn. 81, 15 S. W. R. 1074. Where the statute specifies "house of ill-fame or house of assignation," the place to which the girl is seduced must be of that character. S. *v.* McCrum, 38 Minn. 154, 36 N. W. R. 103. See Bunfill *v.* P., 154 Ill. 640, 39 N. E. R. 565.]

[5] S. *v.* Feasel, 74 Mo. 524; [S. *v.* Bussey, 58 Kan. 679, 50 Pac. R. 891; S. *v.* Stone, 106 Mo. 1, 16 S. W. R. 890.

§ 642. "Seduce and debauch."— Where the statutory words were "seduce and debauch any unmarried woman," with no qualification as to her previous character, the majority of the Michigan court held that, if the defendant has already seduced the complainant under a promise of marriage, then she yields to his embraces under a fresh promise, but for which she would not yield, this subsequent act makes him indictable, though the earlier is barred by the statute of limitations. Said Christiancy, J.: "While we express no opinion as to a female who is shown to be unchaste with other men, we think all that is necessary in a case like the present, where there is no such evidence, is that her personal character should be such as to satisfy the jury that she would not have yielded in the particular case without the express promise of marriage. To require any higher standard of virtue would be to nullify the statute, by making seduction impossible in any case, as well in reference to the first as to any subsequent act of intercourse."[1]

§ 642a. "Procure to have," etc.— Under a statute which makes indictable one who "procures any female to have illicit carnal connection with any man," the offense is not committed by a male person who merely seduces a woman into connection with himself. The procurement must be to have connection with another.[2]

§ 643. Distinguished from rape.— In rape, the copulation must be effected by force;[3] in the present offense, by seductive arts.[4] Therefore a rape cannot be also a seduction.[5] And it

S. *v.* Gibson, 111 Mo. 92, 19 S. W. R. 980, held that taking a girl under age, etc., for a single occasion, would support the charge, but that case was overruled in S. *v.* Wilkinson, 121 Mo. 485, 26 S. W. R. 366. An indictment against three men charging them with having taken a girl, etc., for the purpose of concubinage is fatally defective. She could not be the concubine of all three. S. *v.* Gibson, 111 Mo. 92, 19 S. W. R. 980.]

[1] P. *v.* Millspaugh, 11 Mich. 278, 283. And see P. *v.* Clark, 33 Mich. 112; P. *v.* Brewer, 27 Mich. 134; S. *v.* Jones, 16 Kan. 608; P. *v.* Roderigas, 49 Cal. 9; S. *v.* Groome, 10 Iowa, 308. As to the Connecticut statute, see S. *v.* Bierce, 27 Conn. 319. [See S. *v.* King, 9 S. D. 628, 70 N. W. R. 1046; S. *v.* Marshall, 137 Mo. 463, 39 S. W. R. 63.]

[2] P. *v.* Roderigas, 49 Cal. 9; [S. *v.* Brow, 64 N. H. 577, 15 Atl. R. 216. But not necessarily with a particular person other than defendant. Stevens *v.* S., 112 Ind. 433, 14 N. E. R. 251. And the offense is not committed if the procuring is for one occasion only. Haygood *v.* S., 98 Ala. 61, 13 S. R. 325.]

[3] Crim. Law, II, §§ 1115, 1120, 1121.

[4] *Ante*, § 640.

[5] S. *v.* Lewis, 48 Iowa, 578, 579, [30 Am. R. 407;] S. *v.* Kingsley, 39 Iowa, 439.

was even held to be error to charge the jury that the crime was seduction although the woman "consented partly through fear and partly because the defendant hurt her."[1] But —

Seduction — Fornication — Adultery — Bastardy. — There is no antagonism between seduction and fornication, adultery or bastardy; so that, on an indictment for the first, there may be a conviction for any one of the others, if included within the allegation.[2]

II. The Procedure.

§ 644. Course of discussion. — We shall consider, first, the indictment; secondly, the evidence.

First. **The indictment:** —

Taking girl under sixteen. — It is a good indictment upon the modern English statute before recited[3] to say that the defendant, at a time and place stated, unlawfully did take one C. out of the possession and against the will of B., her father, she the said C. being then and there an unmarried girl under the age of sixteen years, to wit, of the age of fifteen years.[4] The particular allegation of "being an unmarried girl" is said by Archbold to be sufficient.[5]

§ 645. Words of statute. — In general it is sufficient to charge this offense in the words of the statute,[6] adding the time and place and the names of persons.[7]

§ 646. "Purpose of prostitution." — Where the statute requires the taking to be "for the purpose of prostitution,"[8] this element of the offense must be alleged. It is inadequate to

[1] Croghan *v.* S., 22 Wis. 444, 445. And see Furman *v.* Applegate, 3 Zab. 28.

[2] Wood *v.* S., 48 Ga. 192, [15 Am. R. 664;] Hopper *v.* S., 54 Ga. 389; Nicholson *v.* Com., 91 Pa. St. 390.

[3] *Ante*, § 631.

[4] Archb. Crim. Pl. & Ev. (10th Lond. ed.) 477. Such was the form in Reg. *v.* Robins, 1 Car. & K. 456; Reg. *v.* Biswell, 2 Cox, C. C. 279. For other forms on this statute, see Reg. *v.* Hopkins, Car. & M. 254; Reg. *v.* Meadows, 1 Car. & K. 399; Reg. *v.* Timmins, Bell, C. C. 276, 8 Cox, C. C. 401.

[5] Referring to Rex *v.* Moore, 2 Lev. 179; Rex *v.* Boyall, 2 Bur. 832.

[6] S. *v.* Curran, 51 Iowa, 112; [S. *v.* Whalen, 98 Iowa, 662, 68 N. W. R. 554; P. *v.* Fowler, 88 Cal. 136, 25 Pac. R. 110; Cargill *v.* Com. (Ky.), 13 S. W. R. 916; S. *v.* Primm, 98 Mo. 368, 11 S. W. R. 732.]

[7] West *v.* S., 1 Wis. 209. [See S. *v.* Conkright, 58 Iowa, 338, 12 N. W. R. 283.]

[8] *Ante*, § 641.

say "for the purpose of having illicit sexual intercourse with her,"[1] which, we have seen,[2] is a different thing.[3] But,—

"*Promise of marriage.*" — Where the statutory words were "under promise of marriage," it was adjudged not ill to say in the indictment "by means of a promise of marriage."[4]

§ 647. "**Previous chaste character.**" — If the statute requires the female to be of "previous chaste character,"[5] the indictment must aver that at the time of the seduction she was so. And perhaps, in some cases, it must where these words are not in the statute.[6] In Indiana, an indictment to the effect that the defendant had illicit carnal intercourse with one C., a female of good repute for chastity, and below the age of twenty-one years, under a promise of marriage made by him to her, was held to be sufficient.[7]

§ 648. Secondly. **The evidence:** —

Previous chaste character. — Where the woman's previous chaste character is an element in the offense and it must be alleged,[8] it must also be passed upon by the jury.[9] But —

Presumption of chastity. — Some courts deem the presumption of her chastity sufficient to establish it until evidence appears to the contrary.[10] Others hold that, since also the defendant is presumed to be innocent,[11] and so the two presumptions are in conflict, some evidence of her chastity must be

[1] Osborn *v.* S., 52 Ind. 526; [S. *v.* Terrill, 76 Iowa, 149, 4 N. W. R. 128.]

[2] *Ante*, § 641.

[3] [As to sufficiency of indictment under statute against "defiling female ward by guardian" (*ante*, § 637*a*), see S. *v.* Buster, 90 Mo. 514, 2 S. W. R. 834; S. *v.* Sipe, 38 Kan. 201, 16 Pac. R. 257.]

[4] Steinhouse *v.* S., 47 Ind. 17. [See S. *v.* Eckler, 106 Mo. 585, 17 S. W. R. 814, 27 Am. St. R. 372.]

[5] *Ante*, § 639.

[6] P. *v.* Roderigas, 49 Cal. 9. Compare S. *v.* Jones, 16 Kan. 608: [P. *v.* Wallace, 109 Cal. 611, 42 Pac. R. 159.]

[7] S. *v.* Stogdel, 13 Ind. 565.

[8] *Ante*, §§ 639, 647.

[9] S. *v.* Carron, 18 Iowa, 372, 376, [87 Am. D. 401; S. *v.* Gates, 27 Minn. 52, 6 N. W. R. 404; S. *v.* Wenz, 41 Minn. 196, 42 N. W. R. 933; S. *v.* Lockerby, 50 Minn. 363, 52 N. W. R. 958, 36 Am. St. R. 656.]

[10] S. *v.* Wells, 48 Iowa, 671; S. *v.* Higdon, 32 Iowa, 262; S. *v.* Shean, 32 Iowa, 88; Andre *v.* S., 5 Iowa, 389, [68 Am. D. 708;] Boak *v.* S., 5 Iowa, 430; [Smith *v.* S., 118 Ala. 117, 24 S. R. 55; Polk *v.* S., 40 Ark. 482, 48 Am. R. 17; McTyier *v.* S., 91 Ga. 254, 18 S. E. R. 140; Bradshaw *v.* P., 153 Ill. 156, 38 N. E. R. 652; S. *v.* Hemm, 82 Iowa, 609, 48 N. W. R. 971; S. *v.* Burns (Iowa), 78 N. W. R. 681; Ferguson *v.* S., 71 Miss. 805, 15 S. R. 66, 42 Am. St. R. 492; S. *v.* McClintic, 73 Iowa, 663, 35 N. W. R. 696; Barker *v.* Com., 90 Va. 820, 20 S. E. R. 776; Mills *v.* Com., 93 Va. 815, 22 S. E. R. 863; Flick *v.* Com. (Va.), 34 S. E. R. 39.]

[11] Crim. Pro., I, §§ 1103–1106.

brought forward in the first instance.[1] This conclusion seems better to accord with the legal analogies and reasons than the other; while yet ordinarily such evidence can in the nature of things be only slight and circumstantial. If the woman is a witness, she may testify to her previous virtue.[2]

§ 649. Proving woman unchaste.— Similar methods to those explained in the next chapter for proving adultery may be resorted to on this issue. Wanton and indiscreet conduct, for example, may be shown.[3] If she is a witness, she may be asked, on cross-examination, whether she has not used indecent language with other men than the defendant, and been found in bed with them.[4] But it has been held that improper conduct eight years before the alleged seduction, when she was only fourteen years old, is too remote, and it allows too little for the influence of maturer years and probable reformation.[5] We shall see that, in adultery, by the better opinion, libidinous conduct subsequent to the act charged, as well as before, may be shown in aid of the proofs of such act.[6] But, in this offense, on the issue of a previous chastity, the reasons are different. Libidinous conduct after the seduction may be as well traceable to it as to previous unchastity; hence it is not admissible.[7]

§ 650. Supporting prosecuting witness.— In one case a witness for the defendant testified that, on two occasions prior to the seduction charged, he had committed the unlawful act with the woman. And by the majority of the court it was held that the state was properly permitted, in rebuttal of this

[1] West *v.* S., 1 Wis. 209. See also Safford *v.* P., 1 Park. Cr. 474; [Zabriskie *v.* S., 43 N. J. L. 640, 39 Am. R. 610; Oliver *v.* Com., 101 Pa. St. 215, 47 Am. R. 704; S. *v.* McCaskey, 104 Mo. 644, 16 S. W. R. 511; S. *v.* Eckler, 106 Mo. 585, 17 S. W. R. 814, 27 Am. St. R. 372; S. *v.* Thornton, 108 Mo. 640, 18 S. W. R. 841.]

[2] Kenyon *v.* P., 26 N. Y. 203, [84 Am. D. 177.]

[3] S. *v.* Bell, 49 Iowa, 440; P. *v.* McArdle, 5 Park. Cr. 180; [S. *v.* Patterson, 88 Mo. 88, 57 Am. R. 374; S. *v.* Brassfield, 81 Mo. 151, 51 Am. R. 234; O'Neill *v.* S., 85 Ga. 383, 11 S. E. R. 856; S. *v.* Clemons, 78 Iowa, 123, 42 N. W. R. 562; S. *v.* Bell, 79 Iowa, 117, 44 N. W. R. 244; S. *v.* Curran, 51 Iowa, 112, 49 N. W. R. 1006; S. *v.* Baldoser, 88 Iowa, 55, 55 N. W. R. 97.]

[4] S. *v.* Sutherland, 30 Iowa, 570.

[5] S. *v.* Dunn, 53 Iowa, 526, 527; [Suther *v.* S., 118 Ala. 88, 24 S. R. 43, 69 Am. St. R. 52; P. *v.* Kehoe, 123 Cal. 224, 55 Pac. R. 911; S. *v.* Knutson, 91 Iowa, 499, 60 N. W. R. 129; S. *v.* Brassfield, 81 Mo. 151, 51 Am. R. 234.]

[6] *Post*, §§ 679–681.

[7] S. *v.* Wells, 48 Iowa, 671; Mann *v.* S., 34 Ga. 1, 5; [S. *v.* Abegglan, 103 Iowa, 50, 72 N. W. R. 305. But see S. *v.* Robertson, 121 N. C. 551, 28 S. E. R. 59.]

evidence, to introduce "many witnesses, who proved that the prosecutrix was a young woman of good character for chastity, was correct and modest in her deportment, and that, until the occurrence with the defendant, she was considered a virtuous girl." "The fact," said Beck, J., "that a life of purity such as will secure and sustain a reputation for virtue renders in a degree charges of lewdness and sexual indulgence improbable is the ground upon which the evidence objected to was admitted. It is in accord with all experience, and not in conflict with legal principles."[1]

§ 650a. Further of the woman as witness. — The admitting of the injured woman to testify for the state accords with general rule.[2] But some of our statutes, in diverse terms, require her to be corroborated by other evidence, to justify a conviction. For decisions on them, the reader is referred to the note.[3]

§ 651. Whole issue. — The whole issue must be proved.[4] It will vary with the statutes; as, under some, the defendant must be shown to be a married man.[5] Under the greater number there must be evidence of seduction and carnal intercourse.[6]

[1] S. *v.* Shean, 82 Iowa, 88, 91, 92; [Carroll *v.* S., 74 Miss. 688, 22 S. R. 295, 60 Am. St. R. 539; S. *v.* Bryan, 34 Kan. 63, 8 Pac. R. 260. And see S. *v.* Clark, 9 Oreg. 406; P. *v.* Krusick, 93 Cal. 74, 28 Pac. R. 794; Suther *v.* S., 118 Ala. 88, 24 S. R. 43.]

[2] Crim. Pro., I, § 1138; Bowers *v.* S., 29 Ohio St. 542. But see Cole *v.* S., 40 Tex. 147.

[3] Crandall *v.* P., 2 Lans. 309; Kenyon *v.* P., 26 N. Y. 203, [84 Am. D. 177;] S. *v.* Kingsley, 39 Iowa, 439; S. *v.* Painter, 50 Iowa, 317; S. *v.* Smith, 54 Iowa, 743; Boyce *v.* P., 55 N. Y. 644; Armstrong *v.* P., 70 N. Y. 38; S. *v.* Curran, 51 Iowa, 112; S. *v.* Timmens, 4 Minn. 325; [Hart *v.* S., 117 Ala. 183, 23 S. R. 43; Cunningham *v.* S., 73 Ala. 51; Wilson *v.* S., 73 Ala. 527; S. *v.* Keith, 47 Minn. 559, 50 N. W. R. 691; P. *v.* Plath, 100 N. Y. 590, 3 N. E. R. 790, 53 Am. R. 236; P. *v.* Wade, 118 Cal. 672, 50 Pac. R. 841; Rice *v.* Com., 100 Pa. St. 28; Zabriskie *v.* S., 43 N. J. L. 640, 39 Am. R. 610; S. *v.* Bowman, 45 N. J. L. 800; S. *v.* Hayes, 105 Iowa, 82, 74 N. W. R. 757; S. *v.* Arrah, 55 Iowa, 258, 7 N. W. R. 601. Corroboration is not necessary in Missouri (S. *v.* Stone, 106 Mo. 1, 16 S. W. R. 890), except as to promise of marriage, when that is an element of the offense. S. *v.* Hill, 91 Mo. 423.]

[4] For a pretty full case, see Armstrong *v.* P., 70 N. Y. 38. And see S. *v.* Haven, 43 Iowa, 181.

[5] West *v.* S., 1 Wis. 209; [Davis *v.* Com., 98 Ky. 708, 34 S. W. R. 699; Norton *v.* S., 72 Miss. 128, 16 S. R. 264, 18 S. R. 916, 48 Am. St. R. 538; Luckie *v.* S., 33 Tex. Cr. R. 562, 28 S. W. R. 533; S. *v.* Bryan, 34 Kan. 63, 8 Pac. R. 260. Prosecuting witness must be shown to be unmarried. Mesa *v.* S., 17 Tex. Ap. 395; S. *v.* Wheeler, 108 Mo. 658, 18 S. W. R. 924; P. *v.* Krusick, 93 Cal. 74, 28 Pac. R. 794. See S. *v.* Heatherton, 60 Iowa, 175, 14 N. W. R. 230; Bailey *v.* S., 36 Tex. Cr. R. 44, 38 S. W. R. 185.]

[6] S. *v.* Curran, 51 Iowa, 112; Lewis

And under many there must be established a promise of marriage.[1]

§ 652. Court or jury.— The question of the woman's previous chastity is for the jury.[2] The meanings of such words as "seduce,"[3] "prostitution,"[4] and the like, are of law for the court, while the jury deduces the facts from the evidence.

v. P., 37 Mich. 518; P. *v.* Clark, 33 Mich. 112; S. *v.* Danforth, 48 Iowa, 43, [30 Am. R. 387.]

[1] Stinehouse *v.* S., 47 Ind. 17; Com. *v.* Walton, 2 Brews. 487; Cook *v.* P., 2 Thomp. & C. 404.

[2] S. *v.* Carron, 18 Iowa, 372, [87 Am. R. 140.] D. 401.]

[3] S. *v.* Bierce, 27 Conn. 319; [Bailey *v.* S. (Tex. Cr. R.), 30 S. W. R. 669.]

[4] Carpenter *v.* P., 8 Barb. 603. ["Virtuous," definition by the court. O'Neill *v.* S., 85 Ga. 338, 11 S. E. R. 856; McTyier *v.* S., 91 Ga. 254, 18 S. E.

CHAPTER XXXIX.

ADULTERY.

§ 653. Introduction.
654–668. Law of this offense.
669–690. The procedure.

§ 653. How chapter divided.— We shall consider, I. The law of this offense; II. The procedure.

I. The Law of this Offense.

§ 654. Scope of this chapter — Elsewhere.— The subject of this chapter is simple adultery. The various forms of continuous and of open adultery and lascivious behavior, indictable under statutes or as common-law nuisances, are considered in other connections.[1]

At common law.— The simple adultery to be treated of in this chapter is not indictable at the common law.[2] But,—

§ 654a. Under statutes — Their interpretation.— In a considerable number of our states, not all, a single act of adultery is made by statute indictable. The common form of the provision is that one who commits "adultery" shall be punished in a way pointed out; and then it becomes a question of law, what is adultery. Now, although adultery was not punishable in the English common-law courts, it was in the ecclesiastical;[3] and it was ground also for the divorce from bed and board. The word, therefore, had acquired a precise legal meaning; and, for reasons already explained,[4] the courts, in interpreting the new statute, should give it this established meaning. It is —

Adultery defined.— Adultery is the voluntary sexual intercourse of a married person with one not the husband or wife.[5]

[1] *Ante*, § 625; *post*, §§ 695 *et seq.*, 710 *et seq.*; Crim. Law, I, §§ 38, 39, 500, 501, 1083 *et seq.*, 1125 *et seq.*, 1146.

[2] Crim. Law, I, §§ 38, 39, 501; Pollard *v.* Lyon, 1 MacAr. 296.

[3] Id., §§ 38, 39; 2 Burn, Ec. Law, 402, Lewdness; Burgoyne *v.* Free, 2 Hagg. Ec. 456; Watson *v.* Thorp, 1 Phillim. 269.

[4] *Ante*, §§ 96, 97.

[5] 1 Bishop, Mar., Div. & S., § 703; Helfrich *v.* Com., 33 Pa. St. 68, [75 Am. D. 579.]

§ 655. **Differing judicial views.**— Plain as the course of reasoning appears thus far, it has not always been in the minds of our American judges. Largely they have assumed, without inquiry, that the word "adultery" is new in the law; so that, instead of referring it to the ascertained legal meaning, they have sought to define it as a new term. Naturally, discordant opinions have been the result. Some deem the criminal offense committed whenever there is an intercourse whence a spurious issue may proceed; both parties being guilty of it, though one only is married.[1] Again, it is said that "the crime of adultery consists in the illicit commerce of two persons of different sexes, one of whom, at least, is married."[2] These are conclusions from the assumed premises, that the essence of the offense is the danger of a spurious issue. And, carrying out this theory, it is by some held that even a married man does not commit adultery where the woman is unmarried, since in this instance the issue, should there be any, is not imposed upon the marriage.[3] If this theory is right, a woman naturally barren or past child-bearing might multiply lovers to any extent without violating the statute. No such doctrine has been judicially held, and to propose it to a court would be startling. Again,—

§ 656. **Continued.**— We find, in the books, language seeming to favor the proposition that, where either party is married, the carnal act is adultery in both;[4] but probably no adjudication has affirmed that a single woman commits it by a connection with a married man.[5] The Virginia court held that, when the woman is married and the man is not, it is only fornication

[1] S. *v.* Wallace, 9 N. H. 515; S. *v.* Pearce, 2 Blackf. 318; S. *v.* Armstrong, 4 Minn. 335. And see the reasoning in Galbraith's charge (Pennsylvania), 4 Am. Law Reg. 209.

[2] S. *v.* Hinton, 6 Ala. 864; Hull *v.* Hull, 2 Strob. Eq. 174, 187; Tebb's Essay, 6, 7, 35 Law Mag. 68; Shelf. Mar. & Div. 386; Rees Cyc., tit. Fornication.

[3] Galbraith's Charge, 4 Am. Law Reg. 209; S. *v.* Lash, 1 Harrison, 380, [32 Am. D. 397;] Hood *v.* S., 56 Ind. 263, [26 Am. R. 21.] And see S. *v.* Armstrong, 4 Minn. 335.

[4] S. *v.* Hinton, 6 Ala. 864; Hull *v.* Hull, 2 Strob. Eq. 174, 187.

[5] The case of S. *v.* Hinton, *supra*, appears to be one of *living together* in adultery, between which and simple adultery there may be a distinction. The unmarried woman, however, would be guilty of the offense under the statute of Iowa. *Post*, § 658. Whether she would be a principal of the second degree, under a familiar common-law rule, see *post*, § 659. [White *v.* S., 74 Ala. 31; Banks *v.* S., 96 Ala. 78, 11 S. R. 404; Webb *v.* S., 24 Tex. Ap. 164, 5 S. W. R. 651.]

in him.[1] And this conducts us to what we have seen to be the conclusion of reason;[2] and, let us add, it is also the doctrine deemed best sustained by the authorities; namely, that,—

True view.—In all cases where one of the parties to an act of criminal intercourse is married and the other is not, it is adultery in the married party and fornication in the unmarried. Such, by the superior weight of the adjudications, the doctrine is believed to be;[3] and,—

[1] Com. *v.* Lafferty, 6 Grat. 672. In a charge to the grand jury Galbraith, P. J., laid this down as the better law for Pennsylvania. He considered that the authorities in this state (see the next notes) have not established a different doctrine. 4 Am. Law Reg. 209. See *post*, § 658.

[2] *Ante*, § 654*a*.

[3] S. *v.* Buchanan, 55 Ala. 154, 157; S. *v.* Fellows, 50 Wis. 65; Com. *v.* Call, 21 Pick. 509, [32 Am. D. 284;] Com. *v.* Elwell, 2 Met. 190, [35 Am. D. 398;] Respublica *v.* Roberts, 2 Dall. 124, 1 Yeates, 6; S. *v.* Hutchinson, 36 Me. 261; Cook *v.* S., 11 Ga. 53, 56, [56 Am. D. 410;] Com. *v.* Burton, Recorder's Decisions, 83, 85; Terr. *v.* Whitcomb, 1 Mont. 359; Miner *v.* P., 58 Ill. 59; Hunter *v.* U. S., 1 Pin. 91, [39 Am. D. 277;] 2 Greenl. Ev., § 48; 6 Dane, Abr. 677; 1 Bishop, Mar., Div. & S., § 703; Bouvier, Law Dict., tit. Adultery; Train & Heard, Prec. 22. And see Godol. Abr. 469–476; Ayl. Parer. 43; S. *v.* Way, 6 Vt. 311.

In the Scotch law.—In Scotland adultery is a statutory crime—"heinous, and in some cases capital;"—but Hume, who wrote near the beginning of the present century, remarked that it "has not, for many years, been the subject of a criminal prosecution." 1 Hume, Crim. Law (2d ed.), 449. An examination of the modern Scotch reports shows also an entire absence of decisions on this offense. Hume says: "Adultery, in our practice, is committed alike, whether it be that a married man has knowledge of an unmarried woman, or that a married woman is known to an unmarried man. It is true the civilians and foreign doctors have much disputed, and not without plausible grounds, whether such was the rule of the civil law or the law of Moses. Neither can it be said that the expressions of our statutes are of themselves decisive of the question either way; and certainly it is not to be denied that the more heinous mode of this offense is in the seduction of a married woman, which is so severe a blow at the husband's peace and the credit and welfare of his family. Yet our custom, perhaps, on the whole, with a wiser policy and sounder judgment, though chiefly actuated of old by consideration of the sin and the peril to the souls of the parties, has always disowned any such distinction, and, in this article as in that of divorce, has invested the spouses with equal privileges, prescribed to both one line of duty, and exposed them to the same hazards." 1 Hume, Crim. Law (2d ed.), 451. In Erskine's Principles of the Law of Scotland (12th ed.), p. 531, it is said: "This crime [adultery] could, neither by the Roman law (*l.* 6, § 1, *ad leg. Jul. de adult.*), nor the Jewish (*Lev.* xx, 10; *Deut.* xxii, 22), be committed but where the guilty woman was the wife of another. By ours it is adultery if either the man or the woman be married." Mackenzie says: "*Adulterium est vitiatio alterius thori*, the violation of another's bed, and is com-

§ 657. Further of reasons.— However men may differ in their speculations, our *law*, from its earliest periods down to the very time when these adultery statutes were enacted, has placed the incontinence of husband and wife on an exact level; granting the same remedy of divorce from bed and board — or, under statutes, from the bond of matrimony — for either;[1] it has had constantly one definition, and no more, of "adultery." We have seen what the definition is.[2] A court sits to administer the *law* which it finds, not the *speculations* of the incumbents of the bench or of anybody else. So that, whatever the private views of a judge may be, he should judicially give to the word "adultery" in the statutes under contemplation the meaning which the *law* had assigned to it, unless the legislature has indicated otherwise. Still,—

§ 658. Statutory definings.— In some of our states the statutes are in terms to exclude in part or in full these questions and settle doubts. Thus, "When the crime is committed between a married woman and a man who is unmarried, the man shall be deemed guilty of adultery."[3] Again, "If any married man shall have carnal connection with any woman not his lawful wife, or any married woman have carnal connection with any man not her lawful husband, he or she so offending shall be deemed guilty of adultery; and on conviction be," etc.[4] A form of different meaning is, "When the crime is committed

mitted by a married person's lying with one unmarried, or an unmarried person lying with one who is married." He, however, adds: "By the civil law, when a man who was married did lie with a woman who was free, that was judged to be no adultery,"— a proposition to which he does not assent as belonging to the law of Scotland. Mackenzie, Crim. Law, 118, § 11; [S. *v.* Fellows, 50 Wis. 65, 6 N. W. R. 239; S. *v.* Chandler. 96 Ind. 591.]

[1] In England, a statute passed in 1857 — 1 Bishop, Mar., Div. & S., § 65 and note — has made some distinction. But our adultery statutes were earlier enacted; and in every view it cannot affect interpretations with us.

[2] *Ante*, § 654*a*.

[3] Mass. R. S., ch. 130, § 1; Gen. Stats., ch. 165, § 8; Com. *v.* Reardon, 6 Cush. 78; Com. *v.* Elwell, 2 Met. 190, [35 Am. D. 398.]

[4] Pa. Act of March 31, 1860, § 88, Purd. Dig. (9th ed.) 223. About the time of this enactment the Pennsylvania court settled the law for the state in accordance with its terms. Helfrich *v.* Com., 33 Pa. St. 68, [75 Am. D. 579.] For the Georgia provisions and their interpretation, see Castleberry *v.* Kelly, 26 Ga. 606; Cook *v.* S., 11 Ga. 53, [56 Am. D. 410;] Bigby *v.* S., 44 Ga. 344.

between parties only one of whom is married, both are equally guilty of adultery, and shall be prosecuted accordingly."[1]

§ 659. Aider at fact.—If there is a state in which adultery is made a statutory felony, and at the same time no punishment is provided for fornication, the unwritten law, by the rules and reasons whereof all statutes are to be construed,[2] will require the unmarried party in the unlawful act, where only one is married, to be punished for participating with the other as principal in the second degree,[3] unless the statute is in terms to exclude this consequence.[4] Even where the offense is a misdemeanor, the interpretation which imputes legal guilt to the participant will be required if the punishment is heavy, not if it is light.[5] But, in most of the states wherein adultery is punishable, fornication is also, yet less heavily. The statutory terms, therefore, will take the place of the common-law construction; and, the unmarried party being punishable for fornication, he will not be also for participating with the other in adultery.

§ 660. Consent of non-accused party — (Adultery — Fornication — Incest — Rape).—As every offense to be punishable must be voluntary, so in particular must be adultery.[6] But alike in adultery,[7] and, it is believed, in fornication and in incest, where the crime consists of one's unlawful carnal knowledge of another, it is immaterial whether the other participated under circumstances to incur guilt or not,—just as sodomy may be committed either with a responsible human being or an irresponsible one or a beast.[8] Therefore the same act of penetrating a woman who, for example, is too drunk to give consent, may be prosecuted either as a rape[9] or as adultery,[10] at the election of the prosecuting power. There are cases which deny this, and hold that adultery, fornication and incest can be com-

[1] S. *v.* Wilson, 22 Iowa, 364; [S. *v.* Taylor, 58 N. H. 331; Mitten *v.* S., 24 Tex. Ap. 346, 5 S. W. R. 196.]

[2] *Ante*, §§ 128, 131–144.

[3] *Ante*, § 135; Crim. Law, I, §§ 646–654, 659.

[4] *Ante*, §§ 145, 594; S. *v.* Brady, 9 Humph. 74.

[5] *Ante*, §§ 136, 145, 594; Crim. Law, I, §§ 656–659.

[6] *Ante*, § 654*a*.

[7] Com. *v.* Bakeman, 131 Mass. 577, [41 Am. R. 248;] S. *v.* Sanders, 30 Iowa, 582.

[8] Crim. Law, II, §§ 1191–1193; [Holland *v.* S., 11 Tex. Ap. 182; S. *v.* Donovan, 61 Iowa, 278, 16 N. W. R. 130; Com. *v.* Bakeman, 131 Mass. 579, 41 Am. R. 248; Solomon *v.* S., 39 Tex. Civ. R. 140, 45 S. W. R. 706.]

[9] Crim. Law, II, §§ 1121, 1124.

[10] Com. *v.* Bakeman, *supra*.

mitted only with consenting persons, and what is rape cannot be one of the others. But they are believed to proceed partly, and perhaps entirely, on special terms of statutes;[1] certainly, in principle, they can have no other just foundation.

§ 661. The carnal knowledge — (Incest).— In a case of incest, in Ohio, the statutory words being "sexual intercourse," the court deemed them to mean the same thing as "carnal knowledge" in rape. Hence, as in this state emission is essential in rape, it was adjudged to be so in incest.[2] On this basis of reasoning, the general American doctrine would hold emission not to be necessary, and simply *res in re* to suffice.[3] Upon this question in adultery we have no decisions, but this indication as to incest would seem to furnish the rule; for, in principle, the two offenses are not distinguishable.

§ 662. Mistake of law — (Invalid divorce — Void marriage). If a married woman whose husband has gone away and formally taken another wife supposes herself to be thereby freed from him, and even if she is so advised by a magistrate who celebrates a marriage between her and another man, the mistake is of law, and it does not excuse her.[4] A carnal intercourse under such second marriage will, therefore, be adultery.[5] And the same consequence follows the like steps after an invalid divorce, however valid it may be believed by the parties to be.[6] Indeed, whenever a formal marriage is void, sexual intercourse under it is adultery, fornication or incest.[7] But,—

§ 663. Mistake of fact.— Where the mistake, instead of being of law, is of fact, it comes within principles already illustrated in analogous offenses,[8] and explained at large in "Criminal

[1] Speer *v.* S., 60 Ga. 331; De Groat *v.* P., 39 Mich. 124; S. *v.* Thomas, 53 Iowa, 214; S. *v.* Shear, 51 Wis. 460. And see S. *v.* Caldwell, 8 Bax. 576; Baumer *v.* S., 49 Ind. 544, [19 Am. R. 691.] Compare this section with *ante*, § 643.

[2] Noble *v.* S., 22 Ohio St. 541.

[3] *Ante*, § 488; Crim. Law, II, §§ 1127–1132. [*Contra*, Com. *v.* Hussey, 157 Mass. 415, 32 N. E. R. 662.]

[4] Crim. Law, I, §§ 294–296; [S. *v.* Shattuck, 69 Vt. 403, 38 Atl. R. 81.]

[5] S. *v.* Goodenow, 65 Me. 30, 33; [Owens *v.* S., 94 Ala. 97, 10 S. E. R. 669; Hildreth *v.* S., 19 Tex. Ap. 195; S. *v.* Wharton, 20 R. I. 354, 39 Atl. R. 193; Alonzo *v.* S., 15 Tex. Ap. 378, 49 Am. R. 207.]

[6] Hood *v.* S., 56 Ind. 263, [26 Am. R. 21;] S. *v.* Whitcomb, 52 Iowa, 85. See 1 Bishop, Mar., Div. & S., § 711.

[7] Com. *v.* Munson, 127 Mass. 459, [34 Am. R. 411;] Territory *v.* Corbett, 3 Mont. 50; S. *v.* Fore, 1 Ire. 378. See S. *v.* Pearce, 2 Blackf. 318; *post*, § 663.

[8] *Ante*, §§ 490, 596*a*, 631*a*-632*a*.

Law."[1] The victim of rape is not an adulteress;[2] nor does a married woman commit this offense, if, deceived by a man who personates her husband, she admits him to intercourse.[3] Again,—

Unknown defect of fact in marriage.— Though, as just seen, a cohabitation under a marriage simply void in *law* is adultery or fornication,[4] yet, if there is a *fact* unknown to the parties and not by reasonable care discoverable by them, which renders it void while they believe it to be good, the cohabitation is not a crime.[5] The common instance is where a former husband or wife is through such mistake of fact deemed to be dead, and a second marriage is entered into,— as explained under the title "Polygamy."[6] A case which, contrary to just principle, held that adultery was committed,[7] is commented on in another connection.[8]

§ 664. Evil mind co-existing with mistake of fact.— The reason why, in the case supposed, the man is free from legal guilt, is because his steps were prompted by a desire to conform to the statute, which, in letter, he disobeyed; and he believed himself to be conforming to it, and to the other laws, and the rules of good morals. The mistake, which he was not able to avoid, impelled him, and the law does not punish people for what they cannot prevent. But carefulness is one of the duties of life;[9] and, consequently, a man may be responsible for mistaking facts because he did not use proper caution or make due inquiry;[10] so that acts performed under a mistake of fact thus produced are punishable.[11] If, therefore,

[1] Crim. Law, I, §§ 301–310, and particularly the long note at § 303*a*.

[2] *Ante*, § 660.

[3] 1 Bishop, Mar., Div. & S., §§ 710, 711.

[4] *Ante*, § 662.

[5] 1 Bishop, Mar., Div. & S., § 711; [Vaughan *v.* S., 83 Ala. 55, 3 S. R. 530; Banks *v.* S., 96 Ala. 78, 11 S. R. 404; S. *v.* Cody, 111 N. C. 725, 16 S. E. R. 408.]

[6] *Ante*, § 596*a*.

[7] Com. *v.* Thompson, 11 Allen, 23, [87 Am. D. 685.] Compare with Com. *v.* Thompson, 6 Allen, 591, [83 Am. D. 653.]

[8] Crim. Law, I, § 303*a*, note, par. 18.

[9] Crim. Law, I, § 313 *et seq.*; [Owens *v.* S., 94 Ala. 97, 10 S. R. 669.]

[10] Rex *v.* Lediard, Say. 242; Harwood's Case, 1 Mod. 79; Barnes *v.* S., 19 Conn. 398; Sturges *v.* Maitland, Anthon, 208; Com. *v.* Mash, 7 Met. 472, as to which query; and see Alison, Crim. Law, 535, 536, 541, and McDonald's Case, 1 Broun, 238; Crim. Law, I, §§ 303, 304.

[11] Crim. Law, I, § 327, note, 330; 1 East, P. C. 102; Barnes *v.* S., 19 Conn. 398.

parties intermarry contrary to the letter of a statute, where the obstacle is a mistake of fact, not caring or exercising any caution as to whether the fact exists or not, their cohabitation under the void marriage will be criminal; and, if the mistake was in believing a pre-existing marriage to be dissolved, it will be adultery. Yet it will not be where there had been an absence rendering the second marriage not violative of the statute against polygamy.[1] Again,—

§ 665. Intending only fornication.— Where the act of a man intending one wrong terminates in another unintended, the rule of the criminal law, subject to exceptions, is that he is punishable for the result the same as though it was specifically meant. Nor need the proposed wrong be of the indictable sort if the wrong accomplished is.[2] Hence, should a man and woman, not intermarrying, yet believing a former husband or wife of one of them to be dead, commit what both supposed to be fornication, while, in fact, the death had not occurred, the married party would thereby become guilty of adultery. The mistake, however sincere, and made after however much inquiry, did not free the mind from wrong. His purpose was to commit the lighter offense of fornication, but the law declared it to be adultery. Such is the doctrine of principle. In authority, the question seems not to be settled in our American courts.[3]

§ 666. The marriage — (Guilty party after divorce).— A subsisting marriage is an element inseparable from adultery.[4] Yet, while a void marriage will not sustain the accusation,[5] one voidable in the sense special to the matrimonial law will.[6] If a single person is forbidden by law to marry,— as, for example, where a divorce has taken place, and a statute declares that the party in fault shall not enter into a second marriage,— still the person so forbidden does not by any unlawful sexual commerce commit adultery.[7] And, as already seen, adultery will not be criminal where polygamy would not be.[8]

[1] Com. *v.* Thompson, 6 Allen, 591.

[2] Crim. Law, I, §§ 323–334.

[3] See Com. *v.* Elwell, 2 Met. 190, [35 Am. D. 398;] Delaney *v.* P., 10 Mich. 241, 244.

[4] *Ante*, §§ 654*a*, 655; Clay *v.* S., 3 Tex. Ap. 499; Tucker *v.* S., 35 Tex. 118.

[5] *Ante*, § 662; P. *v.* Bennett, 39 Mich. 208; 1 Bishop, Mar., Div. & S., § 105.

[6] 1 Bishop, Mar., Div. & S., §§ 104*a*, 105, 116.

[7] 2 id., § 700; S. *v.* Weatherby, 43 Me. 258, 263, 264, [69 Am. D. 59.] And see *ante*, § 604*a*.

[8] *Ante*, § 664; Com. *v.* Thompson, 6

§ 666a. Whites and blacks.— It is competent for legislation, in our states, to impose a heavier punishment for adultery or fornication between whites and blacks than between persons of one race.[1]

§ 667. Attempts, conspiracies, etc.— Solicitations and other attempts, and conspiracies, to commit adultery, or to procure its commission by others, are within the discussions of "Criminal Law."[2]

§ 668. Degree of offense.— In some of the states — for example, Connecticut[3] — adultery is felony; in others, such as Pennsylvania[4] and Vermont,[5] it is misdemeanor.

II. The Procedure.

§ 669. Course of discussion.— We shall consider, first, the indictment; secondly, the evidence.

First. **The indictment:** —

Effect of statutory terms.— Where, as generally in our states, this offense is created by the single word "adultery," not defined, the indictment must follow purely common-law principles. If the statute adds a partial or full definition, so much of allegation must be supplemented as will cover what is defined, within the rules of pleading on statutes.[6]

§ 670. Joint or separate.— The parties may be indicted separately,[7] or, where the statute or its interpretation makes

Allen, 591, [83 Am. D. 653.] Compare with Com. *v.* Thompson, 11 Allen, 23, [87 Am. D. 685.]

[1] Green *v.* S., 58 Ala. 190, [29 Am. R. 739;] Ford *v.* S., 53 Ala. 150; Ellis *v.* S., 42 Ala. 525; Barnes *v.* S., 48 Ala. 105, overruled. And see 1 Bishop, Mar., Div. & S., §§ 308*a*, 375, and note; Crim. Law, I, § 894; [Pace *v.* S., 106 U. S. 583, 1 Sup. Ct. 637; Pace *v.* S., 69 Ala. 231, 44 Am. R. 518.]

[2] Crim. Law, I, §§ 501, 767, 768; II, §§ 184, 235; Reg. *v.* Pierson, 1 Salk. 382; S. *v.* Avery, 7 Conn. 266, [18 Am. D. 105;] Shannon *v.* Com., 14 Pa. St. 226; [S. *v.* Butler, 8 Wash. 194, 35 Pac. R. 1093.]

[3] S. *v.* Avery, 7 Conn. 266, [18 Am. D. 105;] Crim. Law, I, § 501, and note, § 768.

[4] Crim. Law, I, § 768.

[5] S. *v.* Cooper, 16 Vt. 551.

[6] Crim. Pro., I, §§ 610, 611, 629; [S. *v.* Searle, 56 Vt. 516; S. *v.* Ean (Iowa), 58 N. W. R. 898; S. *v.* Whealey, 5 S. D. 427, 59 N. W. R. 211; Gorman *v.* Com., 124 Pa. St. 536, 17 Atl. R. 26; S. *v.* Briggs, 68 Iowa, 416, 27 N. W. R. 358; S. *v.* Mahan, 81 Iowa, 121, 46 N. W. R. 855; Hildreth *v.* S., 19 Tex. Ap. 195; Mulling *v.* S., 74 Ga. 10; Holland *v.* S., 14 Tex. Ap. 181; S. *v.* Smith, 18 Ind. Ap. 179, 47 N. E. R. 685; S. *v.* Miller, 60 Vt. 90, 12 Atl. R. 526; Com. *v.* Fuller, 118 Mass. 499, 40 N. E. R. 764; S. *v.* Clawson, 30 Mo. Ap. 139.]

[7] S. *v.* Dingee, 17 Iowa, 232; S. *v.* Wilson, 22 Iowa, 364; [S. *v.* Watson, 20 R. I. 354, 39 Atl. R. 193; Solomon *v.* S., 39 Tex. Cr. R. 140, 45 S. W. R. 706.]

the act adultery in both, together,[1] at the election of the power which prosecutes. Even where, by reason of special statutory terms, both parties must be guilty or neither,[2] it is not absolutely necessary that the two be joined in the prosecution.[3]

§ 671. The joint indictment — must show, in some way, that the defendants committed the offense with each other; because, if open to the inference that the acts were distinct and with third persons, it will be bad for duplicity.[4] It will be good, for example, to say that the defendants, naming them, at a time and place specified, not being then and there married to each other, but the woman having a husband living other than the man, naming the husband, did then and there have carnal knowledge together, each of the body of the other, and thereby did commit adultery.[5]

§ 672. The several indictment,— if against the man, for a criminal connection with another's wife, under a statute making it adultery in him, may aver that, at a time and place specified, he committed adultery with a woman named, who was then and there the wife of a man other than the defendant, to wit, such a person, by then and there having carnal knowledge of her the said, etc. Or even less may suffice.[6]

§ 673. Allegation of marriage.— The marriage being an indispensable element in the offense,[7] and necessary to be proved,[8] it must, therefore, be alleged.[9]

How, and averring name.— It is not sufficient simply to charge that the person whose marriage made the carnal act adultery was married; because this allegation would be supported by proof of a marriage between the parties implicated. Therefore it must in some way appear in averment that they

[1] S. *v.* Bartlett, 53 Me. 446; Com. *v.* Elwell, 2 Met. 190, [35 Am. D. 398;] Frost *v.* Com., 9 B. Monr. 362.

[2] *Ante*, § 660; *post*, § 702; Hopper *v.* S., 19 Ark. 143. [Where woman was too drunk to give consent, man may nevertheless be convicted. Com. *v.* Bakeman, 131 Mass. 577, 41 Am. R. 248.]

[3] *Post*, § 708.

[4] Maull *v.* S., 37 Ala. 160.

[5] And see Com. *v.* Elwell, 2 Met. 190, [35 Am. D. 398;] Com. *v.* Thompson, 99 Mass. 444. [Or, as the statute says, "did unlawfully live and cohabit together as man and wife." S. *v.* Chandler, 96 Ind. 591.]

[6] Com. *v.* Reardon, 6 Cush. 78; S. *v.* Bridgman, 49 Vt. 202, [24 Am. R. 124.] And see Tucker *v.* S., 35 Tex. 113.

[7] *Ante*, § 666.

[8] *Post*, § 677; Parks *v.* S., 3 Tex. Ap. 337.

[9] Tucker *v.* S., 35 Tex. 113; Terr. *v.* Whitcomb, 1 Mont. 359; Miner *v.* P., 58 Ill. 59; Clay *v.* S., 3 Tex. Ap. 499.

were not husband and wife.[1] The common form is, observed Shaw, C. J., that, for example, the woman "was the wife of a person named, then living; but perhaps that is not necessary. Any form of words, stating that she was the wife of some person other than the accused, would be sufficient."[2] There may be room for doubt whether the name of the husband or wife can be omitted. But, on the whole, there seems to be no principle of criminal pleading rendering it necessary to mention the name of a third person in such a connection; and we have forms in which the name is not mentioned.[3]

§ 674. "Adultery" or "carnal knowledge."— Commonly the indictment alleges that the defendant "had carnal knowledge," etc. But in Pennsylvania it was adjudged sufficient to charge that he "did commit adultery with a certain" person named. Said Lowrie, C. J.: "'Commit adultery' does not merely imply, but expresses, carnal knowledge; for that is its very meaning."[4] In Alabama, also, this form of the allegation appears to be approved.[5] It is the common form in the civil suit for divorce.[6] Some other analogies favor it; and, though it is a blending of law and fact hardly consistent with nice pleading,[7] it is no more objectionable than various forms of averment always deemed sufficient in other cases.

§ 675. Knowledge of facts.— Though a mistake of the person, or ignorance of a subsisting marriage, or the like, will in some circumstances excuse the carnal act,[8] the indictment need not, in the absence of special terms in the statute, negative such mistake or aver knowledge. Matter of this sort is simply for defense.[9]

[1] Moore *v.* Com., 6 Met. 243; Tucker *v.* S., *supra;* Clay *v.* S., *supra;* Com. *v.* Corson, 4 Pa. Law Jour. R. 271.

[2] Moore *v.* Com., *supra*, at p. 244; [Names *v.* S., 20 Ind. Ap. 168, 20 N. E. R. 401; S. *v.* Searle, 56 Vt. 516; Crane *v.* P., 168 Ill. 395, 48 N. E. R. 54.]

[3] Train & Heard, Prec. 23, 24; Whart. Prec. (2d ed.), pl. 995 *et seq.* See also S. *v.* Hutchinson, 36 Me. 261; S. *v.* Hinton, 6 Ala. 864; S. *v.* Clinch, 8 Iowa, 401; Collum *v.* S., 10 Tex. Ap. 708. The name was not given in Com. *v.* Tompson, 2 Cush. 551, and the indictment was adjudged good on motion in arrest of judgment. [Collum *v.* S., 10 Tex. Ap. 708; Hildreth *v.* S., 19 Tex. Ap. 195.]

[4] Helfrich *v.* Com., 33 Pa. St. 68, 70, 71, [75 Am. D. 579.]

[5] S. *v.* Hinton, 6 Ala. 864; Lawson *v.* S., 20 Ala. 65, [56 Am. D. 182;] Maull *v.* S., 37 Ala. 160.

[6] 2 Bishop, Mar., Div. & S., § 603.

[7] Crim. Pro., I, §§ 329–334, 514, 515.

[8] *Ante*, §§ 663–665.

[9] Crim. Pro., I, §§ 518, 521–525, 637, 638; Com. *v.* Elwell, 2 Met. 190, [35 Am. D. 398;] Fox *v.* S., 8 Tex. Ap. 329, [30 Am. R. 144.]

§ 676. Then and there.— It was in one case adjudged inadequate to say that the defendant, at a place and on a day named, committed adultery "with one E., the wife of one F., she, the said E., being a married woman and the lawful wife of the said F.;" because, "to the fact that she was a married woman and the wife of another, no time is averred."[1] This is holding a well-known rule strictly;[2] and probably, in some of our states, under the modifying influence of statutes or the liberalization of the judicial practice, the decision would be the other way.

§ 677. Secondly. **The evidence:**—

What prove — (Carnal act — Marriage).— The two facts to be established are the carnal act and the marriage.

Elsewhere — Here.— The author, in "Marriage and Divorce," fully treated of the evidence of both;[3] including, as to the marriage, what is special to the present criminal issue.[4] Also as to the marriage, in the chapter on polygamy in the present volume various points are brought forward, applicable as well to this offense as to that.[5] As, in general, the proofs of an issue are the same in criminal causes and in civil,[6] little remains for this connection but to call attention to what is special to the criminal issue in the proofs of adultery, and to some other things particularly important to be borne in mind in these cases.

§ 678. Nature of evidence of carnal act.— Though it is legally competent to prove the carnal act, the same as any other crime, by an eye-witness, such testimony is seldom to be obtained. The proofs, therefore, are almost always circumstantial.[7] Still the evidence must come within established rules;[8] as, for

[1] S. *v.* Thurstin, 35 Me. 205, [58 Am. D. 695.]

[2] Crim. Pro., I, §§ 408, 411.

[3] 1 Bishop, Mar., Div. & S., §§ 408–545; 2 id., §§ 612–647.

[4] 1 Bishop, Mar., Div. & S., §§ 441, 442, 485, 490–502. And see Com. *v.* Belgard, 5 Gray, 95; S. *v.* Libby, 44 Me. 469, 479, [69 Am. D. 115.]

[5] *Ante*, §§ 607–611.

[6] Crim. Pro., I, § 1046.

[7] 2 Bishop, Mar., Div. & S., §§ 614–620; S. *v.* Poteet, 8 Ire. 23; S. *v.* Bridgman, 49 Vt. 202, [24 Am. R. 124;] Com. *v.* Franklin, 6 Gray, 346; S. *v.* Green, Kirby, 87, 88; Com. *v.* Gray, 129 Mass. 474, [37 Am. R. 378;] Richardson *v.* S., 34 Tex. 142; Smelser *v.* S., 31 Tex. 95; Com. *v.* Bowers, 121 Mass. 45; S. *v.* Waller, 80 N. C. 401; S. *v.* Way, 6 Vt. 311; [S. *v.* Eliason, 91 N. C. 564.]

[8] Com. *v.* O'Connor, 107 Mass. 219; S. *v.* Crowley, 13 Ala. 172; Lawson *v.* S., 20 Ala. 65, [56 Am. D. 182.]

example, the confessions of the unindicted accomplice,[1] the suspicions and jealousies of the defendant's husband or wife,[2] reputation in the neighborhood,[3] and the opinion of a witness that adultery was or was not committed at a time testified to,[4] are severally inadmissible.

§ 679. Intent and opportunity.— One of the common forms of the circumstantial evidence consists of showing a purpose or inclination to commit adultery and the opportunity; that is, an adulterous mind in the accused, the same in the person with whom the offense is charged, and a time and place. And the inference is more or less readily drawn, that what was sought, and could be, was.[5] The path to this conclusion can be trodden only step by step; while yet, if the last step is not taken, the preceding ones are of no avail. Some of the steps are,—

Woman unchaste — (*Bawdy-house*).— In connection with other facts, it may be shown that a woman with whom adultery is alleged to have been committed is of bad character and reputation for chastity;[6] or, what may be still stronger, that a house visited by the defendant is a bawdy-house.[7] Again,—

§ 680. Other like acts.— Where the attempt is to prove adultery at a particular time and place, familiarities between the same parties tending thereto, or adultery itself, at a prior time and in another or the same place, may be shown in aid of the conclusion.[8] And within familiar principles, it is no objection that

[1] Spencer *v.* S., 31 Tex. 64; S. *v.* McGuire, 50 Iowa, 153. And see Gore *v.* S., 58 Ala. 391.

[2] S. *v.* Crowley, 13 Ala. 172; [Graham *v.* S., 28 Tex. Ap. 9, 11 S. W. R. 781, 19 Am. R. 309.]

[3] Overstreet *v.* S., 8 How. (Miss.) 328.

[4] 2 Bishop, Mar., Div. & S., § 286; McKnight *v.* S., 6 Tex. Ap. 158; [Webb *v.* S., 24 Tex. Ap. 164, 5 S. W. R. 651.]

[5] 2 Bishop, Mar., Div. & S., §§ 619, 625; [S. *v.* Austin, 108 N. C. 780, 13 S. E. R. 219; S. *v.* Brecht, 41 Minn. 50, 42 N. W. R. 585; P. *v.* Girdler, 65 Mich. 68, 31 N. W. R. 624; S. *v.* Stubbs, 108 N. C. 774, 13 S. E. R. 50; S. *v.* Clawson, 32 Mo. Ap. 93; S. *v.* Briggs, 68 Iowa, 416, 27 N. W. R. 358.]

[6] Com. *v.* Gray, 129 Mass. 474, [37 Am. R. 378;] Blackman *v.* S., 36 Ala. 295.

[7] 2 Bishop, Mar., Div. & S., 625, 626.

[8] 2 id., §§ 617, 618, 625, 630, 635; 2 Greenl. Ev., § 47; Com. *v.* Durfee, 100 Mass. 146; Com. *v.* Pierce, 11 Gray, 447; S. *v.* Marvin, 35 N. H. 22; Com. *v.* Lahey, 14 Gray, 91; McLeod *v.* S., 35 Ala. 395; P. *v.* Jenness, 5 Mich. 305, 320; Com. *v.* Morris, 1 Cush. 391; Com. *v.* Merriam, 14 Pick. 518, [25 Am. D. 420;] Com. *v.* Nichols, 114 Mass. 285, [19 Am. R. 346;] Gaylor *v.* McHenry, 15 Ind. 393; S. *v.* Potter, 52 Vt. 33; [S. *v.* Witham, 72 Me. 531; S. *v.* Kemp, 87 N. C. 538; S. *v.* Pippin, 88 N. C. 646; Cross *v.* S., 78 Ala. 430; Brevaldo *v.* S., 21 Fla. 789; S. *v.* Guest, 100 N. C. 410, 6 S. E. R. 253; Funder-

thus another crime than the one charged is also made to appear.[1] "But," to quote from a previous edition of this work,[2] "strangely enough the Massachusetts court further held, on an indictment for adultery, that, if the anterior familiarities extend so far or are of such character as to show adultery actually committed on this previous occasion, the evidence of them — that is, of the previous adultery — is not admissible;[3] according to which doctrine, if the evidence is a little weak, yet tending remotely to establish the crime, it may be submitted to the jury; but, if it is a little stronger and tends more clearly to the same result, it must be excluded!" After this criticism appeared, the same tribunal, yielding to its force, reversed the doctrine; but, *as is customary with a part of this court*,[4] making no acknowledgment or allusion to the author or his work, that had enabled it to efface, before becoming indelible, a blot from the jurisprudence of the state.[5] Again,—

§ 681. Acts subsequent.— The Massachusetts court has denied that familiarities or adultery subsequent to the adultery charged is admissible against the defendant.[6] This doctrine is less palpably contrary to the authorities[7] than the other, which was afterward abandoned as just stated. And, in reason, the subsequent ill-conduct is perhaps less conclusive than the prior. But,—

§ 682. Continued.— In the first edition of "Criminal Procedure,"[8] in passages transferred to the first edition of the present work, the author pointed out that, in principle, subsequent acts do tend to prove those charged. And the Massachusetts court, following his views, yet not acknowledging their source,

burg *v.* S., 23 Tex. Ap. 392, 5 S. W. R. 244.]

[1] Crim. Pro., I, §§ 1121–1123, 1126; S. *v.* Bridgman, 49 Vt. 202, [24 Am. R. 124.]

[2] This matter originally appeared in the first edition of Crim. Pro., I, § 17, whence it was transferred to this work.

[3] Com. *v.* Thrasher, 11 Gray, 450.

[4] As, for example, see *post*, § 682; 1 Bishop, Mar., Div. & S. (6th ed.), § 381; Crim. Law, I, § 752. I might considerably add to these illustrations were it important.

[5] Com. *v.* Nichols, *supra*.

[6] Com. *v.* Horton, 2 Gray, 354, 355; Com. *v.* Pierce, 11 Gray, 447. In Indiana, on a single charge of incest, which was proved in time and place as laid, the *particeps criminis*, who had testified to this, was not allowed to strengthen the case by testifying also to incest committed at subsequent times. Lovell *v.* S., 12 Ind. 18. See S. *v.* Bates, 10 Conn. 372.

[7] Crim. Pro., I, § 1128; [S. *v.* Witham, 72 Me. 531; S. *v.* Williams, 76 Me. 480.]

[8] Crim. Pro. (1st ed.), I, §§ 15–18.

overruled its former decisions. "There is in each case," said the learned judge who delivered the opinion of the whole court, "a plain misapplication of the rules of evidence to the facts presented. . . The intent and disposition of the parties towards each other must give character to their relations, and can only be ascertained, as all moral qualities are, from the acts and declarations of the parties. It is true that the fact to be proved is the existence of a criminal disposition at the time of the act charged; but the indications by which it is proved may extend, and ordinarily do extend, over a period of time both anterior and subsequent to it. The rules which govern human conduct, and which are known to common observation and experience, are to be applied in these cases, as in all other investigations of fact. An adulterous disposition existing in two persons towards each other is commonly of gradual development; it must have some duration, and does not suddenly subside. When once shown to exist, a strong inference arises that it has had and will have continuance, the duration and extent of which may be usually measured by the power which it exercises over the conduct of the parties. It is this character of permanency which justifies the inference of its existence, at any particular point of time, from facts illustrating the preceding or subsequent relations of the parties. The rule is that a condition once proved is presumed to have been produced by causes operating in the usual way, and to have continuance till the contrary be shown. The limit, practically, to the evidence under consideration is that it must be sufficiently significant in character, and sufficiently near in point of time, to have a tendency 'to lead the guarded discretion of a reasonable and just man' to a belief in the existence of this important element in the fact to be proved. If too remote or insignificant, it will be rejected, in the discretion of the judge who tries the case. The fact that the conduct relied on has occurred since the filing of the libel does not exclude it; and proof of the continuance of the same questionable relations during the intervening time, as in the case at bar, will add to its weight."[1] At the time of the present writing, this doctrine — namely, that subsequent familiarities and

[1] Thayer *v.* Thayer, 101 Mass. 111, Carotti *v.* S., 42 Miss. 334, [97 Am. D. 113, 114, [100 Am. D. 110.] And see 465.]

adulteries between the same parties, equally with the prior ones, are admissible — may be deemed to be established in all our courts, as respects alike the divorce suit and the indictment.[1] Still,—

§ 683. Limiting the time.— In reason, and in some measure on authority, the court should exercise a discretion to exclude evidence of familiarities at other dates than the one in question, if too remote, whether before or after. There can be, in the nature of things, no exact rule as to this. The special nature of the familiarities, and how they are connected with the matter in issue, should enter into the question. In one case, on this ground, "mere isolated acts" occurring eighteen months after the finding of the indictment were excluded.[2]

§ 684. Familiarities with other persons — than the alleged *particeps criminis*, and solicitations of their chastity, tend less directly to prove the adultery in issue. But, in a chain of circumstantial evidence, there are instances wherein, in reason, they would strengthen the link of an adulterous intent. Under the practice of the English ecclesiastical courts in divorce litigation such evidence was common, and there are instances wherein it has been received in divorce cases with us, in connection with other testimony. But the question has not been much considered in our tribunals; and, for further explanations, the reader is referred to the work on "Marriage and Divorce."[3]

§ 685. Time and place.— In divorce law the particular time and place of the adulterous act need not be proved, though the judge or jury must be satisfied that it occurred at some time and some place.[4] In criminal causes it must be shown to have transpired within the county of the indictment.[5] But whether in other respects the same rule applies in criminal as in divorce causes we are not distinctly informed by the authorities. In

[1] 2 Bishop, Mar., Div. & S., § 625; Cole *v.* S., 6 Baxt. 239; S. *v.* Way, 5 Neb. 283; Alsabrooks *v.* S., 52 Ala. 24; S. *v.* Bridgman, 49 Vt. 202, [24 Am. R. 124;] S. *v.* Crowley, 18 Ala. 172.

[2] S. *v.* Crowley, 18 Ala. 172, 175. And see S. *v.* Arnold, 50 Vt. 731; [P. *v.* Hendricksen, 58 Mich. 525, 19 N. W. R. 169; P. *v.* Davis, 52 Mich. 569, 18 N. W. R. 362.]

[3] 2 Bishop, Mar., Div. & S., § 625; also §§ 617, 618.

[4] 2 Bishop, Mar., Div. & S., § 613; [S. *v.* Brecht, 41 Minn. 50, 42 N. W. R. 602.]

[5] Crim. Pro., I, §§ 334, 335.

one case the trial court refused "to instruct the jury that, as the indictment charged a single act of adultery, as committed on a particular day, they must be satisfied that the defendants committed the crime on some particular day or occasion; and that it would not be sufficient for them to be satisfied, from the admissions of the parties, that they committed the crime at some time, without being able in any way to designate that time." On the other hand, it told them "that, if the evidence satisfied them beyond a reasonable doubt that the crime was committed at any time while the defendants were so living together, they might be convicted, though the particular time or occasion could not be ascertained more definitely." And this was held to be correct.[1] It would appear never to be required, in a criminal case, that the jury be satisfied of the precise day of the commission of a crime. If such day were necessary, then would be the precise hour, or minute, or second. The last could never be shown; so that, on this theory, no conviction could ever be had.

§ 686. Confessions.— The divorce law has rules as to confessions special to itself.[2] The rules in criminal causes are also special, but they are different.[3] One indicted for adultery may be convicted on his own confessions,[4] and particularly so when corroborated by circumstances.[5] Still, if the man and woman are jointly indicted, in a single count, for one act of adultery, both cannot be found guilty on the confessions of one to an act committed at a particular time, and of the other to an act at a different time.[6] And, when the indictment is thus joint, the jury should be expressly instructed that the confession of one is not to be accepted by them as evidence against the other.[7]

§ 687. The marriage.— We have seen[8] that the proofs of the marriage have already been fully explained in other con-

[1] Com. *v.* Cobb, 14 Gray, 57, 58.

[2] 2 Bishop, Mar., Div. & S., §§ 240-251.

[3] Crim. Pro., I, §§ 1217-1262; [S. *v.* Stubbs, 108 N. C. 774, 13 S. E. R. 90.]

[4] S. *v.* Libby, 44 Me. 469, [69 Am. D. 115;] Lawson *v.* S., 20 Ala. 65, [56 Am. D. 182;] Frost *v.* Com., 9 B. Mon. 362; [S. *v.* Austin, 108 N. C. 780, 13 S. E. R. 219; P. *v.* Isham (Mich.), 67 N. W. R. 319.]

[5] Com. *v.* Tarr, 4 Allen, 315. And see Bergen *v.* P., 17 Ill. 426, [65 Am. D. 672.]

[6] Com. *v.* Cobb, 14 Gray, 57.

[7] Lawson *v.* S., 20 Ala. 65, [56 Am. D. 182;] Frost *v.* Com., *supra;* [S. *v.* Berry, 24 Mo. Ap. 466; S. *v.* Rinehart, 106 N. C. 787, 11 S. E. R. 572; S. *v.* Mims, 89 S. C. 557, 17 N. E. R. 850.]

[8] *Ante*, § 677.

nections. What is technically termed a fact of marriage, in distinction from proofs by cohabitation and repute, must, except where statutes have otherwise provided, be shown.[1] Ordinarily, and by most opinions, confessions are admissible to the marriage, as to the other parts of the case.[2] But they must be the confessions of the particular party, not of the other party, or of the *particeps criminis*.[3]

§ 688. The witnesses.— The general rules concerning the witnesses in criminal cases[4] apply in this issue. Thus,—

Husband and wife.— Under the common law the husband or wife cannot testify against the other, either to the illicit conduct or the fact of marriage.[5] Not even can the married partner of the unindicted participant in the adultery be admitted to prove it.[6] And if several persons are proceeded against for a conspiracy to charge the wife of one of them with adultery, she cannot be a witness.[7] So far is this doctrine carried that the wife has even been held incompetent to prefer on oath a complaint before a magistrate for the husband's adultery.[8] In some of our states, by statute, the law is otherwise, and the prosecution can be only on her complaint;[9] though, after it is commenced, it can be carried on without

[1] 1 Bishop, Mar., Div. & S., §§ 442, 482 *et seq.*; Wood *v.* S., 62 Ga. 406; Com. *v.* Holt, 121 Mass. 61; P. *v.* Bennett, 39 Mich. 208; Com. *v.* Belgard, 5 Gray, 95; [S. *v.* Behrman, 114 N. C. 797, 19 S. E. R. 220, 25 L. R. A. 449; Webb *v.* S., 24 Tex. Ap. 164, 5 S. W. R. 651; Williams *v.* S., 86 Ga. 548, 12 S. E. R. 743; Owens *v.* S., 94 Ala. 97, 10 S. R. 669; Banks *v.* S., 96 Ala. 78, 11 S. R. 404; Lord *v.* S., 17 Neb. 526, 23 N. W. R. 507; S. *v.* Manley, 95 N. C. 661.]

[2] 1 Bishop, Mar., Div. & S., §§ 497–502, 544, 545; *ante*, § 609; Cameron *v.* S., 14 Ala. 546, [48 Am. D. 111;] S. *v.* Medbury, 8 R. I. 543; [Boger *v.* S., 19 Tex. Ap. 195; P *v.* Imes (Mich.), 68 N. W. R. 157; Owens *v.* S., 94 Ala. 97, 10 S. R. 669.]

[3] Com. *v.* Thompson, 99 Mass. 444. See S. *v.* Bowe, 61 Me. 171.

[4] Crim. Pro., I, §§ 1135–1187.

[5] Id., § 1151; Mills *v.* U. S., 1 Pin. 78; S. *v.* Armstrong, 4 Minn. 335; [Thomas *v.* S., 14 Tex. Ap. 70.]

[6] S. *v.* Welch, 26 Me. 30, [45 Am. D. 94;] S. *v.* Gardner, 1 Root, 485; Cotton *v.* S., 62 Ala. 12; Com. *v.* Gordon, 2 Brews. 569; Com. *v.* Sparks, 7 Allen, 534. See Crim. Pro., I, § 1019; [Com. *v.* Mosier, 135 Pa. St. 221, 19 Atl. R. 943.]

[7] S. *v.* Burlingham, 15 Me. 104; Crim. Pro., I, § 1019.

[8] S. *v.* Berlin, 42 Me. 572; Com. *v.* Jailer, 1 Grant (Pa.), 218. See Crim. Pro., I, §§ 230–232; [P., Long *v.* Magerstadt (Ill.), 32 Chic. Leg. N. 35.

[9] Crim. Pro., I, § 232; S. *v.* Wilson, 22 Iowa, 364; P. *v.* Knapp, 42 Mich. 267, [36 Am. R. 438; S. *v.* Mahan, 81 Iowa, 121, 46 N. W. R. 855; P. *v.* Payment, 109 Mich. 559, 67 N. W. R. 689; P. *v.* Stokes, 71 Cal. 263, 12 Pac. R. 71; P. *v.* Isham (Mich.), 67 N. W. R. 819; Boyer *v.* S., 19 Tex. Ap. 91; S. *v.* Coffee, 39 Mo. Ap. 56; Bush

her presence or consent,[1] and she need not go before the grand jury.[2] Beyond this, we have statutes under which it is competent for husband and wife to testify against each other "in a criminal prosecution for an offense committed by one against the other;" and adultery is deemed to be within the provision.[3]

Particeps criminis.— A mistress is not, like a wife, incompetent;[4] so that an unindicted[5] *particeps criminis* may be a witness.[6] But this witness is an accomplice within the rule[7] requiring the testimony to be corroborated.[8]

§ 689. Province of jury.—The effect of the testimony, equally with its credibility, is, as in other cases, for the jury. It was therefore error for the court on a trial for fornication to instruct them that if they believed the parties were found in bed together, the room-door closed, no one else present, the woman a prostitute, and the defendant in the habit of visiting her, they were bound to find him guilty. Conclusive as the evidence was, the jury, not the court, should draw the inference.[9]

§ 690. Marriage not proved — (Fornication).— Where fornication is indictable, and the proof of the marriage fails, there may be a conviction for this lighter offense,[10] if the allegations of the indictment are adequate.[11]

v. Workman, 64 Iowa, 205, 19 N. W. R. 210; S. *v.* Briggs, 68 Iowa, 416, 27 N. W. R. 358; S. *v.* Donovan, 61 Iowa, 278, 16 N. W. R. 130; P. *v.* Dalrymple, 55 Mich. 519, 22 N. W. R. 20; S. *v.* Henke, 58 Iowa, 457, 12 N. W. R. 477; S. *v.* Stout, 71 Iowa, 343, 32 N. W. R. 372; S. *v.* Maas, 83 Iowa, 46, 49 N. W. R. 1037; Filer *v.* Smith, 96 Mich. 347, 55 N. W. R. 999, 35 Am. St. R. 663; *Re* Smith, 2 Okl. 153, 37 Pac. R. 1099.]

[1] S. *v.* Baldy, 17 Iowa, 39; [S. *v.* Briggs, 68 Iowa, 416, 27 N. W. R. 358.]

[2] S. *v.* Dingee, 17 Iowa, 232.

[3] Roland *v.* S., 9 Tex. Ap. 277; Morrill *v.* S., 5 Tex. Ap. 447; S. *v.* Bennett, 31 Iowa, 24; [Rayliss *v.* P., 46 Mich. 221; S. *v.* Brecht, 41 Minn. 50, 42 N. W. R. 602; Wilson *v.* Daboll, 104 Mich. 155, 62 N. W. R. 293; S. *v.* Smith, 108 Iowa, 440, 79 N. W. R. 115; Com. *v.* Clifford, 145 Mass. 97, 13 N. E. R. 345.]

[4] Crim. Pro., I, § 1154; Dennis *v.* Crittenden, 42 N. Y. 542.

[5] Crim. Pro., I, § 1019; Rutter *v.* S., 4 Tex. Ap. 57. And see Boothe *v.* S., 4 Tex. Ap. 202.

[6] S. *v.* Colby, 51 Vt. 291; P. *v.* Knapp, 42 Mich. 267; Ketchingman *v.* S., 6 Wis. 426. See Spencer *v.* S., 31 Tex. 64.

[7] Crim. Pro., I, §§ 1156–1175.

[8] Merritt *v.* S., 10 Tex. Ap. 402.

[9] Ellis *v.* S., 20 Ga. 438.

[10] S. *v.* Cowell, 4 Ire. 231; Crim. Law, I, § 795; Respublica *v.* Roberts, 2 Dall. 124, 1 Yeates, 6; S. *v.* Hinton, 6 Ala. 864. Otherwise now in Alabama. Smitherman *v.* S., 27 Ala. 23.

[11] *Post*, §§ 692, 693; Com. *v.* Murphy, 2 Allen, 163.

[NOTE.—The following cases are cited as examples of variance in proof: Randle *v.* S., 12 Tex. Ap. 250; Bevins *v.* S., 12 Tex. Ap. 394; Henderson *v.* S., 105 Ala. 139, 16 S. R. 927.]

CHAPTER XL.

FORNICATION AND CRIMINAL BASTARDY.

§ 691. What.— Fornication differs from adultery in not requiring the element of a marriage. Bastardy, also, does not require this element, though it may be committed on a married woman the same as on an unmarried. It is the carnal act which results in the birth of an illegitimate child.

At common law.— Like adultery,[1] fornication and bastardy were punishable under the English ecclesiastical law.[2] But, in the words of Burn, "it is no offense at common law to get a bastard child, and consequently not punishable."[3] There were early English statutes under which, while the father of the bastard was compelled to support it, he might also be whipped, and the mother imprisoned, by order of magistrates;[4] but evidently they are of no force with us. *A fortiori*, a single act of fornication, whether inducing pregnancy or not, is not indictable under the common law of our states.[5] But,—

Under statutes.— In some of our states there are statutes making fornication indictable.[6] Bastardy, in most or all of them, may be redressed by proceedings, some in the criminal form,[7] to compel the father to contribute to the child's support; but they are generally in effect civil,[8] or only *quasi*-crim-

[1] *Ante*, § 654*a*.

[2] Caudrey's Case, 5 Co. 1*a*, 9*a*; 1 Burn, Ec. Law, 132 (refers to Gibs. Codex, 1032).

[3] Burn, Just., Bastards, iv.

[4] Dalton, Just., ch. 11; Burn, Just., Bastards; 18 Eliz., ch. 3, etc.; Hardy *v.* Atherton, 7 Q. B. D. 264, 269.

[5] S. *v.* Rahl, 33 Tex. 76; Pollard *v.* Lyon, 91 U. S. 225.

[6] S. *v.* Way, 6 Vt. 311; S. *v.* Cox, N. C. Term R. 165; Com. *v.* Jones, 2 Grat. 555.

[7] Crim. Law, I, §§ 32, 33; *ante*, §§ 467–470.

[8] Mann *v.* P., 35 Ill. 467; Lewis *v.* P., 82 Ill. 104; S. *v.* Hickerson, 72 N. C. 421; Kolbe *v.* P., 85 Ill. 336; S. *v.* Sullivan, 12 R. I. 212; Petition of Canning, 11 R. I. 257; Mahoney *v.* Crowley, 36 Me. 436; Smith *v.* Lint, 37 Me. 546; Hinman *v.* Taylor, 2 Conn. 357; S. *v.* Worthingtham, 23 Minn. 528; S. *v.* Becht, 23 Minn. 1; [Chambers *v.* S., 45 Ark. 56; Nangatuck *v.* S., 53 Conn. 523, 3 Atl. R. 550; P. *v.* Ogden, 10 Ill. Ap. 296; P. *v.* Stevens, 19 Ill. Ap. 405; Reynolds *v.* P., 115 Ill. 421, 17 N. E. R. 909; Scharf *v.* P., 134 Ill. 240, 24 N. E. R. 761; Harper *v.* S., 101 Ind. 109; S. *v.* McGlothlen, 56 Iowa, 544, 9 N. W. R. 893; S. *v.*

inal.[1] In a few, the indictment as for crime is permitted, or permitted for a refusal to support the child.[2]

§ 691a. Procedure in bastardy.—The indictment[3] and evidence[4] in criminal bastardy are so local to a few states, and involve so little of the general criminal law, that the subject

Severson, 78 Iowa, 683, 43 N. W. R. 533; S. *v.* Johnson, 89 Iowa, 1, 56 N. W. R. 404; Gleason *v.* McPherson Co. Com'rs, 30 Kan. 53, 2 Pac. R. 644; Hodge *v.* Sawyer, 85 Me. 285, 27 Atl. R. 153; S. *v.* Nichols, 29 Minn. 357, 13 N. W. R. 158; Jones *v.* S., 14 Neb. 210, 14 N. W. R. 901; Altschuler *v.* Algaza, 16 Neb. 631, 21 N. W. R. 404; Strickler *v.* Grass, 32 Neb. 811, 49 N. W. R. 804; Olson *v.* Peterson, 33 Neb. 358, 50 N. W. R. 155; Munro *v.* Callahan, 41 Neb. 849, 60 N. W. R. 97; Stoppert *v.* Nierle, 45 Neb. 105, 63 N. W. R. 382; Ford *v.* Smith, 62 N. H. 419; Leconey *v.* Overseer of the Poor, 43 N. J. L. 409; S. *v.* Crouse, 86 N. C. 617; S. *v.* Edwards, 110 N. C. 571, 14 S. E. R. 889; S. *v.* Bowen, 14 R. I. 165.]

[1] Cummings *v.* Hodgdon, 13 Met. 246, 248; Hyde *v.* Chapin, 2 Cush. 77, 79; Graham *v.* Monsergh, 22 Vt. 543; Holcomb *v.* P., 79 Ill. 409; Blankenship *v.* S., 4 Bax. 383; Crawford *v.* S., 7 Bax. 41; Baker *v.* S., 47 Wis. 111; [*Ex parte* Charleston, 107 Ala. 668, 18 S. R. 294; Miller *v.* S., 110 Ala. 69, 20 S. R. 392; E. N. E. *v.* S., 25 Fla. 268, 6 S. R. 58; P. *v.* Harty, 49 Mich. 492, 13 N. W. R. 829; P. *v.* Phalen, 49 Mich. 492, 13 N. W. R. 830; Baker *v.* S., 65 Wis. 50, 26 N. W. R. 167; Van Tassel *v.* S., 59 Wis. 351, 18 N. W. R. 328; Hodgson *v.* Nickell, 69 Wis. 308, 34 N. W. R. 118.

[2] Grogan *v.* S., 58 Ga. 196; Shiver *v.* S., 23 Ga. 230; Locke *v.* S., 3 Kelly, 534; S. *v.* Phelps, 9 Md. 21; Bake *v.* S., 21 Md. 422; Norwood *v.* S., 45 Md. 68; Root *v.* S., 10 Gill & J. 374. In England, disobedience to a judicial order requiring the father of a bastard child to pay money for its support is indictable. Reg. *v.* Marchant, 1 Cox, C. C. 203; Reg. *v.* Ferrall, 2 Den. C. C. 51, 4 Cox, C. C. 431, 1 Eng. L. & Eq. 575; [P. *v.* Colegrove, 63 Hun, 635, 18 N. Y. Supp. 370; S. *v.* Benton, 113 N. C. 655, 18 S. E. R. 657; Myers *v.* Stafford, 114 N. C. 689, 19 S. E. R. 764; S. *v.* Cagle, 114 N. C. 835, 19 S. E. R. 766; S. *v.* Wynne, 116 N. C. 981, 21 S. E. R. 35; McCombs *v.* S., 66 Ga. 580.]

[3] Locke *v.* S., 3 Kelly, 534; Norwood *v.* S., 45 Md. 68; Huff *v.* S., 29 Ga. 424; Walker *v.* S., 5 Ga. 491; [Miller *v.* S., 110 Ala. 69, 20 S. R. 392; Robinson *v.* S., 68 Md. 617, 13 Atl. R. 378; Gorman *v.* Com., 124 Pa. St. 536, 17 Atl. R. 26.]

[4] S. *v.* Read, 45 Iowa, 469; S. *v.* Britt, 78 N. C. 439; Davis *v.* S., 58 Ga. 170; Laney *v.* S., 109 Ala. 34, 19 S. R. 531: Benton *v.* Scarr, 58 Conn. 285, 20 Atl. R. 450; West *v.* S., 84 Ga. 527, 10 S. E. R. 731; Raney *v.* S, 127 Ind. 248, 26 N. E. R. 818; La Mott *v.* S., 128 Ind. 123, 27 N. E. R. 346; S. *v.* Lavin, 80 Iowa, 555, 46 N. W. R. 558; S. *v.* Borie, 79 Iowa, 605, 44 N. W. R. 824; Overlock *v.* Hall, 81 Me. 348, 17 Atl. R. 169; Mann *v.* Maxwell, 83 Me. 146, 21 Atl. R. 844; Neff *v.* S., 57 Md. 385; Odewald *v.* Woodsum, 142 Mass. 512, 8 N. E. R. 347; Bowers *v.* Wood, 143 Mass. 182, 9 N. E. R. 534; Scott *v.* Donovan, 153 Mass. 378, 26 N. E. R. 871; Francis *v.* Rosa, 151 Mass. 532, 24 N. E. R. 1024; Hamilton *v.* P., 46 Mich. 186, 9 N. W. R. 247; P. *v.* Kaminsky, 73 Mich. 637, 41 N. W. R. 833; P. *v.* Keefer, 103 Mich. 83, 61 N. W. R. 338; S. *v.* Tipton, 15 Mont. 74, 38 Pac. R. 222; Denham *v.* Watson, 24 Neb. 779, 40 N. W. R. 308; Dukeheart *v.* Coughman, 36 Neb. 412 54 N. W. R. 680; Stoppert *v.*

will be dismissed with a simple reference to a few cases. The same may be said of the place of the indictment and trial.[1]

§ 692. Joint or separate.— In fornication, plainly, as a general rule, the parties may, the same as in adultery,[2] be indicted either separately or together, at the election of the pleader.[3]

Indictment.— The indictment will vary with the statutory terms, which it must duly cover.[4] The elucidations of that for adultery[5] are applicable to this, except as to the allegation of marriage.

§ 693. Whether negative marriage.— Under special statutory terms,— for example, "if a man commits fornication *with a single woman*,[6] each of them shall be punished," etc.,[7] — the indictment has been required to negative a marriage.[8] And, to make a *prima facie* case, some proof should be introduced to this averment.[9] It is not absolutely clear that, by a true application of the rules of pleading on statutes,[10] this negation of marriage ought to be held essential even on these special words. In the absence of such words, plainly, in principle, a marriage between the parties to a carnal act is matter of defense, lying specially within the knowledge and power of the defendant, to be shown, if it exists, by him at the trial, and so not required to be negatived in the indictment. An illustration precisely in point occurs in rape. If the woman is the man's wife, no personal penetration of her by him, whatever

Nierle, 45 Neb. 105, 63 N. W. R. 382; P. *v.* Schildwachter, 87 Hun, 363, 34 N. Y. Supp. 352; Gaunt *v.* S., 50 N. J. L. 490, 14 Atl. R. 600; S. *v.* Giles, 103 N. C. 391, 9 S. E. R. 433; S. *v.* Hackett, 14 R. I. 162; Crow *v.* Jordon, 49 Ohio St. 655, 32 N. E. R. 750; S. *v.* Bunker, 7 S. D. 639, 65 N. W. R. 33; Swisher *v.* Malone, 31 W. Va. 442, 7 N. E. R. 439; Knight *v.* Morse, 54 Vt. 432; McClellan *v.* S., 66 Wis. 335, 28 N. W. R. 347; Humphrey *v.* S., 78 Wis. 569, 47 N. W. R. 836.

[1] Huff *v.* S., *supra;* Davis *v.* S., *supra;* Heikes *v.* Com., 26 Pa. St. 513.

[2] *Ante*, § 670.

[3] S. *v.* Cox, N. C. Term R. 165.

[4] Delano *v.* S., 66 Ind. 348; Robeson *v.* S., 3 Heisk. 266; S. *v.* Dunn, 26 Ark. 34, 35; S. *v.* Lashley, 84 N. C. 754; S. *v.* Johnson, 69 Ind. 85; [Hutchinson *v.* S., 19 Neb. 262, 27 N. W. R. 113.]

[5] *Ante*, §§ 669–676.

[6] In Texas, the corresponding words are "both being married." Wells *v.* S., 9 Tex. Ap. 160.

[7] Mass. Gen. Stats., ch. 165, § 8. The language of the Revised Statutes was the same. R. S., ch. 130, § 5.

[8] Com. *v.* Murphy, 2 Allen, 163; [Eshelman *v.* P., 52 Ill. Ap. 621.]

[9] Wells *v.* S., *supra;* Hopper *v.* S., 19 Ark. 143.

[10] For example, see Crim. Pro., I, §§ 614, 615, 617, 638.

the circumstances, will constitute the offense;[1] yet the indictment does not negative a marriage with her.[2] And so in fornication, in the absence of special statutory terms, is the little authority which we have.[3]

§ 694. Other questions.— In most other respects this offense is identical with adultery, treated of in the last chapter. And so the elucidations there will render unnecessary anything further here.

[1] Crim. Law, II, § 1119.
[2] Crim. Pro., II, §§ 949, 956.
[3] S. v. Gooch, 7 Blackf. 468; S. v. Stephens, 63 Ind. 542; Bicknell, Crim. Pr. 446–448. See S. v. Lashley, 84 N. C. 754.

CHAPTER XLI.

LIVING IN ADULTERY OR FORNICATION.

§ 695. Introduction.
696–698. Law of the offense.
699–709. The procedure.

§ 695. Order of chapter.— We shall consider: I. The law of the offense; II. The procedure.

I. The Law of the Offense.

§ 696. Statutes — Relations of subject.— The subject of this chapter is a sort of continuation of the discussions of the last two. It is adultery and fornication repeated. The statutes are in terms too diversified to render profitable a minute discussion. They contain such expressions as "living together and carnal intercourse with each other," "habitual carnal intercourse with each other without living together,"[1] "live together as husband and wife without being married,"[2] "live together in adultery or fornication,"[3] "living together in unlawful cohabitation."[4]

§ 697. Elements of offense.— None of these statutes are violated by a mere single act of carnal commerce,[5] and it will not be otherwise though the act transpires in pursuance of a prior arrangement.[6] Nor will mere occasional acts, in private, suffice.[7] Still, it is legally possible for a "living together in

[1] Edwards *v.* S., 10 Tex. Ap. 25; Parks *v.* S., 4 Tex. Ap. 134. For changes in the Texas provisions, see Collum *v.* S., 10 Tex. Ap. 708. And see Wolff *v.* S., 6 Tex. Ap. 195; [Granberry *v.* S., 61 Miss. 440.]

[2] Hopper *v.* S., 19 Ark. 143; Sullivan *v.* S., 32 Ark. 187; [Pinson *v.* S., 28 Fla. 735, 9 S. R. 706.]

[3] Hall *v.* S., 53 Ala. 463; Quartemas *v.* S., 48 Ala. 269; [Powell *v.* S., 12 Tex. Ap. 238; Van Dolsen *v.* S., 1 Ind. Ap. 108, 27 N. E. R. 440.]

[4] Carotti *v.* S., 42 Miss. 334, [97 Am. D. 465.]

[5] McLeland *v.* S., 25 Ga. 477; [Bird *v.* S., 27 Tex. Ap. 559, 11 S. W. R. 641; Thomas *v.* S., 28 Tex. Ap. 300, 12 S. W. R. 1098.]

[6] Smith *v.* S., 39 Ala. 554; [Turney *v.* S., 60 Ark. 259, 29 S. W. R. 843.]

[7] Wright *v.* S., 8 Blackf. 385; Searls *v.* P., 13 Ill. 597; Collins *v.* S., 14 Ala. 608; Carotti *v.* S., 42 Miss. 334; Collum *v.* S., 10 Tex. Ap. 708; Swancoat *v.* S., 4 Tex. Ap. 105; Parks *v.* S., 4

adultery" to be committed in a single day; as, if the parties came together in cohabitation, contemplating its continuance, yet it is broken off by a prosecution, or fear, or other cause.[1] The living must be in the same house, in distinction from two wholly distinct habitations;[2] but it need not be exclusive and continuous.[3] For example, a married man who visits and remains with a lewd woman one night in every week for seven months, at her residence half a mile from his own, commits this offense, though he does not otherwise abandon his own home.[4] To "cohabit together as husband and wife" requires a common habitation, but there need be no profession of marriage.[5]

§ 698. "Open and notorious." — Some of the statutes require the adultery or fornication to be "open and notorious." The offense they create does not differ greatly from that to be treated of in the next chapter. There must, under these statutes, be something like a living together, in distinction from occasional incontinence.[6] And such their cohabitation must be public, in the face of society.[7]

II. The Procedure.

§ 699. Course of discussion. — We shall consider, first, the indictment; secondly, the evidence.

First. **The indictment:** —

The last two chapters — contain directions equally applicable there and here. Beyond which —

Tex. Ap. 134; Quartemas *v.* S., 48 Ala. 269; Clouser *v.* Clapper, 59 Ind. 548; Morrill *v.* S., 5 Tex. Ap. 447; Schwall *v.* S. (Miss.), 21 S. R. 660; Jackson *v.* S., 116 Ind. 464, 19 N. E. R. 330; Pruner *v.* Com., 82 Va. 115; Luster *v.* S., 23 Fla. 339, 2 S. R. 690; Thomas *v.* S., 39 Fla. 427, 22 S. R. 725; S. *v.* Osborne, 39 Mo. Ap. 372; Bodifield *v.* S., 86 Ala. 67, 5 S. R. 559; Edwards *v.* S., 10 Tex. Ap. 287.]

[1] Hall *v.* S., 53 Ala. 463. And see Richardson *v.* S., 37 Tex. 346; [Bodifield *v.* S., 86 Ala. 67, 5 S. R. 559; Walker *v.* S. (Ala.), 16 S. R. 7; McAlpine *v.* S., 117 Ala. 93, 23 S. R. 130.]

[2] Quartemas *v.* S., 48 Ala. 260; S. *v.* Glaze, 9 Ala. 283. But see Parks *v.* S., 4 Tex. Ap. 134.

[3] Smith *v.* S., *supra*.

[4] Collins *v.* S., 14 Ala. 608.

[5] Sullivan *v.* S., 32 Ark. 137; Kinard *v.* S., 57 Miss. 132.

[6] S. *v.* Gartrell, 14 Ind. 280; [Jones *v.* Com., 80 Va. 18. *Contra*, S. *v.* West, 84 Mo. 440; *Ex parte* Thomas, 103 Cal. 497, 37 Pac. R. 514.]

[7] S. *v.* Crowner, 56 Mo. 147; S. *v.* Johnson, 69 Ind. 85; P. *v.* Gates, 46 Cal. 52. [*Contra*, S. *v.* Coffee, 89 Mo. Ap. 56.]

Follow statute.— The indictment must duly pursue the special statutory terms;[1] as,—

"*Live together,*" *etc.*— Where it is made punishable "if any man and woman shall live together as husband and wife without being married," the allegation against a single defendant that he did unlawfully and wickedly bed and live with a person named is inadequate, because not charging a living together as husband and wife without being married.[2]

§ 700. Marriage.— The question as to alleging or negativing a marriage, and of proving either fact, under the differing statutory terms, is sufficiently discussed in the preceding chapters.[3]

§ 701. Certainty —("Or," "And").— On a statute in alternative words,— as "adultery *or* fornication," —it is not, for reasons explained in another connection,[4] good pleading to charge that the parties lived together in "adultery *or* fornication."[5] Nor, it is believed, would it do to say "adultery *and* fornication;" for then the count would be incongruous and double. A ready method of escape from this dilemma, where it is desirable to adapt the indictment to either result of the proofs, is to insert two counts; the one for living in adultery, and the other for living in fornication. The Alabama court has held that, on a single count for living together in adultery, there cannot be a conviction for so living in fornication; the offenses being different, and not included the one in the other.[6] On principle, while this doctrine may be correct under some forms of the indictment, it would seem perfectly practicable to draw a count in such terms as to avoid all objections, whereon the conviction would be for living in adultery if the marriage was proved, or in fornication if it was not.

§ 702. "Together."— The word "together," if in the statute, must in some way be covered by the allegation. It is insufficient to say that the defendants "did live in a state of

[1] S. *v.* Johnson, 69 Ind. 85; S. *v.* Lashley, 84 N. C. 754; Edwards *v.* S., 10 Tex. Ap. 25; Collum *v.* S., 10 Tex. Ap. 708; [Holland *v.* S., 14 Tex. Ap. 182;] and cases cited to the subsequent sections.

[2] Crouse *v.* S., 16 Ark. 566; S. *v.* Dunn, 26 Ark. 34. And see Edwards *v.* S., *supra*.

[3] *Ante*, §§ 673, 687, 693; S. *v.* Stephens, 63 Ind. 542; Collum *v.* S., 10 Tex. Ap. 708; Tucker *v.* S., 35 Tex. 113; Hopper *v.* S., 19 Ark. 143; Wells *v.* S., 9 Tex. Ap. 160; S. *v.* Gooch, 7 Blackf. 468.

[4] Crim. Pro., I, §§ 585–592.

[5] Maull *v.* S., 37 Ala. 160.

[6] Smitherman *v.* S., 27 Ala. 23.

adultery," etc.; because, observed A. J. Walker, C. J., the wrongful things done "do not appear from the indictment to have been perpetrated by any joint act; but, for aught disclosed, may have been altogether distinct, neither defendant participating in the criminal act of the other."[1]

§ 703. Allegation of time — (Continuando, or not). — This is a continuing offense; therefore it may be laid with a *continuando*,[2] or perhaps as committed between one day and another named.[3] Still, since its complete perpetration in a single day is legally possible,[4] it may equally well be charged as on one day,[5] and the proof may be of acts done on any number of days.[6]

§ 704. "Cohabit," etc. — Where the statute makes it punishable "if any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together," an indictment is good which simply charges that, at the time and place, the defendants, not being married to each other, did lewdly and lasciviously associate, bed and cohabit together.[7]

§ 705. Alleging sex. — The sex, whether of the male or female, need not be alleged.[8] Still, there are states wherein, by reason of special statutory terms, or exceptional views of the court, this is required.[9]

§ 706. "Live together." — These statutory words need only be covered by the indictment, without expansion. "If," said Goldthwaite, J., "a single act of fornication was indictable, it might perhaps be necessary to allege the constituents which make up the offense; although, even then, upon the reasoning of the case of The State *v.* Hinton,[10] it would be sufficient to charge the offense in the terms of this indictment. But, enter-

[1] Maull *v.* S., 37 Ala. 160, 161. And see *post*, § 721; [S. *v.* Foster, 21 W. Va. 767; Scott *v.* Com., 77 Va. 344; S. *v.* Foster, 26 W. Va. 272.]

[2] Crim. Pro., I, §§ 393, 394.

[3] S. *v.* Way, 5 Neb. 283; Crim. Pro., I, §§ 395, 396.

[4] *Ante*, § 697.

[5] S. *v.* Glaze, 9 Ala. 283; Hall *v.* S., 53 Ala. 463; Swancoat *v.* S., 4 Tex. Ap. 105.

[6] Crim. Pro., I, § 397.

[7] S. *v.* Lyerly, 7 Jones (N. C.), 158. The indictment, which was held good in this case, was not in the exact terms of the text. S. *v.* Lashley, 84 N. C. 754. See, for a form under the Alabama statute, Lawson *v.* S., 20 Ala. 65, [56 Am. D. 182.]

[8] Crim. Pro., II, § 952; McLeod *v.* S., 35 Ala. 395; S. *v.* Lashley, 84 N. C. 754.

[9] S. *v.* Dunn, 26 Ark. 34.

[10] S. *v.* Hinton, 6 Ala. 864.

taining some doubts as to the correctness of the reasoning in the case cited, we prefer to rest our decision on different grounds. The offense contemplated by the statute was, not a single act, but the living together in fornication; and the facts which enter into the composition of this offense are necessarily so complicated that it is impossible to state them so that the legal conclusion of guilt will result with certainty and precision, and for this reason it is unnecessary to allege them."[1]

§ 707. **Other forms** — of the statute may require corresponding differences in the indictment.[2] But the principles for constructing it are already sufficiently explained.

§ 708. **Joint or several.**— Though the joining in one indictment of the two participants in this guilt seems to be the appropriate course, it is not necessary. The proceeding against one alone is good.[3] Or, if the two are joined and one only is taken, he may be tried; and, if there is a general verdict of guilty, this will not furnish ground for arresting judgment.[4]

§ 709. Secondly. **The evidence:—**

In general.— The explanations of the evidence in the last two chapters are applicable equally under this head, and they cover the entire ground,[5] except what will be obvious to every practitioner.

[1] Lawson *v.* S., 20 Ala. 65, 74, [56 Am. D. 182.] See Crim. Pro., I, §§ 493–498.

[2] As, for example, see S. *v.* Fore, 1 Ire. 378; S. *v.* Jolly, 3 Dev. & Bat. 110, [32 Am. D. 656;] S. *v.* Gartrell, 14 Ind. 280.

[3] Wasden *v.* S., 18 Ga. 264; [S. *v.* Bodifield *v.* S., 86 Ala. 67, 5 S. R. 559.] Rinehart, 106 N. C. 787, 11 S. E. R. 512.]

[4] S. *v.* Lyerly, 7 Jones (N. C.), 158.

[5] For proofs held not sufficient, see Cohen *v.* S., 11 Tex. Ap. 337; [Taylor *v.* S., 36 Ark. 84; Bush *v.* S., 37 Ark. 215; Mynatt *v.* S., 8 Lea (Tenn.), 47;

CHAPTER XLII.

OPEN AND NOTORIOUS LEWDNESS.

§ 710. Introduction.
711–718. Law of the offense.
719–725. The procedure.

§ 710. Order of chapter.— We shall consider, I. The law of the offense; II. The procedure.

I. The Law of the Offense.

§ 711. At common law.— Though a single act of mere private incontinence is not indictable at the common law,[1] one in a public place and witnessed by people is.[2] And, as explained in other connections,[3] the indecent living together of men and women contrary to the order of society, and other like indecencies in the face of the public, may be sufficiently offensive and injurious to the community to be punishable as criminal nuisances.[4]

§ 712. Under statutes.— In aid and extension of this common-law doctrine, we have statutes in various terms, containing such expressions as —

"*Lewdly and lasciviously associate.*" — Under the words "shall lewdly and lasciviously associate and cohabit together," the cohabitation meant was held to be, not simple incontinence in one instance, or in two instances,[5] but a living together by the parties; the legislative purpose being, in the language of the court, "to prevent evil and indecent examples, tending to corrupt the public morals."[6] There must be something more, therefore, than mere private incontinence, continued to how-

[1] *Ante*, §§ 654, 691.
[2] Crim. Law, I, §§ 1125–1127; Reg. *v.* Elliot, Leigh & C. 103; [Vaughan *v.* S., 83 Ala. 55, 3 S. R. 530; Schoudel *v.* S., 57 N. J. L. 209, 30 Atl. R. 589.
[3] Crim. Law, I, §§ 500, 501, 1146.
[4] Brooks *v.* S., 2 Yerg. 482; Britain *v.* S., 3 Humph. 203; Crouse *v.* S., 16 Ark. 566; Delany *v.* P., 10 Mich. 241.
[5] S. *v.* Marvin, 12 Iowa, 499.
[6] Com. *v.* Calef, 10 Mass. 153; S. *v.* Moore, 1 Swan (Tenn.), 136.

ever great a degree.[1] Nor will the mere living together of a man and woman as husband and wife under an invalid marriage, in the mistaken belief that it is valid, constitute this offense.[2]

§ 713. **"Lascivious carriage"**—may be committed by wanton and lascivious acts of one person toward and against the will of another of the opposite sex. The statute was "meant," said Baldwin, J., "to include and suppress all those wanton acts, between persons of different sexes, flowing from the exercise of lustful passions, which are grossly indecent and unchaste, and which are not otherwise punished as crimes against chastity and public decency."[3]

§ 714. **"Open and gross lewdness and lascivious behavior."** Within this expression is a man who indecently exposes his person to a woman, and solicits her to sexual intercourse, and persists in the solicitation, against her opposition and remonstrance.[4] So likewise is one who, intentionally and without excuse, exposes, in the house of another, his person to a girl eleven years old.[5]

§ 715. **"Whoredom"** — **"Whore."** — A "whore" is a woman given to promiscuous commerce with men, usually for hire.[6] The term "whoredom" appears to be less narrow. Within it has been held to be any single act of adultery between a married female and a male not her husband.[7]

§ 716. **"Lewdness"**—differs in meaning both from "whoredom" and from "prostitution." The court, in one case, not defining it, said: "The argument for the defendant, that the word 'lewdness' in the statute applies only to the common-law offense of open and public indecency, cannot be supported. We have no doubt that it includes illicit sexual intercourse and the irregular indulgence of lust, whether public or private."[8]

[1] Com. *v.* Catlin, 1 Mass. 8; S. *v.* Marvin, 12 Iowa, 499. See, however, S. *v.* Cagle, 2 Humph. 414.

[2] Com. *v.* Munson, 127 Mass. 459, [34 Am. R. 411.]

[3] Fowler *v.* S., 5 Day, 81, 84.

[4] S. *v.* Millard, 18 Vt. 574, [46 Am. D. 170.]

[5] Com. *v.* Wardell, 128 Mass. 52. And see S. *v.* Osborne, 69 Mo. 143; Williams *v.* S., 64 Ind. 553, [31 Am. R. 135.]

[6] Sheehey *v.* Cokley, 43 Iowa, 188, [22 Am. R. 236; Fahnestock *v.* S., 102 Ind. 156, 1 N. E. R. 372.]

[7] Rodebaugh *v.* Hollingsworth, 6 Ind. 339.

[8] Com. *v.* Lambert, 12 Allen, 177, 178. Compare with Com. *v.* Catlin, 1 Mass. 8. See also S. *v.* Rye, 9 Yerg. 386.

§ 717. "Public indecency."— In Indiana, where there are no offenses at common law, these words were adjudged to be too indefinite in meaning to create an offense.[1] Thereupon the legislature expressed its own sense of their signification by substituting for them a provision against the indecent exposure of the person in a public place. And Bicknell observes: "The term 'public indecency' was always held to apply especially to indecent exposures of the naked human body; and our statute, as amended, is substantially a re-enactment of a part of the common law."[2]

§ 718. Cohabitation under void marriage.— We have seen that one of these statutes is not violated by a cohabitation under a void marriage supposed to be valid.[3] Probably none of them are.[4]

II. The Procedure.

§ 719. Course of discussion.— We shall consider, first, the indictment; secondly, the evidence.

First. **The indictment:** —

Previous explanations.— The explanations of the indictment in the last three chapters, and particularly the last, will serve in some measure for the present chapter.

Follow statute.— The rule, ordinarily sufficient, is that the indictment for this offense should cover the statutory terms, and it need not in general be much expanded beyond.[5]

§ 720. Marriage.— Under some of the statutes there is scope for the doctrines already considered[6] as to averring or negativing a marriage.[7]

§ 721. "Together"— "With each other"— (Joint).— Some of the statutes have the one, some the other, of these form of words. As in the offense treated of in the last chapter,[8] so in this, the pleader must cover them by his allegations. And it is, at least by some, deemed legally impossible for one

[1] Jennings *v.* S., 16 Ind. 335; S. *v.* Huey, 16 Ind. 338.

[2] Bicknell, Crim. Pr. 448, 449.

[3] *Ante*, § 712.

[4] Com. *v.* Hunt, 4 Cush. 49. And see *ante*, § 666.

[5] *Post*, § 724; Williams *v.* S., 64 Ind. 553, [31 Am. R. 135;] S. *v.* Osborne, 69 Mo. 143; P. *v.* Colton, 2 Utah, 457; [S. *v.* Stubbs, 108 N. C. 774, 13 S. E. R. 90; Com. *v.* Dill, 159 Mass. 61, 34 N. E. R. 84,] and cases cited in subsequent sections.

[6] *Ante*, §§ 673, 687, 693, 700.

[7] S. *v.* Clinch, 8 Iowa, 401.

[8] *Ante*, § 702.

party to commit this offense unless the other commits it also.[1] Still,—

Convictions several.— As in the offense explained in the last chapter,[2] the one may be prosecuted without the other, or may even be convicted after the other is acquitted.[3]

§ 722. Time — (Continuando or not).— This offense, like that treated of in the last chapter,[4] may be charged as continuing or not, at the election of the pleader.[5]

§ 723. "Lewd, etc., person."— On a statute making punishable "lewd, wanton and lascivious persons in speech or behavior," it is sufficient in allegation to say that at, etc., the defendant "was and still is a lewd, wanton and lascivious person in speech and behavior."[6]

§ 724. Further of following statute.— In further illustration of the rule of following the statute,—

Open and public.— It was in Tennessee held necessary to aver that the acts constituting the offense were openly and publicly committed.[7]

Specific acts.— Under a Missouri statute making punishable "every person, married or unmarried, who shall be guilty of open, gross lewdness or lascivious behavior," the simple following of the statutory words was adjudged good.[8] This is believed to be the true doctrine,[9] yet hardly consistent with an earlier case in the same state.[10]

§ 725. Secondly, **The evidence:**—

Circumstantial evidence — is competent, and it may be sufficient;[11] but —

Hearsay — such as rumor and neighborhood talk, is inadmissible.[12]

[1] S. *v.* Byron, 20 Mo. 210; Delany *v.* P., 10 Mich. 241. And see Ashworth *v.* S., 9 Tex. 490. For a sufficient form, see S. *v.* Osborne, 69 Mo. 143; P. *v.* Colton, 2 Utah, 457.

[2] *Ante*, § 708.

[3] S. *v.* Caldwell, 8 Bax. 576.

[4] *Ante*, § 703.

[5] Hinson *v.* S., 7 Mo. 244.

[6] Com. *v.* Parker, 4 Allen, 313.

[7] S. *v.* Moore, 1 Swan (Tenn.), 136.

[8] S. *v.* Bess, 20 Mo. 418.

[9] *Ante*, § 706.

[10] Dameron *v.* S., 8 Mo. 494.

[11] Peak *v.* S., 10 Humph. 99; [S. *v.* Kirkpatrick, 63 Iowa, 554, 19 N. W. R. 660.]

[12] Belcher *v.* S., 8 Humph. 63; Buttram *v.* S., 4 Coldw. 171.

CHAPTER XLIII.

INCEST.

§ 726. Introduction.
727–730. Law of the offense.
731–736. The procedure.

§ 726. How chapter divided.— We shall consider: I. The law of the offense; II. The procedure.

I. The Law of the Offense.

§ 727. How defined.— Incest, where the statutes have not modified its meaning, is sexual commerce, either habitual or in a single instance, and either under a form of marriage or without it, between persons too nearly related in consanguinity or affinity to be entitled to intermarry.[1] And, in this offense, illegitimate consanguinity has the same effect as legitimate.[2]

Marriage voidable — Void.— Where the forbidden marriage is merely voidable, in the sense special to the matrimonial law, a cohabitation under it, before its nullity is judicially declared, is not a crime;[3] but a void marriage could give to the carnal commerce no protection.[4]

[1] Chick *v.* Ramsdale, 1 Curt. Ec. 34; Griffiths *v.* Reed, 1 Hag. Ec. 195; Blackmore *v.* Brider, 2 Phillim. 359; Woods *v.* Woods, 2 Curt. Ec. 516; Burgess *v.* Burgess, 1 Hag. Con. 384; [S. *v.* Guiton, 51 La. An. 155, 24 S. R. 784; S. *v.* Hertzes, 55 Minn. 464, 57 N. W. R. 205; Chinn *v.* S., 47 Ohio St. 575, 26 N. E. R. 986, 11 L. R. A. 630; S. *v.* Wyman, 59 Vt. 527, 8 Atl. R. 900; Norton *v.* S. (Ind.), 3 West. R. 730; Shelly *v.* S. (Tenn.), 31 S. W. R. 492.]

[2] 1 Bishop, Mar., Div. & S., § 315; Woods *v.* Woods, *supra*, at p. 521; S. *v.* Schaunhurst, 34 Iowa, 547; Baker *v.* S., 30 Ala. 521; Morgan *v.* S., 11 Ala. 289; [Clark *v.* S., 39 Tex. Cr. R. 179, 45 S. W. R. 576; P. *v.* Lake (N. Y.), 17 N. E. R. 146; S. *v.* Laurence, 95 N. C. 659.]

[3] 1 Bishop, Mar., Div. & S., §§ 104*a*, 105, 115, 119, 320. In the English ecclesiastical courts, the first step might be a criminal suit for the incest, and then the punishment and the nullity of the marriage would be decreed together. See the English cases just cited.

[4] 1 Bishop, Mar., Div. & S., §§ 105, 119.

§ 728. At common law.— At the time of the settlement of our country, incest, the same as common adultery and fornication, was punishable as an offense against the ecclesiastical laws,[1] but it was not indictable in the common-law courts.[2] It is not, therefore, indictable under our common law.[3] But,—

Under statutes.— Quite generally in our states, yet not absolutely in all,[4] it is made a crime by statutes.[5] And under many or all of the statutes, not only incestuous fornication or adultery is incest, but such also is an incestuous marriage, not requiring the added element of cohabitation.[6]

§ 729. Knowledge of relationship.— Some of the statutes have the word "knowingly," thereby expressly making a knowledge of the relationship an element in the offense.[7] In the absence of this word or its equivalent, while such knowledge is not an affirmative element, and it need not be alleged in the indictment,[8] ignorance of the relationship is, by the Scotch

[1] See the English cases cited to the last section.

[2] Blackstone says: "In the year 1650, when the ruling powers found it to their interest to put on the semblance of a very extraordinary strictness and purity of morals, not only incest and wilful adultery were made capital crimes, but also the repeated acts of keeping a brothel, or committing fornication, were (upon a second conviction) made felony without benefit of clergy. But at the restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to resume a law of such unfashionable rigor. And these offenses have been ever since left to the feeble coercion of the spiritual court, according to the rules of the canon law; a law which has treated the offense of incontinence, nay even adultery itself, with a great degree of tenderness and lenity; owing perhaps to the constrained celibacy of its first compilers." 4 Bl. Com. 64, 65. Incest is indictable under the common law of Scotland. McColl's Case, 1 Scotch Sess. Cas. (4th ser.), Just. 22, 2 Couper, 538.

[3] Crim. Law, I, § 502; S. *v.* Keesler, 78 N. C. 469. See S. *v.* Smith, 30 La. An. 846.

[4] S. *v.* Keesler, *supra*.

[5] Cook *v.* S., 11 Ga. 53, [56 Am. D. 410;] Powers *v.* S., 44 Ga. 209; Com. *v.* Perryman, 2 Leigh, 717; Chancellor *v.* S., 47 Miss. 278; S. *v.* Slaughter, 70 Mo. 484; S. *v.* Peterson, 70 Me. 216; P. *v.* Harriden, 1 Park. Cr. 344; Attorney-General *v.* Broaddus, 6 Munf. 116; Baker *v.* S., 30 Ala. 521; Howard *v.* S., 11 Ohio St. 328; U. S. *v.* Hiler, Morris, 330.

[6] S. *v.* Schaunhurst, 34 Iowa, 547; Gay *v.* S., 2 Tex. Ap. 127; Territory *v.* Corbett, 3 Mont. 50; [Simon *v.* S., 31 Tex. Cr. R. 186, 20 S. W. R. 899; Simon *v.* S., 31 Tex. Cr. R. 196, 20 S. W. R. 716.]

[7] Williams *v.* S., 2 Ind. 439; Baumer *v.* S., 49 Ind. 544, [19 Am. R. 691; Rea *v.* Harrington, 58 Vt. 181, 2 Atl. R. 475.]

[8] *Post*, § 733; S. *v.* Bullinger, 54 Mo. 142; Morgan *v.* S., 11 Ala. 289. See Delany *v.* P., 10 Mich. 241, 244; [*Re* Nelson, 69 Fed. R. 712.]

doctrine,[1] and by the principles of our own law, though the question seems not to have been directly adjudicated, a good defense, on the ground of mistake of fact.[2]

§ 730. Attempts — (Solicitations).— There may be an indictable attempt to commit incest, though the act must proceed far enough.[3] On principle, a solicitation not responded to may constitute an attempt,— a proposition denied in one case.[4] But this case, and the question generally, are sufficiently explained in "Criminal Law."[5]

II. The Procedure.

§ 731. Previous expositions.—Incest being either an unlawful marriage, therefore within the principles explained in the chapter on polygamy, or a particular form of fornication or adultery, consequently within the expositions of the last four chapters, the reader has only to turn to those chapters to find answered most of his inquiries under the present head.

§ 732. Following statute.— The leading rule for all indictments on statutes, to cover in allegation their terms, is the principal one in this offense.[6] Thus,—

Averring relationship.—Under the statutory words, "if any father shall have sexual intercourse with his daughter knowing her to be such," it is not sufficient to allege that the defendant, A., "unlawfully did have sexual intercourse with his daughter B., the said B. then and there knowing that she, the said B., was his, the said A.'s, daughter." A.'s knowledge is not covered by "unlawfully," nor does it otherwise appear.[7] But where the expression in the statute was, "within the degrees of consanguinity within which marriages are prohibited or de-

[1] 1 Alison, Crim. Law, 563; 1 Hume, Crim. Law (2d ed.), 448.

[2] Crim. Law, I, §§ 301–310; *ante*, §§ 596*a*, 663.

[3] P. *v.* Murray, 14 Cal. 159; McColl's Case, 1 Scotch Sess. Cas. (4th ser.), Just. 22, 2 Couper, 538; [P. *v.* Gleason, 99 Cal. 359, 33 Pac. R. 1111.]

[4] Cox *v.* P., 82 Ill. 191.

[5] Crim. Law, I. Introduction to 7th ed., the long note, §§ 764, 768*d*, 772*a*.

The carnal act.— What is the carnal act necessary to the substantive offense we saw under the title Adultery. *Ante*, § 661; Noble *v.* S., 22 Ohio St. 541.

[6] S. *v.* Bullinger, 54 Mo. 142; Baumer *v.* S., 49 Ind. 544, [19 Am. R. 691;] Gay *v.* S., 2 Tex. Ap. 127; [S. *v.* Brown, 47 Ohio St. 102, 23 N. E. R. 747; S. *v.* McGilvery, 20 Wash. 240, 55 Pac. R. 115; S. *v.* Guiton, 51 La. An. 155, 24 S. R. 784; Porath *v.* S., 90 Wis. 527, 63 N. W. R. 1061.]

[7] Williams *v.* S., 2 Ind. 439.

clared by law to be incestuous and void," it was adjudged adequate to aver that the defendant "did commit the crime of fornication" with one B., his daughter.[1] Under the Illinois statute the allegation that the defendant A. did the criminal act on the person of B., the said B. then and there being the daughter of him, the said A., was held to be adequate as to the relationship.[2]

§ 733. "Knowingly."— We have already seen that the word "knowingly," if in the statute, must be in the indictment, otherwise it need not be.[3] Now,—

Both knowing — Joint or several.— If, as some deem, or as under some statutes, the guilt of both parties is essential to that of either one,[4] the knowledge of both, where the statute requires both to have it, must be alleged.[5] But where the offense may be proceeded against as several, and one may be guilty without the other,[6] the knowledge of the defendant alone need be averred.[7]

§ 734. Continuando or not.— Where, by the terms of the statute or its interpretation, one carnal act constitutes the offense, it cannot be charged as continued through a specified number of years; for so the count would be double.[8] But doubtless there are statutes under which this form of averring the time will be good.

§ 735. Proof of relationship.— It has been held, doubtless correctly, that on an indictment for incest the relationship and pedigree of the parties may be proved by reputation[9] or by the defendant's confessions.[10]

[1] Hicks *v.* P., 10 Mich. 395; [P. *v.* Kaiser, 119 Cal. 456, 51 Pac. R. 702; S., De Puy *v.* Evans, 88 Wis. 255, 60 N. W. R. 433.]

[2] Bergen *v.* P., 17 Ill. 426, [65 Am. D. 672;] S. P., Hicks *v.* P., 10 Mich. 395. See also Howard *v.* S., 11 Ohio St. 328; Noble *v.* S., 22 Ohio St. 541; Hutchins *v.* Com., 2 Va. Cas. 331, 332; Attorney-General *v.* Broaddus, 6 Munf. 116; [Waggoner *v.* S., 35 Tex. Cr. R. 199, 32 S. W. R. 896.]

[3] *Ante*, §§ 729, 732. It is so also in simple adultery. Com. *v.* Elwell, 2 Met. 190, [35 Am. D. 398.]

[4] *Ante*, § 660; S. *v.* Thomas, 53 Iowa, 214; De Groat *v.* P., 39 Mich. 124.

[5] Baumer *v.* S., 49 Ind. 544, [19 Am. R. 691.]

[6] Powers *v.* S., 44 Ga. 209.

[7] Baker *v.* S., 30 Ala. 521; Morgan *v.* S., 11 Ala. 289, 290.

[8] Barnhouse *v.* S., 31 Ohio St. 39. And see S. *v.* Temple, 38 Vt. 37; S. *v.* Glaze, 9 Ala. 283.

[9] Ewell *v.* S., 6 Yerg. 364, [27 Am. D. 480;] S. *v.* Bullinger, 54 Mo. 142, 144. See 1 Bishop, Mar., Div. & S., §§ 546–548.

[10] P. *v.* Jenness, 5 Mich. 305; Morgan

§ 736. Other questions.— Some other questions of evidence have been decided in these cases; but relating simply to the sufficiency of the proofs, or not involving principles special to this offense.[1]

v. S., 11 Ala. 289; Bergen v. P., 17 Ill. 426, [65 Am. D. 672;] P. v. Harriden, 1 Park. Cr. 344; S. v. Schaunhurst, 34 Iowa, 547.

[1] Lovell v. S., 12 Ind. 18; P. v. Jenness, 5 Mich. 305; Tuberville v. S., 4 Tex. 128; Gay v. S., 2 Tex. Ap. 127; Freeman v. S., 11 Tex. Ap. 92, [40 Am. R. 787;] Kidwell v. S., 63 Ind. 384; S. v. Ellis, 74 Mo. 385; [Smith v. S., 108 Ala. 1, 19 S. R. 306; P. v. Kaiser, 119 Cal. 456, 51 Pac. R. 702; S. v. Kouhns, 103 Iowa, 720, 73 N. W. R. 353; S. v. Hurd, 101 Iowa, 391, 70 N. W. R. 613; Com. v. Bakeman, 131 Mass. 577; Whitaker v. Com., 95 Ky. 632, 27 S. W. R. 83; Yeoman v. S., 21 Neb. 171, 31 N. W. R. 669; S. v. Jarvis, 20 Oreg. 437, 26 Pac. R. 302; Mercer v. S., 17 Tex. Ap. 452; Bates v. S. (Tex. Cr. R.), 44 S. W. R. 517; Bennett v. S., 32 Tex. Cr. R. 216, 22 S. W. R. 47; Schoenfelt v. S., 30 Tex. Ap. 695, 18 S. W. R. 640; Blanchette v. S., 29 Tex. Ap. 46, 14 S. W. R. 392; Owens v. S., 35 Tex. Cr. R. 345, 35 S. W. R. 875; Mullinix v. S., 32 Tex. Cr. R. 116, 26 S. W. R. 504; Poyner v. S. (Tex. Cr. R.), 51 S. W. R. 376; Kilpatrick v. S., 39 Tex. Cr. R. 10, 44 S. W. R. 830; Porath v. S., 90 Wis. 527, 63 N. W. R. 1061.]

CHAPTER XLIV.

OTHER OFFENSES AGAINST MARRIAGE.

§ 737. In "Marriage and Divorce." — In the author's work on "Marriage and Divorce," there is a chapter on the "Impediments of Race and Civil Condition,"[1] and another on the "Penal Consequences of Irregular Marriage Solemnization."[2] It is not proposed to repeat here what is said there. Still,—

§ 738. Miscegenation. — As there stated, some of our states have statutes against the mixing of races by intermarriage, particularly of blacks and whites; and these statutes, even since the abolition of slavery and the accompanying amendments of the national constitution, and the enforcing acts of congress, are within the legislative power of the states.[3] Nor, in general, did such abolition and those amendments and acts interrupt the operation of the prior statutes of this sort.[4] For something of the interpretation of the statutes and the procedure under them, the reader is referred to the cases in the note.[5]

§ 739. The rest of the subject — is sufficiently discussed in the other work. But the reader may like to see, in a note,[6] a reference to some of the cases.

[1] 1 Bishop, Mar., Div. & S., §§ 308–311.

[2] 1 id., §§ 341–347*a*.

[3] 1 id., §§ 308, 308*a*; *Ex parte* Kinney, 3 Hughes, C. C. 9; *Ex parte* Francois, 3 Woods, 367; Lonas *v.* S., 3 Heisk. 287.

[4] Frasher *v.* S., 3 Tex. Ap. 263, [30 Am. R. 131;] Francois *v.* S., 9 Tex. Ap. 144; S. *v.* Gibson, 36 Ind. 389, [10 Am. R. 42.]

[5] Moore *v.* S., 7 Tex. Ap. 608; Hoover *v.* S., 59 Ala. 57; Green *v.* S., 59 Ala. 68; S. *v.* Bell, 7 Bax. 9, [32 Am. R. 549;] Frasher *v.* S., *supra;* Burns *v.* S., 48 Ala. 195, [17 Am. R. 34,] overruled in Green *v.* S., 58 Ala. 190, [29 Am. R. 739; Linton *v.* S., 88 Ala. 216, 7 S. R. 261; McAlpine *v.* S., 117 Ala. 93, 23 S. R. 130.]

[6] S. *v.* Bray, 13 Ire. 289; S. *v.* Loftin, 2 Dev. & Bat. 31; S. *v.* McWhinney, 5 Blackf. 364; Smyth *v.* S., 8 Eng. 696; Bailey *v.* Fiske, 34 Me. 77; Reg. *v.* James, Temp. & M. 300, 14 Jur. 940, 19 Law J. (N. S.) M. C. 179, 1 Eng. L. & Eq. 552. 2 Den. C. C. 1; Wyckoff *v.* Boggs, 2 Halst. 138; S. *v.* Griffith, 67 Mo. 287; S. *v.* Wilder, 7 Blackf. 582; S. *v.* Horsey, 14 Ind. 185; S. *v.* Pierce, 14 Ind. 302; Com. *v.* Waterman, 122 Mass. 43; Com. *v.* Hill, 6 Leigh, 636; S. *v.* Ross, 26 Mo. 260; Sikes *v.* S., 30 Ark. 496; S. *v.* Winright, 12 Mo. 410; Reg. *v.* Asplin, 12 Cox, C. C. 391, 5 Eng. R. 470; Bonker *v.* P., 37 Mich. 4.

CHAPTER XLV.

ABORTION.

§ 740, 741. Introduction.
742–750. Law of the offense.
751–762. The procedure.

§ 740. Why treated as statutory.— Though, as we shall see,[1] abortion is recognized in some degree as an offense at the common law, practically the prosecutions for it are nearly all upon statutes. Hence it is placed in the statutory division of this series of works.

§ 741. How chapter divided.— We shall consider, I. The law of the offense; II. The procedure.

I. The Law of the Offense.

§ 742. Resulting in death.— An abortion which results in the death of the woman,[2] — or, where the pregnancy has so far advanced that the child passes from her alive, in its death from injuries inflicted in the operation, or from premature exposure to the external world,[3] — is common-law murder. But,—

§ 743. Same under statutes.— In some of our states statutes have either made it manslaughter,[4] or an aggravated abortion punishable less severely than murder.[5] But not all the statutes on the subject thus reduce the offense.[6]

§ 744. Abortion at common law.— The causing of an abortion is an indictable misdemeanor at the common law.[7] There-

[1] *Post*, § 744.

[2] Crim. Law, II, § 691; Reg. *v.* Fretwell, Leigh & C. 161, 9 Cox, C. C. 153; Com. *v.* Hersey, 2 Allen, 173; S. *v.* Moore, 25 Iowa, 128, [95 Am. D. 776;] S. *v.* Dickinson, 41 Wis. 299.

[3] Crim. Law, I, § 328; II, § 691; Reg. *v.* West, 2 Car. & K. 784, 2 Cox, C. C. 500; Storer & Heard, Abortion, 153; [S. *v.* Slage, 82 N. C. 653.]

[4] S. *v.* Dickinson, 41 Wis. 299; P. *v.* Olmstead, 30 Mich. 431; Willey *v.* S., 46 Ind. 363; S. *v.* Glass, 5 Oreg. 73; [S. *v.* Emerich, 87 Mo. 110.]

[5] Gen. Stats., ch. 165, § 9; Com. *v.* Brown, 14 Gray, 419; Com. *v.* Jackson, 15 Gray, 187; Com. *v.* Adams, 127 Mass. 15. Under the earlier Massachusetts statutes, Com. *v.* Wood, 11 Gray, 85, 92. In other states, S. *v.* Harper, 35 Ohio St. 78, [35 Am. R. 596;] P. *v.* Davis, 56 N. Y. 95.

[6] Beasley *v.* P., 89 Ill. 571.

[7] 3 Inst. 50; 1 Hale, P. C. 433; Hawk.

fore a mere unsuccessful attempt to produce it is thus indictable;[1] as, where one administers to a woman a noxious thing with such intent.[2]

At what stage of pregnancy — (Consent or not).— An act of this sort, whether successful or not, committed without the woman's consent, is also, of course, an aggravated assault. Some have denied that, if she consents, it is indictable at the common law, unless she has arrived at the stage of pregnancy termed quick with child.[3] And Hale has on this subject the expression "quick or great with child;"[4] and Coke, "quick with child;"[5] but not in connections denying that the offense may be committed at an earlier stage of the pregnancy. Others reject this distinction. "It is not," said Coulter, J., delivering the opinion of the Pennsylvania court, "the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated."[6] This, in principle, seems to be the reasonable and just doctrine.

§ 745. "Quick with child."— The meaning of this phrase is commonly understood to be, that the woman has felt the child move;[7] and a distinction between it and "with quick child," once taken by a learned judge,[8] has been discarded.[9]

§ 746. Under statutes, as to quick with child.— Our statutes against this offense, with few exceptions,[10] do not in terms require a quicking; and, when they do not, they are not judicially construed to require it. Thus, under the following ex-

P. C. (Curw. ed.), p. 94, § 16. And see 3 Chit. Crim. Law, 798, 799.

[Taylor *v.* S., 105 Ga. 846, 33 S. E. R. 190.]

[1] 1 Russ. Crimes (5th Eng. ed.), 853.

[2] S. *v.* Slagle, 82 N. C. 653.

[3] Com. *v.* Parker, 9 Met. 263, [43 Am. D. 396;] Com. *v.* Bangs, 9 Mass. 387; S. *v.* Cooper, 2 Zab. 52, [51 Am. D. 248;] Smith *v.* S., 33 Me. 48, [54 Am. D. 607.]

[4] 1 Hale, P. C. 433; [P. *v.* McDowell, 63 Mich. 229, 30 N. W. R. 68.]

[5] 3 Inst. 50.

[6] Mills *v.* Com., 13 Pa. St. 631, 633; followed by the North Carolina tribunal in S. *v.* Slagle, 83 N. C. 630, 632;

[7] Rex *v.* Phillips, 8 Camp. 73, 76; Com. *v.* Reid, 1 Pa. Leg. Gaz. R. 182.

[8] Reg. *v.* Wycherly, 8 Car. & P. 262; and see this case for an interesting note by the reporter, showing, on medical authority, that "the popular idea of quick or not quick with child is founded in error."

[9] S. *v.* Cooper, 2 Zab. 52, 57, [51 Am. D. 248;] and see the authorities there cited; also Rex *v.* Russell, 1 Moody, 356, 360. See S. *v.* Smith, 32 Me. 369, [54 Am. D. 578.]

[10] Robbins *v.* S., 8 Ohio St. 131.

pressions, the crime may be committed at any time during gestation: "wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, with intent thereby to procure the miscarriage of any such woman;"[1] with intent to cause and procure the miscarriage of a woman then pregnant with child shall administer," etc.[2] And the Vermont court has even held, under a statute similar in terms to these, that it is not essential for the fœtus to be alive when the attempt is made. "We think," said Redfield, C. J., "the mother is with child, whether the child be dead or alive, until the actual miscarriage by the expulsion of the fœtus,"[3] — as to which there is a *dictum* to the contrary in Massachusetts.[4]

§ 747. "**Noxious thing.**" — In many of the statutes, one of the prohibited means of abortion is the administering of a "noxious thing." The "thing" must, by construction, be "noxious" to the system, not necessarily in small quantities, but in the quantities actually given.[5] It is not noxious if administered in quantities too small to effect injury of any sort.[6] But, to be within the statute, it need not be capable of bringing about the abortion.[7]

"*Poison*" — is another word often employed in the same connection. It has been deemed to be a substance capable of destroying life by its own inherent qualities, without acting mechanically.[8]

"*Administer.*" — To administer the poison or other thing is to cause it to be taken.[9] It may be by forcing it down the

[1] Wilson *v.* S., 2 Ohio St. 319. [And indictment has been sustained as to attempt to procure miscarriage where woman was not even pregnant. Com. *v.* Taylor, 132 Mass. 261.]

[2] Mass. Stat. of 1845, ch. 27; Com. *v.* Wood, 11 Gray, 85. The same, in substance, in Iowa. S. *v.* Fitzgerald, 49 Iowa, 260 [31 Am. R. 148.]

[3] S. *v.* Howard, 32 Vt. 380, 403; [Com. *v.* Surles, 165 Mass. 59, 42 N. E. R. 502.]

[4] Com. *v.* Wood, *supra.*

[5] Reg. *v.* Cramp, 5 Q. B. D. 307, 14 Cox, C. C. 401; Reg. *v.* Cramp, 14 Cox, C. C. 390; S. *v.* Gedicke, 14 Vroom, 86; Reg. *v.* Hollis, 12 Cox, C. C. 463; Reg. *v.* Isaacs, Leigh & C. 220, 9 Cox, C. C. 228; [S. *v.* Gedicke, 43 N. J. L. 86.]

[6] Reg. *v.* Perry, 2 Cox, C. C. 223; Reg. *v.* Hennah, 13 Cox, C. C. 547, the head-note to which case seems not to be correct.

[7] S. *v.* Gedicke, *supra;* Reg. *v.* Hennah, *supra.* And see in Com. *v.* W., 3 Pittsb. 463; [S. *v.* Morrow, 40 S. C. 221, 18 S. E. R. 853.]

[8] P. *v.* Van Deleer, 53 Cal. 147.

[9] Crim. Pro., II, § 645. And see *ante*, § 225.

woman's throat, or by violence compelling her to swallow it.[1] Or it may be by delivering it to one who receives it into her system voluntarily; having, or not, asked for it. Generally, in our statutes, the expression is "administer and cause to be taken;" and perhaps it is a question not absolutely settled in authority, or one depending on other parts of the statute, whether, under the single word "administer,"[2] the defense can be complete before the thing is swallowed.[3]

Intent.— The evil intent specified in the statute, or implied from the nature of the case, is an element indispensable to the offense.[4]

Varying provisions.— The statutes on this subject so vary from one another, and are so changing from time to time, that it becomes specially necessary for the practitioner to study those of his own state, and the adjudications under them.[5]

§ 748. Attempt consummated.— The offense under many of our statutes is an attempt only; as, "administer, etc., with

[1] Blackburn *v.* S., 23 Ohio St. 146.

[2] See the elucidations in Crim. Pro., II, § 645.

[3] *Ante*, § 225; Reg. *v.* Wilson, 37 Eng. L. & Eq. 605, Dears. & B. 127, 7 Cox, C. C. 190; Reg. *v.* Farrow, 40 Eng. L. & Eq. 550, Dears. & B. 164; Reg. *v.* Fretwell, Leigh & C. 161; Reg. *v.* Isaacs, Leigh & C. 220; Reg. *v.* Cramp, 14 Cox, C. C. 390; Reg. *v.* Hollis, 12 Cox, C. C. 463. Under the words, in the New Jersey statute, "administer to her, prescribe for her, or advise or direct her to take or swallow, any poison, drug, medicine, or noxious thing," the indictment need not (see Crim. Pro., II, § 645) aver that the thing was taken or swallowed, nor need this be proved at the trial. "The defendant's guilt," said the learned judge, "is complete by giving the advice with the intent specified in the act, and it is immaterial whether the advice be followed or not." S. *v.* Murphy, 3 Dutcher, 112, 115.

"**Supply or provide.**"— The words of 24 & 25 Vict., ch. 100, § 59, "supply or provide any poison," etc., do not require it to be taken. Reg. *v.* Titley, 14 Cox, C. C. 502.

[4] Reg. *v.* Hillman, Leigh & C. 343; Reg. *v.* Isaacs, Leigh & C. 220; Slattery *v.* P., 76 Ill. 217; Reg. *v.* Titley, 14 Cox, C. C. 502; Com. *v.* Wood, 11 Gray, 85. See Tulley *v.* Corrie, 10 Cox, C. C. 584, 640; [Powe *v.* S., 48 N. J. L. 34, 2 Atl. R. 662; Eggart *v.* S., 40 Fla. 527, 25 S. R. 144.]

[5] There have been certainly three (I cannot say how many more) successive English statutes against attempted abortion, in force at different times, the provisions whereof so differ from one another as to require, in some respects, different constructions; namely, 43 Geo. 3, ch. 58, § 1; 7 Will. 4 and 1 Vict., ch. 85, § 6; and the present statute of 24 & 25 Vict., ch. 100, §§ 58, 59. See Crim. Law, I, § 741 and note; Greaves, Crim. Law Acts, 82. Further, as to American enactments, see Abrams *v.* Foshee, 3 Iowa, 274, [66 Am. D. 77;] Robbins *v.* S., 8 Ohio St. 131; [Lamb *v.* S., 67 Md. 592, 10 Atl. R. 208; P. *v.* Phelps, 133 N. Y. 267, 30 N. E. R. 1012.]

intent to procure a miscarriage." But, by construction, it is no less committed though the attempt is successful, the woman actually miscarrying.[1] The case is like that of burglary, where the crime consists of breaking and entering with intent to perpetrate a felony; yet it is equally burglary if the intended felony is accomplished.[2]

§ 749. **Persons assisting** — may incur guilt, according to the special terms of the statute or the principles of the unwritten law.[3] As to the —

Guilt of consenting woman. — In England, the statute of 24 and 25 Vict., ch. 100, § 58, makes punishable the attempt of a woman with child "to procure her own miscarriage."[4] She may therefore be the accomplice of another person in this crime.[5] But the author has not observed this provision in any of our statutes; and, by reason of their terms, and the particular nature of the offense, the courts in the construction generally regard her as in some degree the victim, and not punishable though she consents.[6]

Woman's consent in defense. — The consent of the woman, or desire to save herself from disgrace, furnishes no excuse to the perpetrator.[7]

§ 750. **Felony or misdemeanor.** — At the common law, and by the statutes of Illinois[8] and of some of the other states, this offense is misdemeanor. But in some of the states there are forms of it which are felony, — a question which the practitioner can best decide from his local books.

[1] Reg. *v.* Wilson, Dears. & B. 127; Com. *v.* W., 3 Pittsb. 463.

[2] Crim. Law, II, §§ 115–117; Crim. Pro., II, § 148.

[3] Com. *v.* Adams, 127 Mass. 15; Reg. *v.* Hollis, 12 Cox, C. C. 463; Crichton *v.* P., 1 Abb. Ap. 467.

[4] And see Reg. *v.* Fretwell, Leigh & C. 161, 9 Cox, C. C. 152.

[5] Reg. *v.* Cramp, 14 Cox, C. C. 390, 393.

[6] Hatfield *v.* Gano, 15 Iowa, 177, 178; Dunn *v.* P., 29 N. Y. 523, [86 Am. D. 319;] Com. *v.* Wood, 11 Gray, 85, 93; Com. *v.* Boynton, 116 Mass. 343; S. *v.* Hyer, 10 Vroom, 598. See Solander *v.* P., 2 Colo. 48; Frazer *v.* P., 54 Barb. 306; P. *v.* Josselyn, 39 Cal. 393. [The New York statute makes it a crime on the part of the woman. P. *v.* Meyers, 5 N. Y. Cr. R. 120.]

[7] Crim. Law, I, §§ 257–260; Com. *v.* Wood, 11 Gray, 85; Com. *v.* Snow, 116 Mass. 47; Reg. *v.* Wilson, Dears. & B. 127, 7 Cox, C. C. 190. And see S. *v.* Glass, 5 Oreg. 73; Com. *v.* Holmes, 103 Mass. 440. [Nor a threat to commit suicide. Hatchard *v.* S., 79 Wis. 357, 48 N. W. R. 380; P. *v.* Abbott, 116 Mich. 263, 74 N. W. R. 529.]

[8] Holliday *v.* P., 4 Gilman, 111.

II. The Procedure.

§ 751. Order of discussion.— We shall consider, first, the indictment; secondly, the evidence.

First. **The indictment:**—

At common law.— As the offense may be either the substantive procuring of an abortion or the attempt to produce it,[1] and the methods are numerous, the common-law indictment will vary with the multiplied diversities of cases.

§ 752. Attempt.— The indictment for the attempt may charge, for example, that, at a time and place specified, the defendant maliciously administered to and caused to be taken by a woman named, she being then and there pregnant with child, divers large quantities of deadly, etc.,[2] with intent then and there to cause her miscarriage, and the premature birth and distruction of the child whereof she was so pregnant. The objection, made in one case, that the allegation of the intent should be "to cause and procure the miscarriage and abortion of the child," instead of the pregnant mother, was overruled.[3] And,—

§ 753. Quick with child.— In a state where the courts hold that, to constitute this common-law offense, the woman must be, not merely pregnant, but quick with child,[4] this matter also must be averred.[5]

§ 754. Under statutes.— In the multiplicity of our statutory provisions, the leading rule for the pleader is to —

Follow the statute.— This rule is specially safe, and in most instances sufficient, in the various forms of the offense now under consideration. Rarely will the allegations require expansion beyond the statutory terms.[6]

[1] *Ante*, § 744.

[2] As to whether the name of the drug must be given, see *post*, §§ 756, 757.

[3] Mills *v.* Com., 13 Pa. St. 631. Compare this case with P. *v.* Lohman, 2 Barb. 216.

[4] *Ante*, § 744.

[5] Com. *v.* Bangs, 9 Mass. 387; Com. *v.* Parker, 9 Met. 263, [43 Am. D. 396. *Contra*, S. *v.* Emerich, 13 Mo. Ap. 492; Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. R. 471; Com. *v.* Tibbetts, 157 Mass. 519, 32 N. E. R. 910; Com. *v.* Noble, 165 Mass. 13, 42 N. E. R. 328; Com. *v.* Surles, 165 Mass. 59, 42 N. E. R. 502; Eckhardt *v.* P., 83 N. Y. 462, 38 Am. R. 462.]

[6] S. *v.* Owens, 22 Minn. 238; Beasley *v.* P., 89 Ill. 571; Watson *v.* S., 9 Tex. Ap. 237; Davis *v.* S., 4 Tex. Ap. 456; Com. *v.* Snow, 116 Mass. 47; S. *v.* McIntyre, 19 Minn. 93; Com. *v.* Brown, 14 Gray, 419; Madden *v.* S., 1

§ 755. Negativing necessity.— Where the statute makes the act an offense unless necessary to save the woman's life, or the like, the indictment must negative such necessity, and in terms which, though they may be general,[1] are broad enough to cover the full statutory meaning.[2]

§ 756. Naming drug.— Our statutes in general, employing such words as "any poison or other noxious thing," and the like, do not descend to specify any particular drug, the administering of which shall be punished. Therefore it is held, by those of our courts that have passed upon the question, not to be necessary for the indictment to be more specific,[3] and give the name of the noxious drug which, in the instance in allegation, was administered.[4] Still,—

§ 757. Further as to which.— This form of the allegation lies close upon the border line, and it is not certain that all our tribunals will accept it as adequate. The English statutes are in the general terms just stated, and all the forms upon them, which the author has observed, specify the drug; as, for example, "a large quantity, to wit, two ounces, of a certain noxious thing called savin." And so likewise are the forms in analogous English cases.[5] And, in justice to the defendant, it

Kan. 340; Com. *v.* Thompson, 108 Mass. 461; Dougherty *v.* P., 1 Colo. 514; Com. *v.* Brown, 121 Mass. 69; S. *v.* Sherwood, 75 Ind. 15; [Com. *v.* Tibbetts, 157 Mass. 519, 32 N. E. R. 910; Baker *v.* P., 105 Ill. 452; Navarro *v.* S., 24 Tex. Ap. 378, 6 S. W. R. 542; S. *v.* Crook, 16 Utah, 212, 51 Pac. R. 1001; Scott *v.* P., 141 Ill. 195, 30 N. E. R. 329; Cave *v.* S., 33 Tex. Cr. R. 335, 26 S. W. R. 503; Cochran *v.* P., 175 Ill. 28, 51 N. E. R. 845.]

[1] Crim. Pro., I, § 641; [S. *v.* Sherwood, 75 Ind. 15; S. *v.* Stokes, 54 Vt. 178.]

[2] S. *v.* Meek, 70 Mo. 355, [35 Am. R. 427;] S. *v.* Sherwood, 75 Ind. 15; Basset *v.* S., 41 Ind. 303; S. *v.* Hollenbeck, 36 Iowa, 112; Willey *v.* S., 52 Ind. 246; Beasley *v.* P., 89 Ill. 571; [S. *v.* Leeper, 70 Iowa, 748, 30 N. E. R. 501.]

[3] For the general question of descending, in the indictment, into this sort of particular, see Crim. Pro., I, §§ 566–584, 611, 619, 624, 629; *ante*, § 440; [S. *v.* Reed, 45 Ark. 333.]

[4] Com. *v.* Morrison, 16 Gray, 224; Watson *v.* S., 9 Tex. Ap. 237; S. *v.* Vawter, 7 Blackf. 592 (referring to Rex *v.* Phillips, 3 Camp. 73); Shotwell *v.* S., 37 Mo. 359; S. *v.* Van Houten, 37 Mo. 357. And see Mills *v.* Com., 13 Pa. St. 631.

[5] Archb. Crim. Pl. & Ev. (19th Lond. ed.) 771; Archb. New Crim. Pro. 295; Matt. Crim. Law, 418; Burn, Just., Abortion; Rex *v.* Phillips, 3 Camp. 73; Rex *v.* Coe, 6 Car. & P. 403; Rex *v.* Cadman, 1 Moody, 114; Rex *v.* Harley, 4 Car. & P. 369; Reg. *v.* Farrow, Dears. & B. 164; Rex *v.* Scudder, 1 Moody, 216. In Reg. *v.* Wilson, Dears. & B. 127, 7 Cox, C. C. 190, it does not appear how the form was in this respect.

would seem but equitable for the grand jury to say, if they know, what was the drug administered, or, if they do not know, to allege their want of knowledge, whether the strict law requires it or not. Yet the averment of the name of the drug, if made, appears to be, like that of the weapon in homicide and some other similar things,[1] of a sort only necessary to be proved in substance; so that, if the evidence discloses instead a drug of some other name, yet of the like effects, there will be no variance,[2] — a proposition not, perhaps, quite conclusively established on the authorities.

§ 758. "Cause and procure."—If the statutory intent is "to cause *and* procure the miscarriage," etc., both verbs, coupled by "and," must be employed in the allegation. It will not do to charge the intent in one count to be to "cause," and in another count to be to "procure."[3] But if the statutory words are "cause *or* procure," either count, so drawn, will be good.[4]

§ 758a. By instruments.— The indictment for attempting or effecting a miscarriage by the use of an instrument follows, like the other, the statute; and is otherwise similar in construction. For example, it may allege, if so the statutory terms will be covered, that, at a time and place stated, the defendant did unlawfully use an instrument, a more particular description whereof is to the jurors unknown, by then and there thrusting it into the body and womb of one, etc., who was then and there pregnant with child, with the intent thereby and then and there to procure her miscarriage.[5]

§ 759. Duplicity.— The use of an instrument and the administering of drugs, to effect the one common object, may both be averred in a single count. It is not thereby rendered double.[6] Or the two methods may be set out each in a separate count; and should the proof show that the result proceeded from them combined, and not solely from either, either count will be

[1] Crim. Pro., I, §§ 488*b*, 488*c*; II, § 514.

[2] Rex *v.* Phillips, 3 Camp. 73; Rex *v.* Coe, 6 Car. & P. 403. See Carter *v.* S., 2 Ind. 617. And see and compare, in the supreme court and court of appeals, Crichton *v.* P., 6 Park. Cr. 363, 1 Keyes, 341, 1 Abb. Ap. 467.

[3] S. *v.* Drake, 1 Vroom, 422.

[4] *Ante*, § 244.

[5] Com. *v.* Brown, 121 Mass. 69; S. *v.* Dyer, 59 Me. 303; Com. *v.* Brown, 14 Gray, 419; Com. *v.* Snow, 116 Mass. 47; [Com. *v.* Thompson, 159 Mass. 56, 33 N. E. R. 1111.]

[6] Com. *v.* Brown, 14 Gray, 419; P. *v.* Davis, 56 N. Y. 95, 100, 101.

thereby sustained, or the verdict of guilty may be general on both.[1]

Death following.— Where death follows, under a statute making this sort of killing an aggravated abortion,[2] it need not be charged also as murder.[3]

§ 760. Secondly. **The evidence:—**

Woman as witness.— The woman is admissible as a witness, within principles explained in another connection.[4] We have seen that, generally in our states, she is not technically an accomplice,[5] whose evidence, therefore,[6] is within the special rule requiring confirmation.[7] But it is by some deemed that, "inasmuch as she was in a moral point of view implicated in the transaction, it would be proper for the jury to consider that circumstance in its bearing upon her credibility;"[8] rendering a caution from the court, to this effect, judicious and proper, and evidence confirmatory particularly appropriate.[9] And some tribunals appear to regard her, as to confirmation, substantially the same as a technical accomplice.[10] Yet, in reason, the difference is wide; for an accomplice swears under the temptation of earning thereby his own immunity, while she does not. She discloses her own disgrace; and, where no evil motive appears for it, this fact may, in reason, strengthen her credibility. Yet plainly the special temptations of the particular case should be taken into the account, and the attention of the jury may well be directed to them.

Wife against husband.— Where a husband is charged with this offense committed, by the use of instruments, on his wife, she may be a witness against him and his accomplices indicted with him; at least, one case so holds. "The offense," said Kent, J., "is clearly one that includes the element of personal violence to the wife; and, whenever that appears, the wife may

[1] Tabler *v.* S., 34 Ohio St. 127.

[2] *Ante*, § 743.

[3] Com. *v.* Jackson, 15 Gray, 187. And see Com. *v.* Holmes, 103 Mass. 440; [S. *v.* Baldwin, 79 Iowa, 714, 45 N. W. R. 297.]

[4] Crim. Pro., I, §§ 1019–1021, 1136–1172.

[5] *Ante*, § 749.

[6] Crim. Pro., I, §§ 1156–1176.

[7] Dunn *v.* P., 29 N. Y. 523, [86 Am. D. 319;] Com. *v.* Boynton, 116 Mass. 343.

[8] Com. *v.* Wood, 11 Gray, 85, 90, 93.

[9] Crim. Pro., I, § 1173; Frazer *v.* P., 54 Barb. 306; Watson *v.* S., 9 Tex. Ap. 237. And see Com. *v.* Drake, 124 Mass. 21.

[10] P. *v.* Josselyn, 39 Cal. 393.

as well be admitted to testify as where the charge is by the state of a breach of the public peace."[1]

§ 761. Circumstances.— Aside from the testimony of the woman, the evidence in these cases is generally circumstantial. Therefore, of necessity, each case will present its special aspects, and what is admissible in one will not necessarily be so in another. Such facts as the secretion of a fœtus about the building where the abortion is alleged to have taken place,[2] the character of the house,[3] the defendant's possession of instruments adapted to this sort of operation,[4] his solicitation of the or this class of business,[5] the woman's low health and spirits and stains on her bed-clothes,[6] — are illustrations of what is, in connection with other facts, admissible.[7]

§ 761a. Dying declarations.— Where the woman dies, her dying declarations are admissible, if the indictment is for murder.[8] But if it is for abortion, and, under the statute,[9] it sets out her death in aggravation of the defendant's guilt, they are not admissible.[10]

§ 762. Burden of proof as to abortion not necessary.— Under a statute which makes it an element of the offense that the abortion was not necessary, some courts hold that, though

[1] S. *v.* Dyer, 59 Me. 303, 307. And see Com. *v.* Reid, 8 Phila. 385; S. *v.* Briggs, 9 R. I. 361, [11 Am. R. 270; S. *v.* Pearce, 56 Minn. 226, 57 N. W. R. 652.]

[2] S. *v.* Howard, 32 Vt. 380, 405.

[3] Hays *v.* S., 40 Md. 633.

[4] Com. *v.* Blair, 126 Mass. 40.

[5] Com. *v.* Holmes, 103 Mass. 440; Weed *v.* P., 56 N. Y. 628; s. c. below, 3 Thomp. & C. 50. See Watson *v.* S., 9 Tex. Ap. 237; [P. *v.* Sessions, 58 Mich. 594, 26 N. W. R. 291; P. *v.* Abbott, 116 Mich. 263, 74 N. W. R. 529.]

[6] Com. *v.* Wood, 11 Gray, 85; P. *v.* Olmstead, 30 Mich. 431; [Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. R. 471.]

[7] And see, for further illustrations, Com. *v.* Brown, 14 Gray, 419; Com. *v.* Hersey, 2 Allen, 173; Dunn *v.* P., 29 N. Y. 523, [86 Am. D. 319;] Crichton *v.* P., 6 Park. Cr. 363; Com. *v.* Brown, 121 Mass. 69; Com. *v.* Blair, 123 Mass. 242; Hays *v.* S., 40 Md. 633; S. *v.* Howard, 32 Vt. 380; [P. *v.* McGonegal, 136 N. Y. 62, 32 N. E. R. 616; Scott *v.* P., 141 Ill. 195, 30 N. E. R. 329; Com. *v.* Corkin, 136 Mass. 429; King *v.* S. (Tex. Cr. R.), 34 S. W. R. 282; P. *v.* Van Zile, 73 Hun, 534, 26 N. Y. Supp. 390; Com. *v.* Fenno, 134 Mass. 217.]

[8] Crim. Pro., I, § 1207; Maine *v.* P., 9 Hun, 113; Rex *v.* Baker, 2 Moody & R. 53; [Montgomery *v.* S., 80 Ind. 338, 41 Am. R. 815; Rhodes *v.* S., 128 Ind. 189, 27 N. E. R. 366; Railing *v.* Com., 110 Pa. St. 100, 1 Atl. R. 314.]

[9] *Ante*, § 743.

[10] P. *v.* Davis, 56 N. Y. 95, 103; S. *v.* Harper, 35 Ohio St. 78, [35 Am. R. 596;] Rex *v.* Hutchinson, 2 B. & C. 608, note; Reg. *v.* Hind, Bell, C. C. 253, 8 Cox, C. C. 300.

this want of necessity must be averred in the indictment,[1] it need not be proved, but the burden is on the defendant to show a necessity.[2] This is a sort of question on which judicial opinions differ.[3]

[1] *Ante*, § 755.

[2] Moody *v.* S., 17 Ohio St. 110; Bradford *v.* P., 20 Hun, 309; [P. *v.* McGonegal, 62 Hun, 623, 11 N. Y. Supp. 147; Hatchard *v.* S., 79 Wis. 357, 48 N. W. R. 380.]

[3] 1 Greenl. Ev., §§ 78–81; *ante*, § 648; *post*, §§ 800*a*, 1051, 1052; S. *v.* Meek, 70 Mo. 355, [35 Am. R. 427; S. *v.* Clements, 15 Oreg. 227, 14 Pac. R. 410. Cases are here cited on questions as to evidence. S. *v.* Watson, 30 Kan. 281, 1 Pac. R. 770; Rhodes *v.* S., 128 Ind. 189, 27 N. E. R. 866; Jones *v.* S., 70 Md. 326, 17 Atl. R. 89, 14 Am. St. R. 362; Com. *v.* Felch, 132 Mass. 22; P. *v.* Sessions, 58 Mich. 594, 26 N. W. R. 291; Clarke *v.* P., 16 Colo. 511, 27 Pac. R. 724; S. *v.* Forsythe, 78 Iowa, 595, 43 N. W. R. 548; Williams *v.* S. (Tex. Ap.), 19 S. W. R. 897; Earl *v.* P., 99 Ill. 123; Hunter *v.* S., 33 Tex. Cr. R. 61, 41 S. W. R. 602.]

CHAPTER XLVI.

CONCEALMENT OF BIRTH OR CHILD MURDER.

§ 763. Introduction.
764–776. Law of the offense.
777–780. The procedure.

§ 763. How chapter divided.— We shall consider, I. The law of the offense; II. The procedure.

I. The Law of the Offense.

§ 764. What and why.— For the protection of bastard children from the temptation of their mothers to conceal their own shame by destroying them at a private birth, statutes have been enacted in England, Ireland, Scotland, and many of our states, making the concealment of the birth or of the death of such a child by the mother, though nothing more appears against her, a crime.

Parent statute.— The parent statute is 21 Jac. 1, ch. 27, providing "that if any woman . . . be delivered of any issue of her body, male or female, which, being born alive, should by the laws of this realm be a bastard; and that she endeavor privately, either by drowning or secret burying thereof, or any other way, either by herself or the procuring of others, so to conceal the death thereof as that it may not come to light whether it were born alive or not, but be concealed; in every such case the said mother so offending shall suffer death, as in case of murder; except such mother can make proof, by one witness at the least, that the child whose death was by her so intended to be concealed was born dead."[1]

§ 765. Later.— In 1803, after the union with Ireland, this statute and the Irish one were repealed by 43 Geo. 3, ch. 58, § 3. It was in 1828 followed by 9 Geo. 4, ch. 31, § 14; now

[1] See, for expositions of this statute, 1 East, P. C. 228; 2 Hale, P. C. 288; 1 Russ. Crimes (3d Eng. ed.), 572; Archb. New Crim. Pro. 297; Archb. Crim. Pl. & Ev. (19th Lond. ed.) 773.

superseded by the somewhat better drawn provisions of 24 and 25 Vict., ch. 100, § 60.

In Scotland,— the old law was superseded by 49 Geo. 3, ch. 14, providing that if any woman "in that part of Great Britain called Scotland shall conceal her being with child during the whole period of her pregnancy, and shall not call for or make use of help or assistance in the birth, and if the child be found dead or be missing, the mother being lawfully convicted thereof shall be imprisoned for a period not exceeding two years."[1]

§ 766. In England, at present,— by 24 and 25 Vict., ch. 100, § 60, "if any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavor to conceal the birth thereof, shall be guilty of a misdemeanor, etc.; provided that, if any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the jury by whose verdict such person shall be acquitted to find, in case it shall so appear in evidence that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavor to conceal the birth thereof; and thereupon the court may pass such sentence as if such person had been convicted upon an indictment for the concealment of the birth."[2]

§ 767. As common law with us.— The date of the parent statute of 21 Jac. 1, ch. 27, is 1623, sufficiently early to be common law in most of our states. The Pennsylvania judges do not include it in their list;[3] but Kilty says it was received in Maryland, and under it there were in early times numerous convictions.[4]

§ 768. Legislation with us.— Our American legislation appears to conform, in the main, to the early model of 21 Jac. 1, ch. 27. Thus, in Arkansas, "if any woman shall endeavor pri-

[1] Alison, Crim. Law, 153; Brown's Case, 1 Swinton, 482.

[2] Mr. Graves tells us that this statute was framed from 9 Geo. 4, ch. 31, § 14, and 10 Geo. 4, ch. 34, § 17, Irish; but was intended also to supply some defects in those statutes. Greaves, Crim. Law Acts, 84.

[3] Report of Judges, 3 Binn. 595, 623.

[4] Kilty, Rep. Stats. 172. This statute of 21 Jac. 1, ch. 27, was originally, by its terms, to be in force only "until the end of the first session of the next parliament;" but it was continued by 3 Car. 1, ch. 4, § 22, and made perpetual by 16 Car. 1, ch. 4.

vately, either by herself or the procurement of others, to conceal the death of any issue of her body, male or female, that it may not come to light, although it cannot be proved that it was murdered, every such mother shall suffer the same punishment as for manslaughter." And it is added that this provision shall not prevent her being indicted for the murder of "such bastard child,"— by construction whereof the indictment for concealment must allege the child to be a bastard.[1] In Maine, "If any woman is willingly delivered in secret of the issue of her body, which would be a bastard if born alive, and conceals the death thereof, so that it is not known whether it was born dead or alive, and was murdered, she shall be punished," etc.; and, by construction, she is to be acquitted if the child is shown to have been born dead.[2] While these statutes are not identical in expression, others, present and past, vary more or less from them and from one another; requiring —

§ 769. Caution as to the interpretation.— By reason of the diversities of the statutes,[3] it is difficult to draw from the past decisions, and those in other localities than our own, safe guides for our own future causes. So that practitioners and courts are compelled to tread cautiously over this ground.

Interpretation specially strict.— It is perceived that the statute makes heavily punishable what of itself is nearly or quite innocent, simply because of its tendency toward an unproved wrong. Hence its interpretation is always specially strict; as, says East, writing of —

21 Jac. 1, ch. 27.— "If," under this statute, the woman "called for help, or confessed herself with child, she is not within the construction of the statute; and then it will lie on the prosecutor to prove that the child was born alive and murdered. Upon the same principle, evidence is always allowed of the mother's having made provision for the birth, as a circumstance to show that she did not intend to conceal it. Again, if the child be born before its time, which is to be collected from circumstances, as if it have no hair, or nails, this

[1] Sullivan *v.* S., 36 Ark. 64.

[2] S. *v.* Kirby, 57 Me. 30. Similar is the Massachusetts statute. Mass. Gen. Stats., ch. 165, § 11; formerly R. S., ch. 130, § 6. See, as to Kentucky, Foster *v.* Com., 12 Bush, 373. As to Texas, S. *v.* Rupe, 41 Tex. 33. As to South Carolina, S. *v.* Love, 1 Bay, 167.

[3] Rex *v.* Douglas, 1 Moody, 480.

is presumptive evidence that it was born dead; but it must be left to the jury upon all the circumstances of the case. At all events, if there be no concealment proved, the case stands as at common law; and the woman is not put to the absolute necessity of proving that the child was born dead. And even the presence of an accomplice has been held to take the case out of the statute."[1] Hence,—

§ 770. What is a concealment?— This is a leading question under our various enactments. Now,—

Birth or death.— Some of them make the offense consist in concealing the "death," others the "birth," of the child; the idea being that it is a badge of murder.

Person present.— If there is any person present when a child is born and dies, there is no concealment by the mother, though such person is an accomplice.[2]

§ 771. "By secret burying," etc.— (Statutory method).— Where the statute specifies the method of concealment,— as, under 9 Geo. 4, ch. 31, § 14, "by secret burying or otherwise disposing of the dead body" (words which have caused "many questions"),[3]— the effect of the particular expression should be regarded. It was not necessary, under this statute, that the body should have been put in what was meant to be its final resting-place; as, for example, it was sufficient where the woman hid it under the bolster on which she laid her head.[4] There must be some act of disposal;[5] a mere denial is not enough.[6] Therefore, if the woman goes to a privy for another purpose, and unawares the child there passes from her into the night-soil and is suffocated, she does not commit the statutory offense, though she denies the birth.[7] And it is the same, as to the complete substantive offense, where she is detected with the body in her possession, about to dispose of it.[8] Where a girl

[1] 1 East, P. C. 228. See *post*, 771.

[2] *Ante*, § 769; Rex *v.* Peat, 1 East, P. C. 229. But see, under other statutes, Rex *v.* Cornwall, Russ. & Ry. 336; Rex *v.* Douglas, 1 Moody, 480.

[3] Greaves, Crim. Law Acts, 84.

[4] Reg. *v.* Perry, Dears. 471, 473, 6 Cox, C. C. 531; Reg. *v.* Goldthorpe, 2 Moody, 244, Car. & M. 335; Reg. *v.* Farnham, 1 Cox, C. C. 349. And see Boyles *v.* Com., 2 S. & R. 40.

[5] Foster *v.* Com., 12 Bush, 373.

[6] Reg. *v.* Turner, 8 Car. & P. 755.

[7] Reg. *v.* Turner, 8 Car. & P. 755; Reg. *v.* Coxhead, 1 Car. & K. 623. See Rex *v.* Cornwall, Russ. & Ry. 336; [S. *v.* Ihrig, 106 Mo. 267, 17 S. W. R. 300.]

[8] Rex *v.* Snell, 2 Moody & R. 44. See Reg. *v.* Goode, 6 Cox, C. C. 318.

puts away her dead child, not from the motive of concealment, but through fear of provoking her father, and otherwise she would have caused it to be buried in the churchyard, she does not commit this offense.[1] Nor does she commit this offense though there is a concealment, if it is by some other person, without her privity or consent.[2]

§ 772. **"Child."** — It has been deemed that the contents of the womb, to be a "child" within these statutes, must have grown so far beyond the embryo state as, in the natural course of things, to have some chance of being born alive, or living after birth. Within which rule "no specific limit," said Erle, J., "can be assigned to the period when the chance of life begins; but it may, perhaps, be safely assumed that under seven months the great probability is that the child would not be born alive."[3] Martin, B., refused to yield to this doctrine, "stating that he saw nothing to limit the word 'child' in the statute to a child likely to live or likely to die, but that as soon as the fœtus had the outward appearance of a child [in this case it was about the length of a man's finger] it was sufficient."[4] As this statute is to be construed with great strictness,[5] and popularly a "child" is the offspring after birth and a "fœtus" is the same before, it does not seem reasonable so to extend the former word by interpretation as to include within its meaning what is popularly within the meaning of the latter alone; and by no possibility can, on being expelled from the womb, become a child, but only a dead lump.[6]

§ 773. **Our own statutes,** — it is seen, conform more nearly to these earlier English statutes than to the present one. Yet it will be helpful to see something on the latter; namely, —

24 and 25 Vict. — There have been a few cases on 24 and 25 Vict., ch. 100, § 60, before quoted.[7] The endeavor to conceal

[1] So the doctrine was laid down by Coltman, J., to a jury. Reg. *v.* Morris, 2 Cox, C. C. 489.

[2] Rex *v.* Higley, 4 Car. & P. 366; Reg. *v.* Bate, 11 Cox, C. C. 686.

[3] Reg. *v.* Berriman, 6 Cox, C. C. 388, 390. And see Reg. *v.* Hewitt, 4 Fost. & F. 1101.

[4] Reg. *v.* Colmer, 9 Cox, C. C. 506.

[5] *Ante*, § 769.

[6] For further authorities on the earlier English statutes see Reg. *v.* Bird, 2 Car. & K. 817; Rex *v.* Snell, 2 Moody & R. 44; Reg. *v.* Ash, 2 Moody & R. 294; Reg. *v.* Jones, 2 Moody & R. 295, note; Reg. *v.* Bell, 2 Moody & R. 294, note; Reg. *v.* Halton, 2 Moody & R. 295, note; Rex *v.* Watkins, 1 Russ. Crimes (3d Eng. ed.), 574. And see Com. *v.* Clark, 2 Ashm. 105.

[7] *Ante*, § 766.

the birth must be by putting the child where it is deemed not likely to be found. To place it in an open box in the prisoner's bedroom, and say where it is to the medical men inquiring for it, is not within the statute.[1] What is "a 'secret disposition' must," in the words of Bovill, C. J., concurred in by the other judges, "depend upon the circumstances of each particular case. The most complete exposure of the body might be a concealment; as, for instance, if the body were placed in the middle of a moor in the winter, or on the top of a mountain, or in any other secluded place where the body would not be likely to be found." In the case in controversy, "the evidence of a secret disposition consisted in the situation in which the body was placed; and it was a question for the jury to say whether placing the body in such a situation was, in fact, a secret disposition of the body."[2] By the terms of this statute, the secret disposition must be, not of the living, but of the "dead body;" consequently, where a mother, to conceal the birth, put her child alive in the corner of a field to die from exposure, and it was found dead, she was held not to have committed this statutory offense,[3] though she was guilty of a crime at the common law.

§ 774. Within mischief.— The concealment is not alone sufficient, but the entire case must come within the mischief to be remedied by the statute.[4] Again,—

Born dead.— There is no need the child should have been born alive.[5] But it is otherwise under the North Carolina statute, by reason of its differing words; while yet the defendant has the burden of proof to show that the child was still-born.[6]

§ 775. Accomplices.— Under a considerable part of the statutes,— for example, the Rhode Island one,— no person but the

[1] Reg. *v.* Sleep, 9 Cox, C. C. 559. And see Reg. *v.* George, 11 Cox, C. C. 41.

[2] Reg. *v.* Brown, Law R. 1 C. C. 244, 246. And see Reg. *v.* Opie, 8 Cox, C. C. 332; Reg. *v.* Clarke, 4 Fost. & F. 1040; Reg. *v.* Cook, 11 Cox, C. C. 542; Reg. *v.* Nixon, 4 Fost. & F. 1040, note; [S. *v.* Conover (N. J. L.), 4 Crim. L. Mag. 233.]

[3] Reg. *v.* May, 10 Cox, C. C. 448, 15 W. R. 751, 16 Law Times (N. S.), 362.

[4] Com. *v.* Clark, 2 Ashm. 105; 1 East, P. C. 228; *ante*, § 232.

[5] Rex *v.* Cornwall, Russ. & Ry. 336; Reg. *v.* Wright, 9 Car. & P. 754. See further, on the English law, Rex *v.* Maynard, Russ. & Ry. 240; Rex *v.* Cole, 2 Leach, 1095, 3 Camp. 371; Rex *v.* Dobson, 1 Lewin, 43; [Com. *v.* Hopkins (Ky.), 5 S. W. R. 392.]

[6] S. *v.* Joiner, 4 Hawks, 350. Under the Pennsylvania statute of 1718, concealment of the death was evidence that the child was born alive and killed by the mother. But under statutes of 1786 and 1790, concealment was not sufficient evidence to

mother can commit the offense as principal of the first degree. But, when she is guilty, others may be guilty as principals of the second degree, or as accessories, on the ground of aiding her.[1] It was the same also under the English statute of 9 Geo. 4, ch. 31, § 14,— a defect cured by 24 and 25 Vict., ch. 100, § 60.[2] If, under the former English provision, the mother employed an accomplice to do the active work, she could be convicted as principal in the first degree though not continually present; as, though she remained in bed while he buried the body.[3] But where she was not personally concerned in the disposal of the body, "you must show," said Montague Smith, J., "that the child was taken away at her request or privity."[4]

§ 776. These discussions — will be helpful if carefully examined by the practitioner in connection with the statutes and decisions of his own state. But here, as under every other title in the law, it is impossible for the elucidations of an author to supply the place of thought and circumspection in those who use his book.

II. The Procedure.

§ 777. The indictment — should duly cover the statutory terms; as, for example, under such as those of 24 and 25 Vict., ch. 100, § 60,[5] it may charge that the defendant, at a time and place stated, being big with child, was delivered thereof, and then and there it did die; whereupon she did afterward, then and there, by secretly burying its dead body, endeavor to conceal the birth thereof.[6] But —

§ 778. Mode of secreting.— It will not do simply to say that the defendant concealed, etc., "by secreting the said child;"

convict the mother; there must also have been presumptive proof that the child was born alive. And by statute of 1794, concealment is not conclusive evidence unless the circumstances satisfy the jury that the mother wilfully and maliciously destroyed the child. Pennsylvania *v.* McKee, Addison, 1; [S. *v.* Kirby, 57 Me. 33; S. *v.* Stewart, 93 N. C. 539.]

[1] S. *v.* Sprague, 4 R. I. 257; Rex *v.* Douglas, 7 Car. & P. 644. See Reg. *v.* Wright, 9 Car. & P. 754; [S. *v.* Conover (N. J. L.), 4 Crim. L. Mag. 233; S. *v.* Stewart, 93 N. C. 539.]

[2] Greaves, Crim. Law Acts, 84. And see, on this question, Reg. *v.* Bird, 2 Car. & K. 817; Reg. *v.* Skelton, 3 Car. & K. 1119.

[3] Id.; Rex *v.* Douglas, 7 Car. & P. 644.

[4] Reg. *v.* Bate, 11 Cox, C. C. 686, 688.

[5] *Ante*, § 766.

[6] Archb. Crim. Pl. & Ev. (19th Lond. ed.) 773; Id. (10th Lond. ed.) 435; compare with cases cited *post*, §§ 778, 779.

for, as the offense is committed only by overt acts, they — that is, the manner of the secreting — must be averred. The word "secreting" indicates merely a conclusion of law.[1] Yet, on the other hand, it has been held under the Pennsylvania statute, contrary to this which is believed to be the better view, that the indictment need not say in what manner or by what acts the mother endeavored to conceal the death.[2]

§ 779. Averring death.— As the concealing of a living child is not within these statutes, the death must in some way be averred.[3] But whether it occurred before, at, or after the birth need not be specified.[4] It has been adjudged sufficient to say that the defendant afterwards, etc., "the said infant having on the day and year aforesaid died, did endeavor," etc.[5]

§ 779a. Prima facie case.— Only a *prima facie* case is required to appear in allegation. Matter of defense need not be negatived.[6]

§ 780. Evidence.— "The prosecutor," said Rogers, J., "must prove the birth of the child, its death, an endeavor to conceal its birth, and that if born alive it would be a bastard."[7] But the proofs required will vary somewhat with the statute.

Bastardy.— The evidence of bastardy was, in one case, that the defendant had said to a witness "she had never told any one but the father of the child, and he was a long way in the country, his name was Thomas Harris, and he had lately got married." Littledale, J., instructed the jury that this, if believed, was sufficient.[8]

Corpus delicti.— Clear identification of the body, the same as in murder,[9] has been deemed important.[10]

Verdict.— A verdict of "guilty of concealment in manner and form as she stands indicted" is insufficient, because it does not pass upon the question whether or not the child was a bastard.[11]

[1] Foster *v.* Com., 12 Bush, 373; Reg. *v.* Hounsell, 2 Moody & R. 292; Reg. *v.* Coxhead, 1 Car. & K. 623.

[2] Boyles *v.* Com., 2 S. & R. 40.

[3] Rex *v.* Davis, 1 Russ. Crimes (3d Eng. ed.), 574; Perkins' Case, 1 Lewin, 44; Douglass *v.* Com., 8 Watts, 535.

[4] Perkins' Case, *supra;* Reg. *v.* Coxhead, 1 Car. & K. 623; [S. *v.* Ellis, 43 Ark. 93; S. *v.* White, 76 Mo. 96; S. *v.* Ihrig, 106 Mo. 267, 17 S. W. R. 300.]

[5] Boyles *v.* Com., 2 S. & R. 40.

[6] S. *v.* Rupe, 41 Tex. 33.

[7] Douglass *v.* Com., 8 Watts, 535. And see Rex *v.* Poulton, 5 Car. & P. 329; Pennsylvania *v.* McKee, Addison, 1, 2.

[8] Rex *v.* Poulton, *supra.*

[9] Crim. Pro., I, §§ 1056–1060.

[10] Reg. *v.* Williams, 11 Cox, C. C. 684.

[11] Boyles *v.* Com., 2 S. & R. 40.

CHAPTER XLVII.

CARRYING WEAPONS.

§§ 781, 782. Introduction.
783–793. Law of the offense.
794–801. The procedure.

§ 781. How this discussion.— The statutes on the subject of this chapter are numerous and diverse in their terms. Therefore it will be profitable to direct attention only to leading doctrines, and cite the authorities; assuming that the reader has before him the statutes and decisions of his own state.

§ 782. How chapter divided.— We shall consider, I. The law of the offense; II. The procedure.

I. The Law of the Offense.

§ 783. Statute of Northampton.— The parent statute on this subject is that of Northampton, 2 Edw. 3, ch. 3, A. D. 1328. It provides that "no man, etc., except the king's servants in his presence, and his ministers in executing of the king's precepts, or of their office, etc., be so hardy to come before the king's justices or other of the king's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain," etc., making the offense a misdemeanor.[1]

With us.— Notwithstanding the early date of this statute, we have no evidence that it was accepted as common law in our colonies.[2] But,—

[1] For the interpretations of this statute, see 1 Hawk. P. C. (Curw. ed.) 488, § 4 *et seq.*

[2] Kilty deems it not "applicable to the circumstances of the people." Kilty, Rep. Stats. 31. The Pennsylvania judges do not mention it. Report of Judges, 3 Binn. 599, 610. But, in reason, it would seem adapted to the wants of every civilized community, and fully within the principles on which the early English statutes were received in the colonies.

§ 784. Going armed with dangerous weapons, at common law.— Whatever we may deem of this statute, the leading offense punishable by it, namely, riding or going about armed with dangerous or unusual weapons to the terror of the people, was always indictable under the common law of England,[1] and it has become a part of the common law of our states.[2] And —

§ 785. Same under statutes.— This common-law offense has also been extended, regulated and confirmed by statutes in some of our states.[3] But,—

§ 786. "Secret," "concealed," etc.— Generally in the states which have legislated on the subject, the simple carrying of the weapon, without reference to whether it is open or concealed, or to the terror of people or not, is prohibited;[4] or else the inhibition is limited to the "secret" or "concealed" carrying. The object sought is the protection of the community.[5]

Forms of statutes.— The statutory terms are numerous and varying. Thus, in Indiana they were at one time, "wear or carry any dirk, pistol, sword in a cane, or other dangerous weapon concealed."[6] Then they were changed to "every person, not being a traveler, who shall wear or carry any dirk, pistol, bowie-knife, dagger, sword in cane, or any other dangerous or deadly weapon concealed, or shall carry or wear any such weapon openly, with the intent or avowed purpose of injuring his fellow-men."[7] In Alabama we have: "Any person who, not being threatened or having good reason to apprehend

[1] 4 Bl. Com. 149; 1 Hawk. P. C. (Curw. ed.), p. 488, § 4; Knight's Case, 3 Mod. 117, Comb. 38. [But picking up and holding in one's hands for a few moments and then replacing is not a carrying. Brooks *v.* S., 15 Tex. Ap. 88. Nor finding in the road and taking home. Mangum *v.* S., 15 Tex. Ap. 362. See also Presser *v.* S., 19 Tex. Ap. 52, 53 Am. R. 383. And it is a continuing act, so that having on a pistol at two different houses within a short space of time on the same evening is only one offense. Smith *v.* S., 79 Ala. 257.]

[2] S. *v.* Huntly, 3 Ire. 418, [40 Am. D. 416;] S. *v.* Roten, 86 N. C. 701.

[3] Nunn *v.* S., 1 Kelly, 243; S. *v.* Bentley, 6 Lea, 205. The following cases are under statutes relating to the carrying of arms by negroes and slaves: S. *v.* Harris, 6 Jones (N. C.), 448; S. *v.* Hannibal, 6 Jones (N. C.), 57; S. *v.* Chavers, 5 Jones (N. C.), 11; [S. *v.* Johnson, 16 S. C. 187; Driggers *v.* S. (Ala.), 26 S. R. 512.]

[4] Dycus *v.* S., 6 Lea, 584.

[5] Haynes *v.* S., 5 Humph. 120; Evins *v.* S., 46 Ala. 88.

[6] S. *v.* Duzan, 6 Blackf. 31.

[7] Bicknell, Crim. Pr. 397, referring to Laws 1859, p. 129; 2 G. & H. 480; [Pluman *v.* S., 135 Ind. 308, 34 N. E. R. 968.] And see Haynes *v.* S., *supra*.

an attack, or traveling, or setting out on a journey, carries concealed about his person a bowie-knife, or any other knife or instrument of a like kind or description, or a pistol, or fire-arms of any other kind or description, or an air-gun."[1] Some of the interpretations are —

§ 787. **"Carries"—"Conceals."**—Under the Alabama statute, said Rice, C. J., "the word 'carries' was used as a synonym of 'bears;' and the word 'concealed' means wilfully or knowingly covered or kept from sight. Locomotion is not essential to constitute a carrying within the meaning of that section." So that one who, being in another's room with several persons, has in his vest pocket, out of sight, a pistol, commits the offense.[2] And it is no excuse for a defendant that, at other times than the one in question, he carried the weapon openly; and such, indeed, was his habit.[3] A weapon hid from ordinary observation is concealed, though it may be discovered on close scrutiny.[4] On the other hand,—

§ 788. **Partly hidden.**— Though the weapon is partly hidden, yet if it is exposed so far as to enable every one plainly to see what it is, there is not a concealment within this statute.[5] But, in different words, the Florida enactment makes it punishable "to carry arms of any kind secretly on or about their person, etc. Provided, that this law shall not be so construed as to prevent any person from carrying arms openly outside of all their clothes." And this provision is held to be violated by so carrying the weapon partly concealed.[6]

§ 788*a*. **Statutory exemptions.**— Among the exemptions specified in the statutes,[7] from their general terms, are such as that the person is a —

Traveler — On journey.— "Traveling" implies the going of some distance — but no exact distance can be defined; it may be short[8] — from home, beyond the circle of one's immediate

[1] Lockett *v.* S., 47 Ala. 42. And see Owen *v.* S., 31 Ala. 387.

[2] Owen *v.* S., 31 Ala. 387, 389. Further as to what is a carrying, see Page *v.* S., 3 Heisk. 198, note.

[3] Washington *v.* S., 36 Ga. 242. And see Hicks *v.* Com., 7 Grat. 597.

[4] Jones *v.* S., 51 Ala. 16; S. *v.* Roten, 86 N. C. 701; Carr *v.* S., 34 Ark. 448, [36 Am. R. 15.]

[5] Stockdale *v.* S., 32 Ga. 225; Killet *v.* S., 32 Ga. 292; [S. *v.* Reams, 121 N. C. 556, 27 S. E. R. 1004; Smith *v.* S., 96 Ala. 71, 11 S. R. 71; Ramsey *v.* S., 91 Ala. 29, 8 S. R. 568; Williams *v.* Com., 18 Ky. L. R. 663, 37 S. W. R. 680.]

[6] Sutton *v.* S., 12 Fla. 135; [S. *v.* Bios, 37 La. An. 259.]

[7] *Ante*, § 786.

[8] Lockett *v.* S., 47 Ala. 42; [Hath-

acquaintances.[1] A man on his daily return from his place of business in the city to his home in the country is not a traveler.[2] But one is such who is taking a two days' journey on a river raft,[3] or is passing through the county at the rate of ten miles a day with cattle for a distant market.[4] Not every going from home is a "journey,"[5] nor does every pause by a traveler on his way suspend his journey. The question is a mixed one of intent and acts.[6] The protection to a traveler on his journey extends over the whole time; namely, from the setting out to the return.[7]

§ 788b. "Threatened" — (Self-defense).—The statutory terms exempting persons who are "threatened," or are otherwise acting in self-defense, differ; and they require no special explanations.[8] Though one has been threatened, if he carries the weapon for offense, intending to make or provoke an attack, he is, by construction, not within the exemption.[9] The right to carry the weapon will not extend to one having no rea-

cote *v.* S., 55 Ark. 181, 14 Crim. L. Mag. 237, 17 S. W. R. 721.]

[1] Gholson *v.* S., 53 Ala. 519, [25 Am. R. 652; Lott *v.* S., 122 Ind. 393, 24 N. E. R. 156; McGuirk *v.* S., 64 Miss. 209, 1 S. R. 103; Darby *v.* S., 23 Tex. Ap. 408, 5 S. W. R. 90; McCauley *v.* S. (Tex. Cr. R.), 45 S. W. R. 576; Stanfield *v.* S. (Tex. Cr. R.), 34 S. W. R. 116; Davis *v.* S., 45 Ark. 536; Goss *v.* S. (Tex. Cr. R.), 40 S. W. R. 725.]

[2] Eslava *v.* S., 49 Ala. 355. [But spending three-fourths of his time between home and his business at a long distance makes him a traveler. Burst *v.* S., 89 Ind. 133.]

[3] Baker *v.* S., 49 Ala. 350; [Skeen *v.* S. (Tex. Cr. R.), 30 S. W. R. 218; Chambers *v.* S. (Tex. Cr. R.), 30 S. W. R. 357.]

[4] Rice *v.* S., 10 Tex. Ap. 288.

[5] Smith *v.* S., 3 Heisk. 511; [Shelton *v.* S., 27 Tex. Ap. 443, 11 S. W. R. 458.]

[6] Carr *v.* S., 34 Ark. 448, [36 Am. R. 15; Ball *v.* S. (Tex. Cr. R.), 43 S. W. R. 992; Eubanks *v.* S. (Tex. Cr. R.), 40 S. W. R. 725; Stilley *v.* S., 27 Tex. Ap. 445, 11 S. W. R. 458; Lawson *v.* S. (Tex. Cr. R.), 31 S. W. R. 645; Price *v.* S. (Tex. Cr. R.), 31 S. W. R. 380.]

[7] Coker *v.* S., 63 Ala. 95. See also, as to the subject of this paragraph, Maxwell *v.* S., 38 Tex. 170; *Ex parte* Boland, 11 Tex. Ap. 159; Chaplin *v.* S., 7 Tex. Ap. 87; [*Re* Lee, 46 Fed. R. 59, 13 Crim. L. Mag. 719; Campbell *v.* S., 28 Tex. Ap. 44, 11 S. W. R. 832; West *v.* S., 26 Tex. Ap. 99, 9 S. W. R. 485; Ratigan *v.* S. (Tex. Cr. R.), 26 S. W. R. 407; Thomas *v.* S., 37 Tex. Cr. R. —, 38 S. W. R. 1011; Scott *v.* S., 113 Ala. 106, 21 S. R. 355; Dooley *v.* S., 89 Ala. 90, 8 S. R. 528; Strictland *v.* S., 33 Tex. Cr. R. —, 28 S. W. R. 466; Suddith *v.* S., 70 Miss. 250, 11 S. R. 680.]

[8] Hardin *v.* S., 63 Ala. 38; Shorter *v.* S., 63 Ala. 129; Smith *v.* S., 69 Ind. 140; Polk *v.* S., 62 Ala. 237; S. *v.* Carlton, 48 Vt. 636; Bailey *v.* Com., 11 Bush, 688; Hopkins *v.* Com., 3 Bush, 480; S. *v.* Speller, 86 N. C. 697.

[9] Stroud *v.* S., 55 Ala. 77; [Brown *v.* S. (Tex. Cr. R.), 29 S. W. R. 1079; Collier *v.* S., 68 Ala. 499; Bemey *v.* S., 69 Ala. 233.]

son to apprehend an attack in the particular circumstances, however it might be in others.[1]

§ 788c. Officers and official places.— There are statutory exceptions in favor of the carrying of weapons by officers and in official places, requiring no special explanations.[2] And there are statutes against carrying them in these and other specified places.[3]

§ 789. Motive and exemptions by construction.— One, to be punishable under this statute, must intentionally do what it forbids, with any superadded evil intent which it specifies. And doing this with such intent, and no more, he commits the offense.[4] Hence, for example, it is no defense that the motive for carrying the weapon was merely to exhibit it as a curiosity.[5] And, in general, a reasonable occasion for carrying it, of a sort not within the statutory exemptions, will not avail one who has intentionally violated the prohibiting letter of the statute.[6] Nor

[1] Chatteaux *v.* S., 52 Ala. 388; [Strother *v.* S., 74 Miss. 447, 21 S. R. 147; Brownlee *v.* S., 35 Tex. Cr. R. 213, 32 S. W. R. 1043; Coleman *v.* S., 28 Tex. Ap. 173, 12 S. W. R. 590; S. *v.* Barnett, 34 W. Va. 74, 11 S. E. R. 735; Davenport *v.* S., 85 Ala. 336, 5 S. R. 576; Alexander *v.* S., 27 Tex. Ap. 533, 11 S. W. R. 628; McGuirk *v.* S., 64 Miss. 209, 1 S. R. 103; Short *v.* S., 25 Tex. Ap. 379, 8 S. W. R. 832; Phillips *v.* S. (Tex. Cr. R.), 30 S. W. R. 1063; Reach *v.* S., 94 Ala. 113, 11 S. R. 414; O'Neal *v.* S., 32 Tex. Cr. R. 42, 22 S. W. R. 25.]

[2] O'Conner *v.* S., 40 Tex. 27; Carmichael *v.* S., 11 Tex. Ap. 27; Beasley *v.* S., 5 Lea, 705; Gayle *v.* S., 4 Lea, 466; Horn *v.* S., 6 Lea, 335; Brewer *v.* S., 6 Bax. 446; Miller *v.* S., 6 Bax. 449; Snell *v.* S., 4 Tex. Ap. 171; Williams *v.* S., 42 Tex. 466; Featherston *v.* S., 35 Tex. Cr. R. 612, 34 S. W. R. 276; Corley *v.* S. (Tex. Cr. R.), 33 S. W. R. 975; Munn *v.* S. (Tex. Cr. R.), 33 S. W. R. 977; Walker *v.* Lea, 47 Fed. R. 695; Clayton *v.* S., 21 Tex. Ap. 343; S. *v.* Williams, 72 Miss. 992, 18 S. R. 486.]

[3] Summerlin *v.* S., 3 Tex. Ap. 444; S. *v.* Wilforth, 74 Mo. 528; Crim. Law, II, § 309*a*; [Burns *v.* S., 36 Tex. Cr. R. 601, 38 S. W. R. 204; Strey *v.* S. (Tex. Cr. R.), 40 S. W. R. 997; S. *v.* Hayne, 88 N. C. 625.]

[4] Crim. Law, I, §§ 343–345; *ante*, § 132; Morton *v.* S., 46 Ga. 292; Cutsinger *v.* S., 7 Bush, 392; [Straham *v.* S., 68 Miss. 347, 8 S. R. 844; S. *v.* Chippey, 9 Houst. (Del.) 583, 30 Atl. R. 438; S. *v.* Pollock, 49 Mo. Ap. 445.]

[5] Walls *v.* S., 7 Blackf. 572. [*Contra*, S. *v.* Murray, 39 Mo. Ap. 127; S. *v.* Roberts, 39 Mo. Ap. 47; S. *v.* Larkin, 24 Mo. Ap. 410; Barkley *v.* S., 28 Tex. Ap. 99, 12 S. W. R. 495; Truax *v.* S., 14 Ky. L. R. 299.]

[6] Reynolds *v.* S., 1 Tex. Ap. 616; S. *v.* Speller, 86 N. C. 697; Preston *v.* S., 63 Ala. 127; Livingston *v.* S., 3 Tex. Ap. 74; Cutsinger *v.* S., *supra*; S. *v.* Martin, 31 La. An. 849; Titus *v.* S., 42 Tex. 578; Carroll *v.* S., 28 Ark. 99, [18 Am. R. 538.] See Moorefield *v.* S., 5 Lea, 348; Waddell *v.* S., 37 Tex. 354; Christian *v.* S., 37 Tex. 475; Hilliard *v.* S., 37 Tex. 358. [*Contra*, Blair *v.* S., 26 Tex. Ap. 387, 9 S. W. R. 890; Sanderson *v.* S., 23 Tex. Ap. 520, 5 S. W. R. 138; S. *v.* Gilbert, 87 N. C. 527,

will it avail him that the carrying was on his own premises,[1] unless the statute has this exception.[2]

§ 790. Bowie-knife or "like kind."— Under the words "bowie-knife or knife or instrument of like kind or description," indicating the forbidden weapon, a knife in some of its essential particulars like a bowie-knife is included, but not one all the essential particulars whereof are different.[3]

Fire-arms.—A "fire-arm" has been defined to be "a weapon acting by the force of gunpowder." It includes[4] a —

§ 791. Pistol.—A "pistol," to be within the statute, need not be loaded.[5] All its essential parts must be in possession;[6] but, as they can be readily adjusted, they need not be put together.[7] By what appears to be the better opinion, if it has no mainspring or only a broken one, and if it cannot be discharged in the ordinary way, yet can be by a match, it is still a pistol within the statute,[8] though the contrary was once held.[9]

§ 792. Constitutionality of these statutes:—

Under United States constitution.— The provision which, if any in the United States constitution, governs this question,

42 Am. R. 518; S. *v.* Harrison, 93 N. C. 605; Rives *v.* S. (Tex. Cr. R.), 40 S. W. R. 488; Zolicoffer *v.* S. (Tex. Cr. R.), 43 S. W. R. 992.]

[1] Dycus *v.* S., 6 Lea, 584; Carroll *v.* S., *supra;* [S. *v.* Pigford, 117 N. C. 748, 23 S. E. R. 182; Ross *v.* S. (Tex. Cr. R.), 45 S. W. R. 489; Nichols *v.* S. (Tex. Cr. R.), 45 S. W. R. 494; Moss *v.* S., 65 Ark. 368, 45 S. W. R. 987; S. *v.* Perry, 120 N. C. 580, 26 S. E. R. 580.]

[2] Baird *v.* S., 38 Tex. 599. [Common stairway to office building not within the statute creating exception. Clark *v.* S., 49 Ark. 174, 4 S. W. R. 658; Short *v.* S., 25 Tex. Ap. 379, 11 S. W. R. 832; S. *v.* Hewell, 90 N. C. 705; Farley *v.* S., 72 Ala. 170. Nor to laborer on land of another. S. *v.* Terry, 93 N. C. 585, 53 Am. R. 472; Kinkead *v.* S., 45 Ark. 536; Ross *v.* S. (Tex. Cr. R.), 28 S. W. R. 1063; Page *v.* S. (Tex. Cr. R.), 25 S. W. R. 774; Ball *v.* S. (Tex. Cr. R.), 25 S. W. R. 627; Lemmon *v.* S., 50 Ark. 559, 20 S. W. R. 404; Jones *v.* S., 55 Ark. 186, 17 S. W. R. 719; Maupin *v.* S., 89 Tenn. 367.]

[3] Sears *v.* S., 33 Ala. 347; [Brewer *v.* S., 113 Ala. 106, 21 S. R. 355.]

[4] Atwood *v.* S., 53 Ala. 508, opinion by Brickell, C. J.

[5] S. *v.* Duzan, 6 Blackf. 31; [S. *v.* Bollis, 73 Miss. 57, 19 S. R. 99.]

[6] Cook *v.* S., 11 Tex. Ap. 19.

[7] Hutchinson *v.* S., 62 Ala. 3, [34 Am. R. 1; Redus *v.* S., 82 Ala. 53, 2 S. R. 713; Crawford *v.* S., 94 Ga. 772, 21 S. E. R. 992.]

[8] Williams *v.* S., 61 Ga. 417, [34 Am. R. 102;] Atwood *v.* S., 53 Ala. 508; [Redus *v.* S., 82 Ala. 53, 2 S. R. 713; Crawford *v.* S., 94 Ga. 772, 21 S. E. R. 992.]

[9] Evins *v.* S., 46 Ala. 88, 89. Further as to what is a pistol, see Barton *v.* S., 7 Bax. 105; Holland *v.* S., 33 Ark. 560; Puryear *v.* S., 44 Ga. 221; [Underwood *v.* S. (Tex. Cr. R.), 29 S. W. R. 777.]

is that "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."[1] It is among the older amendments, most[2] of which are held to be restrictions on the national power, and not to bind the states.[3] This one is declaratory of personal rights, so also are some of the others which are adjudged not to extend to the states; and, contrary perhaps to some former views, it is now settled in authority that this provision has no relevancy to state legislation.[4] Still,—

§ 793. Under state constitutions.— The same guaranty to the people of the right "to keep and bear arms" is largely found in our state constitutions; in some of them, in these words alone, and in others more or less qualified. In reason, the keeping and bearing of arms has reference only to war, and possibly also to insurrections wherein the forms of war are as far as practicable observed; yet certainly not to broils, bravado and tumult, disturbing the public repose, or to private assassination and secret revenge. Nor are these, in the language of the constitutional provision now under consideration, "necessary to the security of a free state." Nor yet are dirks, bludgeons, revolvers, and other weapons which are not used in war, "arms." Moreover, there is no species of property,[5] and no private right, the "keeping" and "bearing" of which may not be *regulated*[6] by legislation for the public good. Hence, in reason, statutes

[1] Const. U. S. Amendm., art. 2.

[2] Justices *v.* Murray, 9 Wall. 274.

[3] Crim. Law, I, §§ 946, 981; Crim. Pro., I, §§ 64, 145, 261, 301, 891; Barron *v.* Baltimore, 7 Pet. 243, 247; Livingston *v.* New York, 8 Wend. 85; S. *v.* Shumpert, 1 S. C. 85; S. *v.* Anderson, 30 La. An. 557; S. *v.* Wells, 46 Iowa, 662; North Missouri R. R. Co. *v.* Maguire, 49 Mo. 490, [8 Am. R. 141;] Prescott *v.* S., 19 Ohio St. 184, [2 Am. R. 388;] Colt *v.* Eves, 12 Conn. 243; James *v.* Com., 12 S. & R. 220; Barker *v.* P., 3 Cow. 686, [15 Am. D. 322;] Reed *v.* Rice, 2 J. J. Mar. 44, [19 Am. D. 122;] S. *v.* Paul, 5 R. I. 185; S. *v.* Keeran, 5 R. I. 497; Boyd *v.* Ellis, 11 Iowa, 97; Com. *v.* Hitchings, 5 Gray, 482, 485. See Campbell *v.* S., 11 Ga. 353; U. S. *v.* Rhodes, 1 Abb. (U. S.) 28.

[4] U. S. *v.* Cruikshank, 92 U. S. 542; Andrews *v.* S., 3 Heisk. 165, [8 Am. R. 8;] Fife *v.* S., 31 Ark. 455, [25 Am. R. 556.] See Nunn *v.* S., 1 Kelly, 243; Stockdale *v.* S., 32 Ga. 225; S. *v.* Jumel, 13 La. An. 399. [Nor is statute in conflict with United States constitution, Fourteenth Amendment, in abridging privileges and immunities of citizens of the United States. Miller *v.* Texas, 153 U. S. 535, 38 Law. ed. 812, 14 Sup. Ct. 874. Even though it discriminates between persons of good character and those not of good character. S. *v.* Workman, 35 W. Va. 367, 14 S. E. R. 7, 14 L. R. A. 600; S. *v.* Shelby, 90 Mo. 302.]

[5] Com. *v.* Tewksbury, 11 Met. 55.

[6] *Post*, § 989; Lewis *v.* S., 2 Tex. Ap. 26; Wilson *v.* S., 33 Ark. 557, [34 Am.

like those explained in the foregoing sections do not violate any of our constitutions; and so, with some differences in the form of the argument and limitations of the doctrine, our courts generally hold;[1] though there are opinions in dissent.[2]

II. The Procedure.

§ 794. Course of discussion.— We shall consider, first, the indictment; secondly, the evidence.

First. **The indictment:**—

Follow statute.— In general, the indictment for this offense is simply required to cover duly, with time and place,[3] all the material statutory terms, and it need not be expanded beyond.[4] Thus,—

§ 795. "Carry."— If the statutory word is "carry," it is ill to say that the defendant "did *have* about his person" the weapon.[5] But,—

Loaded.— Under a statute making punishable one "who, having or carrying a deadly weapon, shall exhibit the same in a rude, angry, or threatening manner," an indictment for thus exhibiting a pistol need not allege that it was loaded.[6] Moreover,—

Name of person terrified.— Where the thing inhibited is the carrying of the weapon to the terror of any person, an indictment is good which simply charges that the defendant carried it "to the fear and terror of certain persons," not mentioning

R. 52;] S. *v.* Buzzard, 4 Pike, 18; S. *v.* Speller, 86 N. C. 697; Edmonds *v.* Banbury, 28 Iowa, 267, [4 Am. R. 177.]

[1] Fife *v.* S., 31 Ark. 455, [25 Am. R. 556;] Andrews *v.* S., 3 Heisk. 165, [8 Am. R. 8;] English *v.* S., 35 Tex. 473, [14 Am. R. 374;] Lewis *v.* S., *supra;* S. *v.* Wilburn, 7 Bax. 57; Cockrum *v.* S., 24 Tex. 394; Wright *v.* Com., 77 Pa. St. 470; Hill *v.* S., 53 Ga. 472; Owen *v.* S., 31 Ala. 387; S. *v.* Buzzard, *supra;* S. *v.* Speller, *supra;* Aymette *v.* S., 2 Humph. 154; S. *v.* Reid, 1 Ala. 612, [35 Am. D. 44;] S. *v.* Mitchell, 3 Blackf. 229; S. *v.* Newsom, 5 Ire. 250; S. *v.* Jumel, 13 La. An. 399; [S. *v.* Workman, 35 W. Va. 367, 14 S. E. R. 7, 14 L. R. A. 600. Nor do ordinances of a city when not opposed to statutes. *Re* Cheney, 90 Cal. 217, 9 Pac. R. 432.]

[2] Bliss *v.* Com., 2 Litt. 90, [13 Am. D. 251.] See Ely *v.* Thompson, 3 A. K. Mar. 70; Jennings *v.* S., 5 Tex. Ap. 298; Leatherwood *v.* S., 6 Tex. Ap. 244; Wilson *v.* S., 33 Ark. 557.

[3] Rex *v.* Silcot, 3 Mod. 280. And see Rex *v.* Pursey, 12 Mod. 485.

[4] Pickett *v.* S., 10 Tex. Ap. 290, 291; S. *v.* Swope, 20 Ind. 106; S. *v.* Judy, 60 Ind. 138; Hill *v.* S., 53 Ga. 472; S. *v.* Bentley, 6 Lea, 205; Owens *v.* S., 3 Tex. Ap. 404; S. *v.* Green, 3 Heisk. 131.

[5] S. *v.* Carter, 36 Tex. 89.

[6] Gamblin *v.* S., 45 Miss. 658; S. P. in substance, S. *v.* Duzan, 6 Blackf. 31.

their names. So the Tennessee court has held,[1] but it is not certain that this point would be so adjudged in all the states.[2]

§ 796. Expanding beyond statute.—In special circumstances the allegations for this offense must be expanded beyond the statutory terms. Thus,—

Armed when arrested.—A statute made it punishable for one to be armed, in a way pointed out, "when arrested upon a warrant of a magistrate issued against him for an alleged offense," or "when arrested by a sheriff, deputy-sheriff, constable, police officer or watchman, while committing a criminal offense."[3] Thereupon a man was indicted for being armed when arrested while in the act of drunkenness. And the court, assuming, without deciding, that drunkenness was one of the crimes meant by the statute, interpreted it to "apply only to legal arrests made by virtue of a warrant, or in pursuance of some valid legal authority," not to "cases where parties were unlawfully arrested, or to protect officers from injury or harm when they were mere trespassers, or doing acts which were unauthorized by law." Consequently the allegations must in some way render apparent the lawfulness of the arrest. By the other laws of the state, officers had no general authority to make arrests for drunkenness without warrant; therefore either a warrant, or the particular facts which gave the authority without it, must be alleged.[4] In another case the indictment set out an arrest on a warrant by a police officer; but, by the laws of the state, police officers might be appointed either with or without the power to serve the sort of process specified. The indictment, not alleging that the particular officer had the power, was adjudged insufficient.[5]

§ 797. Sufficient.—It has been adjudged sufficient under the Indiana statute to say that the defendant, at a time and place mentioned, he not being then and there a traveler, did wear and carry concealed about his person a dangerous and deadly weapon, to wit, a fire-arm called a revolver.[6]

§ 798. Negativing exceptions and provisos.—The rules as to negativing the exceptions and provisos in statutes are stated

[1] S. *v.* Bentley, 6 Lea, 205.
[2] Crim. Pro., I, § 571.
[3] Mass. Gen. Stats. 164, § 10.
[4] Com. *v.* O'Connor, 7 Allen, 583, 584, opinion by Bigelow, C. J.
[5] Com. *v.* Doherty, 103 Mass. 443.
[6] S. *v.* Swope, 20 Ind. 106.

elsewhere.[1] Within these rules, some, in the statutes now under discussion, must be negatived,[2] others need not be.[3]

§ 799. Secondly. **The evidence:—**

Concealed.— Where the offense is the carrying of a "concealed weapon," the fact that it was concealed, as alleged, must be shown.[4]

§ 800. **How much of allegation.**— The full offense must be made out in the proofs.[5] But as more may be alleged than suffices to constitute it, only so much of allegation as is indispensable to it need be established. For example, where the charge was the carrying of "deadly weapons, to wit, a bowie-knife, and also a dirk or dagger," it was sustained by proof of the bowie-knife, though nothing appeared as to the dirk or dagger.[6]

§ 800a. **Negative averments.**— On the somewhat disputed question of proving the negative averments,[7] we have adjudications that the allegation of the defendant's not being a peace officer,[8] and the same of his not being a traveler,[9] need not, though necessary to be made, be established as a part of the *prima facie* evidence of guilt.

§ 800b. **Carry about person.**— The charge that the defendant carried a pistol about his person is sustained by showing that he carried it in his hand.[10]

[1] Crim. Pro., I, §§ 631–641.

[2] S. *v.* Duke, 42 Tex. 455; Young *v.* S., 42 Tex. 462; Smith *v.* S., 42 Tex. 464; Summerlin *v.* S., 3 Tex. Ap. 444; Leatherwood *v.* S., 6 Tex. Ap. 244; Wiley *v.* S., 52 Ind. 516; S. *v.* Clayton, 43 Tex. 410.

[3] S. *v.* Maddox, 74 Ind. 105; S. *v.* Jackson, 1 Lea, 680; Com. *v.* McClanahan, 2 Met. (Ky.) 8; [Terr. *v.* Burns, 6 Mont. 72, 9 Pac. R. 432.]

[4] Washington *v.* S., 36 Ga. 242; Ridenour *v.* S., 65 Ind. 411; Haskew *v.* S., 7 Tex. Ap. 107; Newsome *v.* S., 61 Ga. 481; Smith *v.* S., 10 Tex. Ap. 420.

[5] Wilson *v.* S., 52 Ga. 40.

[6] Com. *v.* Howard, 3 Met. (Ky.) 407.

[7] *Ante*, § 762.

[8] Leatherwood *v.* S., 6 Tex. Ap. 244; [Featherston *v.* S., 35 Tex. Cr. R. 612, 34 S. W. R. 276.]

[9] Wiley *v.* S., 52 Ind. 516.

[10] Woodward *v.* S., 5 Tex. Ap. 296. [In the following cases, carrying in wagons, in satchels and hand-bags and in baskets was ruled to be carrying about the person, to wit: Diffey *v.* S., 86 Ala. 66, 5 S. R. 576; Smith *v.* S., 96 Ala. 66, 11 S. R. 71; Boles *v.* S., 86 Ga. 255, 12 S. E. R. 361; Willis *v.* S., 105 Ga. 633, 32 N. E. R. 155; S. *v.* McManis, 89 N. C. 555, and Garrett *v.* S. (Tex. Cr. R.), 25 S. W. R. 285; and under similar or identical circumstances the opposite ruling was made: Cunningham *v.* S., 76 Ala. 88; Ladd *v.* S., 92 Ala. 58, 9 S. R. 568; Com. *v.* Sturgeon (Ky.), 37 S. W. R. 680; George *v.* S. (Tex. Cr. R.), 29 S. W. R. 680; Cathey *v.* S., 23 Tex. Ap. 493, 5 S. W. R. 137, and Hardy *v.* S., 37 Tex. Cr. R. 511, 40 S. W. R. 299.]

§ 801. Some witnesses seeing and others not.— Where one witness swore that during a quarrel between himself and the defendant he saw a pistol about the person of the latter, and another that he was present, looked closely to see and saw none, and must have seen it if there had been one, it was held not error to charge the jury that both might have sworn truly, and that the preponderance was in favor of the positive testimony of the former, whose attention, excited by the quarrel, was directed toward the weapon.[1] In another case an instruction not very different from this was adjudged erroneous.[2] In reason, the question being purely of fact, the court should say nothing to the jury leading them to suppose it to be within the cognizance of any rule of law. But something of this appears in another connection.[3]

[1] Fitzgerald *v.* S., 12 Ga. 213.
[2] Haskew *v.* S., 7 Tex. Ap. 107.
[3] Crim. Pro., I, §§ 1071, 1147. For further questions see Wilson *v.* S., 33 Ark. 557, [34 Am. R. 52;] Tipler *v.* S., 57 Miss. 685; Hopkins *v.* Com., 3 Bush, 480.

CHAPTER XLVIII.

ELECTION OFFENSES—THE LAW.[1]

§ 802. Introduction.
803, 804. These offenses in general.
805–806*a*. Offenses by officers of elections.
807–826. By voters and others as to voting.

§ 802. How chapter divided.— We shall consider, I. These offenses in general; II. Offenses by the officers of elections; III. Offenses by voters and others as to voting.

I. These Offenses in General.

§ 803. At common law.— Offenses of the classes to be treated of in this chapter are indictable at the common law,[2] as explained in another connection;[3] though, by reason of the great number of the prohibiting statutes, the indictment is generally, in practice, upon them. And —

Elsewhere — are discussed the connected offenses of —

Betting on elections,— further on in this volume;[4] —

Liquor selling,[5] — by some statutes made specially penal on election day, or when carried on at or near a place where an election is being held;[6] —

Conspiracy,[7] — whereof a conspiracy against the freedom and purity of an election, or an individual's right to vote thereat, or to violate the common law or a statute in respect of an elec-

[1] For matter relating to this title, see *ante*, §§ 205, 223; *post*, § 931 *et seq.*

[2] Com. *v.* McHale, 97 Pa. St. 407; Com. *v.* McHale, 97 Pa. St. 397, [39 Am. R. 808;] Com. *v.* Jones, 10 Phila. 211; [Mason *v.* S., 55 Ark. 529, 18 S. W. R. 827; S. *v.* Jackson, 73 Me. 91, 40 Am. R. 342; Com. *v.* Weitzel, 24 Pitts. Law J. (Pa.) 303; Com. *v.* Shaub, 5 Lanc. Law Rev. (Pa.) 121.]

[3] Crim. Law, I, § 471.

[4] *Post*, §§ 852, 931 *et seq.*

[5] *Post*, § 933 *et seq.*

[6] Hoskey *v.* S., 9 Tex. Ap. 202; Haines *v.* S., 7 Tex. Ap. 30; S. *v.* Powell, 3 Lea, 164; S. *v.* Kidd, 74 Ind. 554; S. *v.* Cady, 47 Conn. 44; Manis *v.* S., 3 Heisk. 315; English *v.* S., 7 Tex. Ap. 171; S. *v.* Stamey, 71 N. C. 202; S. *v.* Irvine, 3 Heisk. 155; *post*, § 1070*b*.

[7] Crim. Law, II, § 169 *et seq.*; Crim. Pro., II, § 202 *et seq.*

tion, is indictable at the common law,[1] and in some localities under statutes;[2]—

Bribery,— in respect of elections[3] as well as in other respects.[4]

§ 804. As between states and United States.— The election, in the states, of purely state officers, is, with a single exception, matter of state regulation, not within the jurisdiction of the national government.[5] The exception is that, by the fifteenth amendment of the constitution of the United States, "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color or previous condition of servitude;" and "the congress shall have power to enforce this article by appropriate legislation." Congress has so legislated. But the effect has not been to make the qualification of voters for state officers a national question. It is such to the extent only that the national power may and does restrain the states from discriminating, in their laws, so as to withhold the ballot from one of a particular race, etc., who would be entitled to it by their general provisions; punishing, also, acts committed in violation of what is thus established.[6] But the qualifications of voters other-

[1] Crim. Law, II, §§ 86 and note, 219, 220, 222, 223, 229; Com. *v.* McHale, 97 Pa. St. 397.

[2] Crim. Law, II, §§ 236-238; U. S. *v.* Goldman, 3 Woods, 187; U. S. *v.* Mitchell, 1 Hughes, C. C. 439; U. S. *v.* Butler, 1 Hughes, C. C. 457; U. S. *v.* Crosby, 1 Hughes, C. C. 448; [Com. *v.* Shaub (Pa.), 5 Lanc. Law Rev. 121.]

[3] Crim. Law, II, § 86; Russell *v.* Com., 3 Bush, 469; Com. *v.* Stephenson, 3 Met. (Ky.) 226; Simpson *v.* Yeend, Law R. 4 Q. B. 626; Milnes *v.* Bale, Law R. 10 C. P. 591; S. *v.* Purdy, 36 Wis. 213, [17 Am. R. 485;] Grant *v.* Pagham, 3 C. P. D. 80; Rex *v.* Pitt, 1 W. Bl. 380; Sulston *v.* Norton, 3 Bur. 1235, 1 W. Bl. 317; [Johnson *v.* Com., 99 Ky. 53, 13 S. W. R. 520; Com. *v.* Budy, 5 Pa. Dist. R. 270; S. *v.* Schoonover, 135 Ind. 526, 35 N. E. R. 119. Offer of ground to build court-house as inducement to voters for change of location is not. Hall *v.* Marshall, 80 Ky. 552; U. S. *v.* McBosley, 29 Fed. R. 897; S. *v.* Downs, 148 Ind. 324, 47 N. E. R. 670; Epps *v.* Smith, 121 N. C. 157, 28 S. E. R. 357; Com. *v.* Selby, 87 Ky. 594, 9 S. W. R. 819.]

[4] Crim. Law, II, § 85 *et seq.*; Crim. Pro., II, §§ 126, 127.

[5] Minor *v.* Happersett, 21 Wall. 162; U. S. *v.* Crosby, 1 Hughes, C. C. 448.

[6] U. S. *v.* Reese, 92 U. S. 214; U. S. *v.* Crosby, 1 Hughes, C. C. 448; Wood *v.* Fitzgerald, 3 Oreg. 568; U. S. *v.* Canter, 2 Bond, 389; Anthony *v.* Halderman, 7 Kan. 50; U. S. *v.* Souders, 2 Abb. (U. S.) 456. And see U. S. *v.* Cruikshank, 92 U. S. 542; *Ex parte* Virginia, 100 U. S. 339; [U. S. *v.* Fisher (C. C.), 8 Fed. R. 414; U. S. *v.* Baldridge, 11 id. 552; U. S. *v.* Mumford, 16 id. 223; U. S. *v.* Morrissey, 32 id. 147; U. S. *v.* Coy, id. 538; U. S. *v.* Carpenter, 41 id. 330; U. S. *v.* Belvin, 46 id. 381; Van Buren *v.* U. S., 36 id. 77; Mason *v.* S., 55 Ark. 529, 18 S. W. R. 827.]

wise in the states are for the states themselves; as, for example, whether the ballot shall extend to women.[1] The election of the national officers of senator, representative to congress, president and vice-president proceeds on a mixture of state and national law.[2] The consequence whereof, and of the interest which the general government has in its own officers, is that it may and does exercise some supervision over the elections, in the states, of such officers; and punish violations of the election laws as to them.[3]

II. Offenses by the Officers of Election.

§ 805. Duties.— The duties of the officers of the elections are variously prescribed by statutes;[4] some of the provisions whereof are directory[5] and others mandatory, within distinctions already explained.[6]

Mistake.— Knowledge of the law is not conclusively imputed to these officers;[7] so that if, acting carefully and conscientiously, they do what is contrary to their duty through a mistake either of law or of fact, they are exempt from indictment.[8] Yet under some circumstances and by some opinions the person injured, whereby, for example, he loses his vote, may have

[1] Minor *v.* Happersett, *supra;* U. S. *v.* Anthony, 11 Blatch. 200; Minor *v.* Happersett, 53 Mo. 58.

[2] Const. U. S., art. 1, § 4; art. 2, § 2; Amendm., arts. 12, 14, 15.

[3] *Ex parte* Clarke, 100 U. S. 399; *Ex parte* Siebold, 100 U. S. 371; U. S. *v.* Anthony, 11 Blatch. 200; U. S. *v.* Nicholson, 3 Woods, 215; U. S. *v.* Gitma, 3 Hughes, C. C. 549; U. S. *v.* Clayton, 2 Dil. 219; U. S. *v.* Hayden, 52 How. Pr. 471. See U. S. *v.* Cruikshank, 92 U. S. 542; [U. S. *v.* Gale, 109 U. S. 65, 27 Lawy. ed. 857; U. S. *v.* Molloy, 31 Fed. R. 19; U. S. *v.* O'Connor, id. 449.]

[4] S. *v.* Smith, 18 N. H. 91; P. *v.* Livingston, 79 N. Y. 279; S. *v.* Camden, 13 Vroom, 335; Dells *v.* Kennedy, 49 Wis. 555, [35 Am. R. 786;] U. S. *v.* Clayton, 2 Dil. 219; P. *v.* Wilson, 62 N. Y. 186; S. *v.* Fitzgerald, 44 Mo. 425; Wattles *v.* P., 18 Mich. 446; Bernier *v.* Russell, 89 Ill. 60; P. *v.* Wheeler, 18 Hun, 540; Keenan *v.* Cook, 12 R. I. 52.

[5] Lee *v.* S., 49 Ala. 43; P. *v.* Cook, 4 Seld. 67, [59 Am. D. 451;] P. *v.* Wilson, 62 N. Y. 186; P. *v.* Livingston, 79 N. Y. 279; Taylor *v.* Taylor, 10 Minn. 107.

[6] *Ante*, §§ 254–256.

[7] Crim. Law, I, § 299; [U. S. *v.* Molloy, *supra;* U. S. *v.* Baldridge, *supra.* As to unlawful acts which naturally or necessarily affect the result of an election a criminal intent will be presumed. P. *v.* Burns, 75 Cal. 627, 17 Pac. R. 646; C. *v.* Connelly, 163 Mass. 539, 40 N. E. R. 862; U. S. *v.* Carpenter, 41 Fed. R. 330.]

[8] S. *v.* Smith, 18 N. H. 91, 94; Com. *v.* Sheriff, 7 Phila. 84; [Com. *v.* Maher (Pa.), 38 Leg. Int. 269.]

his civil action against them.[1] Others require, even in this case, that their act should have been corrupt.[2] And —

§ 806. Judicial.— Though the statutes of our states differ, and the duties imposed on these officers are diverse, to a large extent they are deemed judicial or *quasi* such,[3]— a ground largely exempting them from criminal or even civil liability for their mistakes.[4] Of this sort is the passing upon the qualifications of voters, whether in making out or revising voting lists, or receiving or rejecting votes at the polls.[5] Therefore, for example, the presiding officer at an election is not criminally liable for any mistake which he may honestly make in receiving or refusing to receive a vote.[6]

§ 806a. Other questions,— within the scope of this sub-title, have been adjudged; but they are so far local, or involve so little of general jurisprudence, that they may be dismissed with a simple reference to the cases.[7]

III. Offenses by Voters and Others as to Voting.

§ 807. Elective franchise.— Highly as the right to vote in governmental affairs is by most esteemed, it is not, like that to life, liberty and the pursuit of happiness, fundamental, natural and inalienable. But, among all nations, it is simply a polit-

[1] Bernier *v.* Russell, 89 Ill. 60; Lincoln *v.* Hapgood, 11 Mass. 350 (compared with Humphrey *v.* Kingman, 5 Met. 162, 167); Thomas *v.* Hinkle, 35 Ark. 450. See Byler *v.* Asher, 47 Ill. 101; Bevard *v.* Hoffman, 18 Md. 479, [81 Am. D. 618.]

[2] Friend *v.* Hamill, 34 Md. 298; Goetchens *v.* Matthewson, 5 Lans. 214; Busteed *v.* Parsons, 54 Ala. 393, [25 Am. R. 688;] Moran *v.* Rennard, 3 Brews. 601; Carter *v.* Harrison, 5 Blackf. 138; Jenkins *v.* Waldron, 11 Johns. 114, [6 Am. D. 359.] Consult, as to these questions, Crim. Law, I, §§ 459, 460. 462; II, § 791 *et seq.*

[3] S. *v.* Powers, 75 N. C. 281; Keenan *v.* Cook, 12 R. I. 52; Miller *v.* Rucker, 1 Bush, 135.

[4] Crim. Law, I, §§ 459–464; S. *v.* Powers, *supra;* Keenan *v.* Cook, *supra.* And see U. S. *v.* Hayden, 52 How. Pr. 471; Burkett *v.* McCarty, 10 Bush, 758.

[5] Byrne *v.* S., 12 Wis. 519; S. *v.* Daniels, 44 N. H. 383; Bevard *v.* Hoffman, 18 Md. 479, [81 Am. D. 618.] And see S. *v.* Staten, 6 Coldw. 233. But see Huber *v.* Reily, 53 Pa. St. 112.

[6] S. *v.* McDonald, 4 Harring. (Del.) 555; S. *v.* Porter, 4 Harring. (Del.) 556.

[7] Com. *v.* Trimmer, 84 Pa. St. 65; S. *v.* Jefferson, 17 Fla. 707; P. *v.* Pease, 27 N. Y. 45; P. *v.* Wheeler, 18 Hun, 540; Wattles *v.* P., 13 Mich. 446; Harbaugh *v.* P., 33 Mich. 241; Supervisors of Elections' Case, 114 Mass. 247, [19 Am. R. 341;] Wayman *v.* Com., 14 Bush, 466; [Mincher *v.* S., 66 Md. 227, 6 Atl. R. 451; S. *v.* Colton, 9 Houst. (Del.) 530, 33 Atl. R. 259; Boland *v.* P., 25 Hun, 423.]

ical privilege, conferred by the governing power on such of the people as it will.[1] The elective franchise, therefore, is with us similar to the franchise of making laws, which the voters confer, from time to time, on the men who constitute our legislative bodies. By the theory of our governments, national and state, the governing power is in the people; who, while they have no natural and inalienable right to vote at our ordinary elections, have the right to determine who these voters shall be. This they have done in our written constitutions; so that what is declared therein to be the right to the elective franchise, it, in reason and authority, is.[2]

§ 808. Who the people to determine.—It is not in every particular settled with us who are the people to determine on whom the elective franchise shall be conferred; in other words, to ordain our written constitutions. By the public law of nations as now practiced,— so the author understands,— the voters to decide upon a form of government, and in whom the governing power shall be reposed, are all the male persons who have reached the age of majority. To a large extent, not absolutely, the history of our people and governments shows this rule to prevail with us. But, in connection with it, there are special considerations, and, in the states, results wrought by the constitution of the United States, not best to be entered into here.[3]

§ 809. Power of legislation.—The rights of voting conferred by our constitutions cannot be taken away or abridged by statutes.[4] But—

To regulate.— Constitutional rights, like any other, may be regulated by legislation to any extent which does not impair them,[5] and by the same power they may be enforced or made effectual.[6] Within which doctrine a statute in aid of or regulating a constitutional right to vote is good; but it cannot, under color of doing this, take the right away.[7] Thus,—

[1] Ridley *v.* Sherbrook, 3 Coldw. 569; Anderson *v.* Baker, 23 Md. 531; Blair *v.* Ridgely, 41 Mo. 63, [97 Am. D. 248.]

[2] S. *v.* Staten, 6 Coldw. 233; Huber *v.* Reily, 53 Pa. St. 112; Blair *v.* Ridgely, *supra;* Anderson *v.* Baker, *supra;* Spencer *v.* Board of Registration, 1 MacAr. 169, [29 Am. R. 582.]

[3] *Ante*, § 804; Crim. Law, I, §§ 160–171; *In re* Hughes, Phillips (N. C.), 57.

[4] Monroe *v.* Collins, 17 Ohio St. 665; Davies *v.* McKeeby, 5 Nev. 369; Page *v.* Allen, 58 Pa. St. 338, [98 Am. D. 272;] S. *v.* Staten, 6 Coldw. 233; Cooley, Const. Lim. (2d ed.) 599; Huber *v.* Reily, 53 Pa. St. 112; Ridley *v.* Sherbrook, 3 Coldw. 569.

[5] *Ante*, § 793; Field *v.* P., 2 Scam. 79.

[6] *Ante*, § 11*a*, note, 92*b*.

[7] Monroe *v.* Collins, *supra;* Patter

Registration laws.— Though the constitution defines the qualifications of voters, statutes may compel preliminary registration,[1] and render an election without it void.[2] But —

Qualifications.— To vary a constitutional qualification[3] — as, for example, to make longer or shorter the required residence[4] — is not within the legislative power.

Forfeiture of right to vote — (Punishment).— Constitutional rights may be waived.[5] Therefore they may be forfeited.[6] So that legislation may, and it sometimes does, make the forfeiture of the constitutional right to vote a punishment for crime.[7] But there must first be a conviction,[8] after which a pardon will restore the forfeited right.[9] As to the power of —

§ 810. Congress over voting in states.— Some of our state constitutions expressly declare incompetent those convicted of felony under either the state or national laws.[10] Under such a constitution the president's pardon of a national offense revives, within the doctrine just stated, the forfeited right to vote in the state.[11] Besides which it seems to have been deemed to be within the congressional power to impose the forfeiture of the right to vote in a state for state officers as a penalty for the violation of national law. But the true view of this question is that, if the state constitution makes United States citizenship an element in the right to vote, such citizenship may be forfeited under the national laws, and then the right will terminate by the state laws.[12] For the simple and pure question of the ballot in a state depends, with the single exception al-

son *v.* Barlow, 60 Pa. St. 54; Capen *v.* Foster, 12 Pick. 485, [23 Am. D. 632;] S. *v.* Lean, 9 Wis. 279.

[1] Byler *v.* Asher, 47 Ill. 101; S. *v.* Staten, *supra;* Cooley, Const. Lim. (2d ed.) 601, 602; S. *v.* Baker, 38 Wis. 71; Edmonds *v.* Banbury, 28 Iowa, 267, [4 Am. R. 177.] See S. *v.* Bond, 38 Mo. 425.

[2] S. *v.* Albin, 44 Mo. 346.

[3] Bourland *v.* Hildreth, 26 Cal. 161; Day *v.* Jones, 31 Cal. 261; Monroe *v.* Collins, 17 Ohio St. 665; Page *v.* Allen, 58 Pa. St. 338.

[4] P. *v.* Canaday, 73 N. C. 198, [21 Am. R. 465;] Quinn *v.* S., 35 Ind. 485, [9 Am. R. 754.] And see S. *v.* Baker, *supra.*

[5] Crim. Law, I, § 995; Crim. Pro., I, §§ 50, 112, 118.

[6] *In re* Duffy, 4 Brews. 531.

[7] Huber *v.* Reily, 53 Pa. St. 112. Some of our constitutions have this provision. Gandy *v.* S., 10 Neb. 243.

[8] S. *v.* Symonds, 57 Me. 148. It is immaterial that the conviction occurred while the party was a minor. Hamilton *v.* P., 57 Barb. 625.

[9] Jones *v.* Alcorn Registrars, 56 Miss. 766; Ridley *v.* Sherbrook, 3 Coldw. 569.

[10] Gandy *v.* S., 10 Neb. 243.

[11] Ridley *v.* Sherbrook, 3 Coldw. 569; Jones *v.* Alcorn Registrars, 56 Miss. 766.

[12] Huber *v.* Reily, 53 Pa. St. 112.

ready explained,[1] on state laws, and is in no degree under the control of the United States.[2]

§ 811. Voting out of state.— A necessary prerequisite to voting is the ascertainment of a time and place.[3] Commonly the place is fixed by the constitution or by statutes; and, in the nature of things, it must ordinarily be within the state. But during the late civil war there were in some of the states attempts to reserve the ballot to soldiers serving out of the state. Under some of the constitutions a statute to this effect was adjudged valid; under others, not. The Pennsylvania constitution made one a voter who should have "resided in the state one year, and in the election district *where he offers to vote* ten days immediately preceding such election;"[4] and the majority of the court, deeming personal presence essential to the offering of a vote, held the statute which permitted voting out of the state to be unconstitutional.[4] Still,—

§ 812. The right — of the state, by its constitution, or by a statute not in conflict with any constitutional provision, to permit voting in this way, is plain on general principles.[5] And,—

§ 813. Punishment of voter out of state.— Should we admit that a state cannot punish even its own citizen for a crime committed abroad, still, within the doctrine that a man in one locality becomes guilty of crime in any other wherein his wrongful act takes effect,[6] one who, out of the state, sends or deposits to be sent into it a vote there to take effect contrary to its laws, may be punished. Overlooking this principle, the Pennsylvania court held that if at such an election a foreigner, serving the United States, and owing no allegiance temporary or otherwise to Pennsylvania, casts illegally his vote out of the state to operate in it, the state power has no jurdisdiction over the offense. In the case of a citizen of the state, the doctrine was admitted to be otherwise.[7]

[1] *Ante*, § 804.

[2] Spragins *v.* Houghton, 2 Scam. 377.

[3] Stephens *v.* P., 89 Ill. 337.

[4] Chase *v.* Miller, 41 Pa. St. 403, 419. See Hulseman *v.* Rems, 41 Pa. St. 396. Of the like sort is Opinion of Justices, 44 N. H. 633. For other opinions on the one side and the other of the general constitutional question see Bourland *v.* Hildreth, 26 Cal. 161; Opinion of the Judges, 30 Conn. 591; Soldiers' Voting Bill, 45 N. H. 595; Lehman *v.* McBride, 15 Ohio St. 573; S. *v.* Main, 16 Wis. 398; P. *v.* Blodgett, 13 Mich. 127.

[5] See *ante*, § 810; Crim. Law, I, § 152.

[6] Crim. Law, I, §§ 110–112; Crim. Pro., I, §§ 53, 59, 61.

[7] Com. *v.* Kunzmann, 41 Pa. St. 429. See S. *v.* Main, 16 Wis. 398.

§ 814. Validity of election — (Illegal voting). — To make punishable an unlawful voting, the election must be legal and valid.[1] Now,—

Informalities. — Not all informalities invalidate an election,[2] some do.[3] The question seems to be within the distinction of directory and mandatory statutes, already discussed.[4]

§ 815. Illegal voting and perjury — are distinct offenses. Therefore, on a prosecution for the former, it is no objection that the defendant took an oath affirming his qualifications, and so is indictable also for the latter.[5] As to —

§ 816. What is voting. — It was in Tennessee laid down, that if on election day one standing before the judges delivers to the proper officer his vote, and by their order his name is announced and the clerk registers it, he votes, though the officer neglects till the polls are closed to put the ballot into the box for safe-keeping.[6]

§ 817. "Residence" of voter. — Most of our constitutions and statutes require the voter to "reside" at the place where he offers his vote. Abstractly, and as applied to some things, there is a slight difference between "residence" and "domicile;" so that, for example, while a man can have but one "domicile," he may "reside" at more places than one at the same time. But in various connections in the written laws, and as applied to other things, residence means domicile.[7] It is believed that it does in our voting laws; for to permit a man to vote in more places than one is contrary to their spirit, and the one place, if termed "residence" in the statute or constitution, can be no other than the domicile.[8] A person, therefore, who goes to a place merely to vote, or for some other temporary object, does not become thereby a resident;[9] his inhabitancy must be with the intention of remaining.[10] For illustration,—

[1] *Ex parte* Rodriguez, 39 Tex. 705. And see Reg. *v.* Vaile, 6 Cox, C. C. 470; Reg. *v.* Hague, 4 B. & S. 715.

[2] S. *v.* Cohoon, 12 Ire. 178, [55 Am. D. 407;] S. *v.* Bailey, 21 Me. 62.

[3] S. *v.* Williams, 25 Me. 561.

[4] *Ante*, §§ 254–256.

[5] S. *v.* Minnick, 15 Iowa, 123. See S. *v.* Welsh, 21 Minn. 22.

[6] Steinwehr *v.* S., 5 Sneed, 586. See S. *v.* Elwood, 12 Wis. 551; Com. *v.* Gale, 10 Bush, 488; Reg. *v.* Hague, 4 B. & S. 715, 9 Cox, C. C. 412.

[7] 2 Bishop, Mar., Div. & S., §§ 124, 124*a*.

[8] Chase *v.* Miller, 41 Pa. St. 403; Allentown Election Case, 8 Phila. 575; Beardstown *v.* Virginia, 81 Ill. 541; Harbaugh *v.* P., 33 Mich. 241.

[9] S. *v.* Minnick, 15 Iowa, 123.

[10] S. *v.* Marshall, 45 N. H. 281.

Student — Soldier.— Sojourning in a place as a student[1] or a soldier[2] does not make one a resident within our voting laws.

§ 818. **"Offering" — "Promising" — (Bribery).**— Under the Delaware statute, there is held to be no difference between "offering" and "promising" a reward to a voter.[3]

Municipal corporation.— In Tennessee it is adjudged not indictable to cast a ballot illegally for the officers of a municipal corporation,[4] — a proposition a little doubtful on principle.[5]

§ 818a. **Personating voter.**— Under some of the English[6] and American[7] statutes, it is an offense to "personate any person entitled to vote."[8] But one who is dead is not so entitled, and to personate him is not within the inhibition.[9]

§ 819. **Intent.**— There must be the like evil intent as in other cases of crime; as,—

Mistaking age.— A minor, told by his parents and believing he is of age, is not punishable when he votes as he might lawfully do if he were so.[10] But —

§ 820. **"Knowingly and fraudulently" — (Advised — Ignorance of law).**— A statute punishing a non-voter who shall "*knowingly and fraudulently* vote," is, it has been adjudged, violated if he votes under the advice of a non-official and non-professional person that he may. But the learned judge deemed that the question would have been different "if the defendant had stated the facts to the judges of the election and they had decided in favor of his right to vote; for their decision would rebut the presumption of knowledge on his part in a manner contemplated by law."[11] Yet an erroneous opinion of these

[1] Fry's Election Case, 71 Pa. St. 302, [10 Am. R. 698;] Vanderpoel *v.* O'Hanlon, 53 Iowa, 246, [36 Am. R. 216;] Allentown Election Case, *supra.*

[2] Devlin *v.* Anderson, 38 Cal. 92; P. *v.* Riley, 15 Cal. 48; Hunt *v.* Richards, 4 Kan. 549.

[3] S. *v.* Harker, 4 Harring. (Del.) 559.

[4] S. *v.* Liston, 9 Humph. 603.

[5] Crim. Law, I, §§ 246, 471, note.

[6] Such as 14 & 15 Vict., ch. 105, § 3; 22 Vict., ch. 35, § 9.

[7] S. *v.* Lockbaum, 38 Conn. 400.

[8] As to this at common law, see Crim. Law, I, §§ 466, 471, and note, 587.

[9] Whiteley *v.* Chappell, Law R. 4 Q. B. 147, 11 Cox, C. C. 307. And see further, as to this offense, Reg. *v.* Vaile, 6 Cox, C. C. 470; Reg. *v.* Hague, 4 B. & S. 715, 9 Cox, C. C. 412; Martin *v.* S., 1 Tex. Ap. 586; Reg. *v.* Bent, 1 Den. C. C. 157, 2 Car. & K. 179, 1 Cox, C. C. 356.

[10] Gordon *v.* S., 52 Ala. 308, [23 Am. R. 575;] Carter *v.* S., 55 Ala. 181; Crim. Law, I, § 307.

[11] S. *v.* Boyett, 10 Ire. 336, opinion by Pearson, J.; S. *v.* Hart, 6 Jones (N. C.), 389; [S. *v.* Pearson, 97 N. C. 434, 1 S. E. R. 914, 2 Am. St. R. 303.]

officials not communicated to the party voting will not excuse him.[1] Notwithstanding the statutory words, some weight is in these cases given to the party's presumed knowledge of the law. Again,—

§ 821. "Knowingly," "not qualified."— Another form of the statute makes punishable "any person who shall *knowingly* vote at any election, not being at the time a qualified voter." And the court observed that the legislature did not intend by these words "to violate a fundamental principle of the criminal law." Therefore, for example, one below the qualifying age, who, knowing his age, votes, under the mistaken idea that the law permits him, commits the statutory offense.[2] But—

§ 822. Further of mistaking law.— This view seems to overlook the familiar principle that, when a particular condition of the mind is an element of an offense, the lack of it produced by a mistake of law is as available to the defendant as if it were from any other cause.[3] So that,—

§ 823. "Fraudulently."— Where, in Rhode Island, a statute made punishable one who should "*fraudulently* vote, not being qualified," it was held that a voter who knows the facts, and, believing them to qualify him while they do not, casts illegally, yet with an honest purpose, his vote, does not commit the offense. And it did not vary the case that the defendant was challenged at the polls, and persisted in voting. For, in the words of Ames, C. J., he "regarded, as he treated, this as an attempt to scare him from the exercise of his right; and we are yet to learn that a mistake about one's rights, with full knowledge of all the facts relating to them, and an honest assertion of them, is equivalent to fraud under such a statute as this. The statute 9 Anne, ch. 10, § 40, visited a penalty upon a postmaster who *wittingly*, *willingly* and *knowingly* detained letters, and caused them to be detained and opened; but in Meirelles *v.* Banning,[4] the king's bench held that a postmaster who delivered a bankrupt's letters to his assignee, believing that the assignee was entitled to them for the purposes of the

[1] S. *v.* Hart, *supra*.

[2] McGuire *v.* S., 7 Humph. 54. The English case of Reg. *v.* Price, 3 Per. & D. 421, 11 A. & E. 727, seems to confirm this view.

[3] Crim. Law, I, §§ 297–299.

[4] 2 B. & Ad. 909.

commission, and such having been the practice of the office for more than thirty years, was not liable to the penalty."[1] So —

§ 824. "Knowingly," "wilfully"—(Advised).— The Massachusetts statute provided a punishment for any person who, "*knowing* himself not to be a qualified voter, shall, at any election, *wilfully* give in a vote;"[2] and these words were held not to conclude the defendant to know the law. And said Shaw, C. J., "it is necessary to prove, not only that the party had no right to vote, but that he knew it. As this qualification depends upon domicile, and that is often a complicated question of law and fact, we have no doubt that if the voter in good faith and with an honest purpose to ascertain the right shall make a true statement of the facts of his case to a professional man, or any other man of skill and experience capable of advising him correctly, the evidence of such advice, and the facts upon which it was taken, are competent as bearing upon the question whether he knew that he had not a right to vote."[3]

§ 825. Double voting—(Simple inhibition).— A statute with no such qualifying words as "knowingly," "fraudulently," "wilfully," and the like, ordained that, "if any person shall on the same day vote in more towns than one for the same officers, he shall forfeit," etc. And it was held that if a man, under no mistake of facts, but, mistaking the law, votes in two towns, supposing himself at the casting of each ballot to be entitled, he is indictable, however innocent in morals may be his real motive. In the particular instance, one just of age voted in the town where his father lived; being told, and believing, that his voting place was there. He then went to his work in an adjoining town; and here, being told that he had been wrongly advised, and this was his voting place, submitted all the facts, including the former vote, to those officers of the town who by law were intrusted with the duty of passing upon the qualifications of voters. They advised him that he might

[1] S. *v.* Macomber, 7 R. I. 349, 353.

[2] Mass. R. S., ch. 4, § 6. Slightly changed in Gen. St., ch. 8, § 30.

[3] Com. *v.* Bradford, 9 Met. 268, 272. Similar is the Iowa doctrine. S. *v.* Sheeley, 15 Iowa, 404. And see Reg. *v.* Dodsworth, 8 Car. & P. 218.

Inspector.— As to the duties and liabilities of an inspector of elections in New York, see P. *v.* Pease, 30 Barb. 588; Hogan *v.* P., 2 Thomp. & C. 585.

still cast a vote in this town; he did, and was held to have violated thereby the statute.[1] On the other hand,—

Mistake of fact through drunkenness.— The California statute is in like terms; namely, "vote more than once at any election." And it was held that if one, not knowing he has already voted (being, for example, too drunk to know), votes a second time, he is not punishable, though the word "knowingly" is not in the statute.[2]

§ 826. Other questions.— A few other questions have arisen under the criminal law,[3] and many under the civil.[4] But none of them are so purely criminal and of such general importance[5] as to justify a further extension of this chapter.

[1] S. *v.* Perkins, 42 Vt. 399. To the like effect is S. *v.* Welch, 21 Minn. 22. Compare with *ante*, §§ 806–820; Nettles *v.* S., 49 Ala. 35; Harbaugh *v.* P., 33 Mich. 241.

[2] P. *v.* Harris, 29 Cal. 678. *Contra*, S. *v.* Welch, 21 Minn. 22.

[3] As to voting under naturalization papers.— U. S. *v.* Burley, 14 Blatch. 91; *In re* Coleman, 15 Blatch. 406; P. *v.* Pease, 27 N. Y. 45; P. *v.* Pease, 30 Barb. 588.

False answers.— Reg. *v.* Bent, 1 Den. C. C. 157, 2 Car. & K. 179, 1 Cox, C. C. 356; Dennis *v.* S., 17 Fla. 389; Com. *v.* Shaw, 7 Met. 52.

[4] Nichols *v.* Mudgett, 32 Vt. 546; Liness *v.* Hesing, 44 Ill. 113, [92 Am. D. 153.]

[5] But the following may here be stated:

"Freeman."— Under this word a woman is not entitled to vote. Burnham *v.* Luning, 9 Phila. 241. See U. S. *v.* Anthony, 11 Blatch. 200.

Ballot.— The constitutional provision that elections shall be by ballot secures to the voter secrecy as to his vote. Williams *v.* Stein, 38 Ind. 89, [10 Am. R. 97.]

CHAPTER XLIX.

ELECTION OFFENSES — THE PROCEDURE.

§ 827. Introduction.
828–840. The indictment.
841–843. The evidence.

§ 827. How chapter divided.— We shall consider, I. The indictment; II. The evidence.

I. The Indictment.

§ 828. In general.— The offenses under this head, and the forms of the statutes creating them, being diverse, no general direction for the indictment can be given, except to frame it after the rules for indictments on statutes.[1]

§ 832.[2] Alleging election.— There must be some sort of allegation that there was an election lawfully[3] being held;[4] sometimes or ordinarily, also, for what purpose;[5] but this averment is not always necessary.[6] In England the writ or precept is

[1] Crim. Pro., I, § 593 *et seq.*; Wattles *v.* P., 13 Mich. 446; U. S. *v.* Hendric, 2 Saw. 476; U. S. *v.* Hendric, 2 Saw. 479; U. S. *v.* O'Neill, 2 Saw. 481; U. S. *v.* Johnson, 2 Saw. 482; U. S. *v.* Cruikshank, 1 Woods, 308. 92 U. S. 542; Biggerstaff *v.* Com., 11 Bush, 169; S. *v.* McCollum, 44 Mo. 343; S. *v.* Welch, 21 Minn. 22; S. *v.* Lockbaum, 38 Conn. 400; U. S. *v.* Hirschfield, 13 Blatch. 330; Com. *v.* Desmond, 122 Mass. 12; Dennis *v.* S., 17 Fla. 389; Gallagher *v.* S., 10 Tex. Ap. 469; Hoskey *v.* S., 9 Tex. Ap. 202; Johnson *v.* P., 94 Ill. 505; U. S. *v.* Crosby, 1 Hughes, C. C. 448; U. S. *v.* Petersburg Judges, 1 Hughes, C. C. 493; Reg. *v.* Vaile, 6 Cox, C. C. 470; S. *v.* Dustin, 5 Oreg. 375; Humphreys *v.* S., 17 Fla. 381. [As the state laws relating to election for members of congress are adopted by the United States the indictment should conclude against the statutes of the United States. U. S. *v.* Brader, 16 Fed. R. 116. Joint indictment against judges and clerks bad. U. S. *v.* Davis, 33 Fed. R. 621.]

[2] Sections 829–831 omitted from this edition.

[3] *Ante*, 814; [Com. *v.* Harber (Pa.), Lanc. Bar, 139; Com. *v.* Maddox (Ky.), 32 S. W. R. 129.]

[4] Tipton *v.* S., 27 Ind. 492, 493; Newell *v.* Com., 2 Wash. (Va.) 88.

[5] Carter *v.* S., 55 Ala. 181, 188; [Blitz *v.* U. S., 153 U. S. 308, 38 L. ed. 725; Gandy *v.* S., 32 Ala. 61, 2 S. R. 465; Lane *v.* S., 39 Ohio St. 312; Gallagher *v.* S., 10 Tex. Ap. 469.]

[6] S. *v.* Lockbaum, 38 Conn. 400; Gallagher *v.* S., 10 Tex. Ap. 469. See S. *v.* Minnick, 15 Iowa, 123.

set out,[1] but nothing of this sort is generally required in our states.[2] Thus,—

§ 833. Sufficient.— An indictment for illegally voting at a town meeting, averring that the meeting was duly holden, without stating how or by what authority called, was adjudged sufficient.[3] So also it was enough to say "that the inhabitants were convened, according to the constitution and laws of the state, in legal town meeting, for the choice of town officers."[4] And an averment that, at the time and place mentioned, the defendant voted at a certain election authorized by law, then and there held, implies that it was held by the proper officers.[5]

§ 834. The place — is, as of course, alleged.[6] But that it is within the state need not be added.[7]

§ 835. Want of qualification.— Where the indictment is for voting or registering without being qualified, most of the cases require it to specify the qualification lacking.[8] Within which rule it is sufficient, for example, to say that the defendant was under twenty-one years of age.[9] Other cases hold it to be adequate simply to aver that the defendant voted "not being qualified to vote according to the constitution and laws of this state."[10] To some degree, the difference seems to depend on differences in cases, statutes, and particular disqualifications. In principle, there are circumstances wherein the latter form should be deemed adequate while yet it would not

[1] Reg. *v.* Bowler, Car. & M. 559; Reg. *v.* Ellis, Car. & M. 564.

[2] Gallagher *v.* S., *supra*.

[3] S. *v.* Marshall, 45 N. H. 281. And see Com. *v.* Desmond, 122 Mass. 12; S. *v.* Hardy, 47 N. H. 538.

[4] S. *v.* Bailey, 21 Me. 62. And see S. *v.* Marshall, *supra*. [United States statute is an exception to this rule. U. S. *v.* Seaman, 23 Fed. R. 882.]

[5] S. *v.* Douglass, 7 Iowa, 413. And see U. S. *v.* Johnson, 2 Saw. 482.

[6] Com. *v.* Desmond, 122 Mass. 12; Wilson *v.* S., 52 Ala. 299; U. S. *v.* Johnson, 2 Saw. 482; S. *v.* Bruce, 5 Oreg. 68, [20 Am. R. 734;] Gallagher *v.* S., 10 Tex. Ap. 469. But see S. *v.* Lockbaum, 38 Conn. 400; [S. *v.* Doherty, 25 Fed. R. 28.]

[7] Com. *v.* Shaw, 7 Met. 52.

[8] Crim. Pro., I, § 627; Quinn *v.* S., 35 Ind. 485, [9 Am. R. 754;] U. S. *v.* Hirshfield, 13 Blatch. 330; S. *v.* Moore, 3 Dutcher, 105; S. *v.* Tweed, 3 Dutcher, 111; Gordon *v.* S., 52 Ala. 308, [23 Am. R. 575.] See S. *v.* Bruce, 5 Oreg. 68, [20 Am. R. 734; P. *v.* Neil, 91 Cal. 465, 27 Pac. R. 760; P. *v.* McKenna, 81 Cal. 22, 22 Pac. R. 488; P. *v.* Barber, 48 Hun (N. Y.), 198.]

[9] Gordon *v.* S., *supra;* U. S. *v.* O'Neill, 2 Saw. 481.

[10] S. *v.* Macomber, 7 R. I. 349; S. *v.* Douglass, 7 Iowa, 413; Gallagher *v.* S., 10 Tex. Ap. 469, 471.

be in others; because, first, this is a negative averment, not therefore in general required to be so full as an affirmative one;[1] and secondly, qualification may be a compound fact, consisting of several particulars whereof a specification would be unnecessary in pleading it,[2] therefore, *a fortiori*, not necessary in its negation.[3]

§ 836. Act of voting.— There is no unvarying form for setting out the act of voting. It is sufficient, for example, to say that the defendant did wilfully and unlawfully give in his vote.[4] The name of the person voted for, and the offices to be filled, need not be mentioned.[5]

§ 837. Double voting.— The terms of the statutes creating this offense[6] differ, and the indictment must duly cover them. Assuming them to be covered, it may, for example, after setting out the election, with time and place, add, that thereat and then and there the defendant did wilfully, etc., cast more than one vote, etc.[7] It need not say for whom.[8]

In two places.— If the offense consists of voting in two places, both are material; they must be alleged, and a variance between allegation and proof will be fatal. Where there were two counts, alternating the order of the places of voting, and the jury could not determine in which the last, or illegal, act occurred, it was held that they could not convict upon either or both.[9]

§ 838. Election judges unlawfully receiving vote.— A statute made punishable "any judge or sheriff who shall knowingly and unlawfully receive the vote of any other than a qualified voter." Thereupon an allegation against one of the judges, that he knowingly and unlawfully received the vote of a person not entitled to vote, not mentioning what his associates did, was adjudged sufficient. It set out a crime, "however the other judges and sheriff may have acted."[10]

[1] Crim. Pro., I, § 641.

[2] And see *ante*, § 706.

[3] And see Com. *v.* Gray, 2 Duv. 373; S. *v.* Daniels, 44 N. H. 383.

[4] S. *v.* Moore, 3 Dutcher, 105. See Reg. *v.* Bowler, Car. & M. 559; U. S. *v.* Watkinds, 7 Saw. 85.

[5] S. *v.* Minnick, 15 Iowa, 123, 125; Wilson *v.* S., 52 Ala. 299.

[6] *Ante*, § 825; [S. *v.* Miller, 132 Mo. 297, 33 S. W. R. 1149.]

[7] S. *v.* Boyington, 56 Me. 512; [S. *v.* Patterson, 116 Ind. 45, 18 N. E. R. 270.]

[8] *Ante*, § 836; Wilson *v.* S., 52 Ala. 299.

[9] S. *v.* Fitzpatrick, 4 R. I. 269.

[10] Com. *v.* Gray, 2 Duv. 373. See P. *v.* McManus, 34 Barb. 620; Byrne

§ 839. Appointment of election officers.— To aver that persons named were judges of the election is equivalent to saying that they were duly appointed such, and is sufficient.[1]

Knowledge of election officer.— An indictment against the proper officer for refusing to put a name on the voting list should allege that he knew the person to be entitled to vote.[2]

§ 840. "Falsely and fraudulently" for "wilfully."— An English statute[3] made punishable one who should "*wilfully* make a false answer" as to his qualifications to vote. And to allege that the defendant did it "falsely and fraudulently," omitting the word "wilfully," was adjudged ill.[4] But,—

"*Unlawfully*" *for* "*illegally.*"— Under a Tennessee statute which employed the word "illegally," it was held good to say in the indictment "unlawfully;" for "the words are synonymous."[5]

II. The Evidence.

§ 841. Qualification of election officers.— Where the official character of the officers of an election is among the issues, it is sufficient *prima facie* to show that they acted as such.[6]

False answers — Variance.— On an indictment for giving false answers to the election officers, the allegation of the defendant's intent was that it was to procure his name to be placed on the list of voters and to obtain permission to vote. But the proofs showed that his name was on the list when the answers were given. Thereupon this allegation was held not to be of a sort which could be rejected as surplusage, and so the case failed by reason of the variance.[7]

§ 842. Presumption of residence.— On the issue of non-residence it is sufficient *prima facie* to prove against the defendant that during the period for which the residence was required by law he did not actually abide in the place. The burden is

v. S., 12 Wis. 519; [U. S. v. Doherty, 25 Fed. R. 28; U. S. v. Vigil, 7 N. M. 296, 34 Pac. R. 530.]

[1] S. v. Randles, 7 Humph. 9.

[2] S. v. Daniels, 44 N. H. 383; [U. S. v. Kelsey, 42 Fed. R. 882. *Contra*, Com. v. Maddox (Ky.), 33 S. W. R. 129.]

[3] The Municipal Corporations Act, 5 & 6 Will. 4, ch. 76, § 34.

[4] Reg. v. Bent, 1 Den. C. C. 157. See Crim. Pro., I, § 613; [U. S. v. Dwyer, 56 Fed. R. 464.]

[5] S. v. Haynorth, 3 Sneed, 64.

[6] Crim. Pro., I, § 1130; II, §§ 824, 891, 893; Com. v. Shaw, 7 Met. 52.

[7] Com. v. Shaw, *supra*.

then on him to show, if he can, that he was away for a temporary purpose.[1]

§ 842a. Proof of voting — (Voting lists).— The poll-lists have been deemed to be the highest evidence that the defendant cast a vote, without which the offense cannot be made out.[2] But probably this would not be so under every form of the laws.

§ 843. "Corroborating circumstances" — (Bribery).— By a statute, one accused of receiving a bribe for his vote could not be convicted "on the testimony of a single witness, unless sustained by strong corroborating circumstances." And it was held that the mere fact of the candidate having had private interviews with several friends on the day of the election did not satisfy the requirement.[3]

[1] S. *v.* Marshall, 45 N. H. 281.

[2] Wilson *v.* S., 52 Ala. 299; Hunter *v.* S., 55 Ala. 76.

[3] Russell *v.* Com., 3 Bush, 469. [A few decisions are appended upon questions of evidence and procedure: Com. *v.* O'Hara (Ky.), 33 S. W. R. 412; Owens *v.* S., 67 Md. 307, 10 Atl. R. 210; Com. *v.* McGinty, 145 Mass. 257, 14 N. E. R. 98; P. *v.* McKane, 80 Hun, 322, 30 N. Y. Sup. 95; Cooper *v.* S., 26 Tex. Ap. 575, 10 S. W. R. 216; Com. *v.* Barry, 98 Ky. 394, 33 S. W. R. 400; S., Shultz *v.* Luy, 103 Wis. 524, 79 N. W. R. 776. As to election expenses see S., Crow *v.* Bland, 144 Mo. 534, 46 S. W. R. 440, 41 L. R. A. 297.]

CHAPTER L.

GAMING — THE LAW.[1]

§§ 844, 845. Introduction.
846–851. Common law and old statutes.
852–856. Generally of our own legislation.
857–881. Expositions of particular provisions.

§ 844. What for this chapter.— The statutes on this subject are so numerous and diverse that a full treatment of them would conduct us through an almost interminable course of discussions merely local to particular states. It will not be attempted. What is proposed, therefore, is to present views helpful everywhere, with citations of the cases not explained as well as of those which are, and the local ones with the rest; enabling the reader to conduct for himself any minuter investigations desired.

§ 845. How divided.— We shall consider: I. The unwritten and old English statutory law of the subject; II. Generally of the American legislation and its validity; III. Expositions of particular statutory provisions.

I. The Unwritten and Old English Statutory Law of the Subject.

§ 846. At common law.— Simple gaming, with no special element of criminality, is not punishable by the common law either of England or of our states.[2] But —

§ 847. In other offenses.— It is or may be an ingredient in some other offenses; as,—

Gaming-house.— The keeping of a common gaming-house is an indictable nuisance at the common law.[3] So also —

[1] **Gaming-house.**— For the nuisance of keeping a gaming-house, see Crim. Law, I, § 1135 *et seq.*

[2] Crim. Law, I, §§ 504, 1135; Bell *v.* Norwich, 3 Dy. 254*b*; Case of Monopolies, 11 Co. 84*b*, 87*b*; 1 Hawk. P. C. (Curw. ed.), p. 721; 1 Russ. Crimes (3d Eng. ed.), 455; 1 Gab. Crim. Law, 451; U. S. *v.* Milburn, 4 Cranch, C. C. 719; [Paulk *v.* Jasper Land Co., 116 Ala. 178, 22 S. R. 495.]

[3] Crim. Law, I, §§ 504, 1135 *et seq.*

False dice.— Winning another's money with false dice is a punishable common-law cheat.[1]

§ 848. **Wager.**— A wager is a species of game. Like the other sorts, it appears not to be indictable at the common law. Yet, to an extent not well defined in the books, it is deemed contrary to the policy of the law; so that, by some opinions, in the more flagrant cases, and by other opinions in all cases, a civil suit to recover the wager cannot be maintained.[2]

In Scotland — no action is maintainable on any gaming contract; while yet mere gaming, in distinction from keeping a gaming-house and the like, appears not to be punishable by the unwritten law there prevailing.[3]

§ 849. **Old English statutes:**—

17 Edw. 4, ch. 3,— was repealed by 33 Hen. 8, ch. 9, under the words "all other statutes made for the restraint of unlawful games." Therefore, not being in existence when our country was settled, it could not have become a part of our common law. This statute of —

§ 850. **33 Hen. 8, ch. 9,**— was the leading enactment on the subject in England when we received thence our unwritten law. The "bowyers, fletchers, stringers and arrowhead makers" having complained to parliament that their business had been made unprofitable by the people leaving archery for gaming, this statute directed them to exercise themselves with long bows; every man to have not less than one such bow and four arrows, and every boy over seven one bow and two arrows. Then it proceeded with various inhibitions of gaming and gaming-houses. For example, by section 17, "no manner of artificer or craftsman of any handicraft or occupation, husbandman, apprentice, laborer, servant at husbandry, journeyman, or

[1] Crim. Law, II, § 157.

[2] Bishop, Con., §§ 530–532; Lewis *v.* Littlefield, 15 Me. 233; Ball *v.* Gilbert, 12 Met. 397; Gibbons *v.* Gouverneur, 1 Denio, 170; Ellis *v.* Beale, 18 Me. 337, [36 Am. D. 726;] Dunman *v.* Strother, 1 Tex. 89, [46 Am. D. 97;] Crow *v.* S., 6 Tex. 334; Bryant *v.* Mead, 1 Cal. 441; Trenton Mutual Life & Fire Ins. Co. *v.* Johnson, 4 Zab. 576; Gahan *v.* Neville, 2 Cal. 81; Dewees *v.* Miller, 5 Harring. (Del.) 347; Nudd *v.* Burnett, 14 Ind. 25; Worthington *v.* Black, 13 Ind. 344; Murdock *v.* Kilbourn, 6 Wis. 468; Woodcock *v.* McQueen, 11 Ind. 14; Sipe *v.* Finarty, 6 Iowa, 394; Craig *v.* Andrews, 7 Iowa, 17; Com. *v.* Gourdier, 14 Gray, 390, 391; Sutphin *v.* Crozer, 1 Vroom, 257, reversed, 3 Vroom, 462; Lear *v.* McMillen, 17 Ohio St. 464; Walker *v.* Armstrong, 54 Tex. 609; Smith *v.* Bouvier, 70 Pa. St. 325. See *post*, § 872 *et seq.*

[3] Greenhuff's Case, 2 Swinton, 236.

servant of artificer, mariners, fishermen, watermen, or any serving man shall, etc., play at the tables, tennis, dice, cards, bowls, clash, coyting, logating, or any other unlawful game, out of Christmas, under the pain of twenty shillings, to be forfeit for every time; and in Christmas to play at any of the said games in their masters' houses, or in their masters' presence; and also, that no manner of persons shall at any time play at any bowl or bowls in open places out of his garden or orchard, upon the pain for every time so offending to forfeit six shillings eight pence."[1]

§ 851. With us.— This statute had never any force in Maryland[2] or probably in any of the other colonies.[3] Its date, 1541, is not too recent; but there are other objections, apparent on its entire face, too obvious to need explanation, showing that it could not have become a part of our common law.

Other old English statutes are — 16 Car. 2, ch. 7 (A. D. 1664);[4] 10 and 11 Will. 3, ch. 17 (A. D. 1699);[5] 9 Anne, ch. 6 (A. D. 1710);[6] 9 Anne, ch. 14,[7] and 10 Anne, ch. 26.[8] But though these have been the basis for American legislation, none of them probably are common law with us; or, at least, are to be practically relied on as the foundation for an indictment.[9]

II. Generally of the American Legislation and its Validity.

§ 852. Diversified objects enumerated — (Cases cited).— The statutes are numerous and diverse; and, as every practitioner will have before him those of his own state, to recite

[1] See 1 Hawk. P. C. (Curw. ed.), pp. 721–725.

[2] Kilty, Rep. Stats. 75.

[3] See Dunman *v.* Strother, 1 Tex. 89, 92, [46 Am. D. 97.] It is not set down by the Pennsylvania judges as in force in that state. Report of Judges, 3 Binn. 595.

[4] See 1 Hawk. P. C. (Curw. ed.), pp. 726, 729.

[5] Id., pp. 733, 734.

[6] Id., p. 734.

[7] Id., pp. 727, 728–731.

[8] Id., p. 734.

[9] Dunman *v.* Strother, 1 Tex. 89, 92, [46 Am. D. 97.] In U. S. *v.* Dixon, 4 Cranch, C. C. 107, 108, 109, Cranch, C. J., observed: "The British statutes of 16 Car. 2, ch. 7, against deceit in gaming; 9 Anne, ch. 14, § 1, avoiding securities for money lost at gaming; id., § 2, providing that, if more than £10 be lost at play at one sitting, it may be recovered; and § 3, requiring the winner to answer on oath, are in force in this country. But the English and British statutes prohibiting certain games to certain classes of persons never were in force in Maryland, and consequently are not in force here."

them in detail would not be a wise use of our space. The acts prohibited by them, with many of the cases decided thereon, are such as the following:

Keeping implements or gaming place.— The keeping of a bowling-alley,[1] a billiard-table,[2] a faro bank, or other like device;[3] —

In particular places.— The having of the facilities for gaming, or allowing it, or personally gaming, in places where intoxicating liquors are sold,[4] or in saloons,[5] or public houses,[6] or other public places,[7] to which youth will be allured, or in the vicinity of a dwelling-house,[8] or in a place under the defendant's control;[9] —

[1] S. *v.* Currier, 23 Me. 43; Com. *v.* Stowell, 9 Met. 572; Com. *v.* Drew, 3 Cush. 279; Needham *v.* S., 1 Tex. 139; S. *v.* Hay, 29 Me. 457; Com. *v.* Goding, 3 Met. 130.

[2] Smith *v.* S., 22 Ala. 54; S. *v.* Moseley, 14 Ala. 390; Mayers *v.* S., 3 Eng. 222; Blanton *v.* S., 5 Blackf. 560; S. *v.* Mathews, 2 Brev. 82; Harbaugh *v.* P., 40 Ill. 294; Gibbons *v.* P., 33 Ill. 442; Com. *v.* Emmons, 98 Mass. 6; Com. *v.* Sylvester, 13 Allen, 247; Ward *v.* S., 17 Ohio St. 32; Pardee *v.* Smith, 27 Mich. 33; Carr *v.* S., 50 Ind. 178; Hanrahan *v.* S., 57 Ind. 527; Longworth *v.* S., 41 Tex. 508; Mayers *v.* S., 3 Eng. 222; [Liebman *v.* Miller, 20 Misc. 246, 46 N. Y. Supp. 532.]

[3] S. *v.* Howery, 41 Tex. 506; S. *v.* Andrews, 43 Mo. 470; Wheeler *v.* S., 42 Md. 563; Schooler *v.* S., 57 Ind. 127; Terr. *v.* Copely, 1 New Mex. 571; St. Louis *v.* Sullivan, 8 Mo. Ap. 455; S. *v.* Savannah, T. U. P. Charl. 235, [4 Am. D. 708;] S. *v.* Stogsdale, 67 Mo. 630; S. *v.* Thomas, 50 Ind. 292; Rice *v.* S., 3 Can. 141; Campbell *v.* S., 2 Tex. Ap. 187; Harris *v.* S., 5 Tex. 11; McCoy *v.* Zane, 65 Mo. 11; Euper *v.* S., 35 Ark. 629; Simms *v.* S., 60 Ga. 145; Hayes *v.* S., 55 Ind. 99; S. *v.* Whitworth, 8 Port. 434; Com. *v.* Wyatt, 6 Rand. 694; Ervine *v.* Com., 5 Dana, 216; Com. *v.* Burns, 4 J. J. Mar. 177; S. *v.* Markham, 15 La. An. 498; [Com. *v.* Adams, 160 Mass. 310, 35 N. E. R. 851; S. *v.* Shaw, 39 Minn. 153, 39 N. W. R. 305.]

[4] *Ante*, § 294; Campbell *v.* S., 55 Ala. 89; Ray *v.* S., 50 Ala. 172; Harcrow *v.* S., 2 Tex. Ap. 511; Phillips *v.* S., 51 Ala. 20; S. *v.* Black, 9 Ire. 378; S. *v.* Terry, 4 Dev. & Bat. 185; S. *v.* Coleman, 3 Ala. 14; Burdine *v.* S., 25 Ala. 60; Marston *v.* Com., 18 B. Monr. 485; Cole *v.* S., 9 Tex. 42; S. *v.* Hix, 3 Dev. 116; Jacobi *v.* S., 59 Ala. 71.

[5] O'Brien *v.* S., 10 Tex. Ap. 544.

[6] *Ante*, § 299; Com. *v.* Tilton, 8 Met. 232; S. *v.* Smitherman, 1 Ire. 14; S. *v.* Records, 4 Harring. (Del.) 554; Com. *v.* Price, 8 Leigh, 757; S. *v.* Barns, 25 Tex. 654; Millican *v.* S., 25 Tex. 664; S. *v.* Mansker, 36 Tex. 364; S. *v.* Jurgins, 31 Tex. 588.

[7] *Ante*, §§ 298, 299; Wilcox *v.* S., 26 Tex. 145; O'Brien *v.* S., 10 Tex. Ap. 544; Lindsey *v.* S., 48 Ala. 169; Elsberry *v.* S., 41 Tex. 158; S. *v.* Roderica, 35 Tex. 507; S. *v.* Arnold, 37 Tex. 409; Perez *v.* S., 48 Ala. 356; Sheppard *v.* S., 1 Tex. Ap. 304; Lowrie *v.* S., 43 Tex. 602; [Johnson *v.* S., 83 Ala. 65, 3 S. R. 790.]

[8] S. *v.* Noyes, 10 Fost. (N. H.) 279.

[9] S. *v.* Cooster, 10 Iowa, 453; Com. *v.* Edds, 14 Gray, 406; S. *v.* Mathis, 3 Pike, 84; Roberts *v.* Com., 11 B. Monr. 3; Calvert *v.* Com., 5 B. Monr. 264. [Occupying room, hiring telegraph

Particular day.—Gaming on a particular day, as, for instance, on the Sabbath day;[1]—

Betting and wagers.—Betting by persons on games played by others,[2] or on a public election,[3] or horse-race,[4] together with some other forms of wager;[5]—

Encouraging gaming—(*Minors*).—One's otherwise encouraging gaming in others,[6] or even permitting it by minors, or allowing them to congregate where games are played;[7]—

Horse-racing.—The public racing of horses, and especially under specified circumstances;[8]—

operator, and for a commission telegraphing bets on races to the point where they take place, is keeping and maintaining a gaming room. P. v. Weithoff, 93 Mich. 631, 53 N. W. R. 784.]

[1] S. v. Fearson, 2 Md. 310; S. v. Conger, 14 Ind. 396; S. v. Anderson, 30 Ark. 131.

[2] Bagley v. S., 1 Humph. 486; Crow v. S., 6 Tex. 334; Torney v. S., 13 Mo. 455; Horton v. S., 8 Eng. 62; Ward v. S., 22 Ala. 16; Bachellor v. S., 10 Tex. 258, 262; S. v. Bates, 10 Mo. 166; Eubanks v. S., 5 Mo. 450; S. v. Blair, 41 Tex. 30; S. v. Bristow, 41 Tex. 146; Blair v. S., 32 Tex. 474; Napier v. S., 50 Ala. 168; S. v. Czarnikow, 20 Ark. 160; Anderson v. S., 9 Tex. Ap. 177; Ben v. S., 9 Tex. Ap. 107; Bone v. S., 63 Ala. 185; Stone v. S., 3 Tex. Ap. 675; Mitchell v. S., 55 Ala. 160; Jacobson v. S., 55 Ala. 151; Ray v. S., 50 Ala. 172; Bass v. S., 37 Ala. 469; Flynn v. S., 34 Ark. 441; Schuster v. S., 48 Ala. 199.

[3] *Post*, § 931 *et seq.*; Doyle v. Baltimore, 12 Gill & J. 484; Veach v. Elliott, 1 Ohio St. 139; S. v. Cross, 2 Humph. 301; Morgan v. Pettit, 3 Scam. 529; S. v. McLelland, 4 Sneed, 437; Com. v. Kennedy, 15 B. Monr. 531.

[4] S. v. Blackburn, 2 Coldw. 235.

[5] S. v. Posey, 1 Humph. 384; Parsons v. S., 2 Ind. 499; Dunman v. Strother, 1 Tex. 89; Com. v. Shelton, 8 Grat. 592; Dobkins v. S., 2 Humph. 424; Bagley v. S., 1 Humph. 486; Barret v. Hampton, 2 Brev. 226; Smoot v. S., 18 Ind. 18.

[6] Fugate v. S., 2 Humph. 397; S. v. Ebert, 40 Mo. 186; Hitchins v. P., 39 N. Y. 454; S. v. Hall, 3 Vroom, 158.

[7] Manheim v. S., 66 Ind. 65; Com. v. Emmons, 98 Mass. 6; Moore v. S., 65 Ind. 213; Ready v. S., 62 Ind. 1; Donniger v. S., 52 Ind. 326; S. v. Ward, 57 Ind. 537; Squier v. S., 66 Ind. 317; Alexander v. S., 48 Ind. 394; Zook v. S., 47 Ind. 463; Green v. Com., 5 Bush, 327; S. v. Derichs, 42 Iowa, 196; Stern v. S., 53 Ga. 229, [21 Am. R. 266;] Bartender v. S., 51 Ind. 73; Conyers v. S., 50 Ga. 103, [15 Am. R. 686;] Powell v. S., 62 Ind. 531; Hipes v. S., 73 Ind. 39.

[8] S. v. Fidler, 7 Humph. 502; Fidler v. S., 7 Humph. 508; Van Valkenburgh v. Torrey, 7 Cow. 252; Shropshire v. Glascock, 4 Mo. 536, [31 Am. D. 189;] Boynton v. Curle, 4 Mo. 599; Gibbons v. Gouverneur, 1 Denio, 170; S. v. Posey, 1 Humph. 384; Ellis v. Beale, 18 Me. 337, [36 Am. D. 726;] S. v. Nees, 1 Ind. 64; Watson v. S., 3 Ind. 128; Huff v. S., 2 Swan (Tenn.), 279; Redman v. S., 33 Ala. 428; Goldsmith v. S., 1 Head, 154; S. v. Catchings, 43 Tex. 654; King v. S., 3 Tex. Ap. 7; Robb v. S., 52 Ind. 216.

Why.— Each of these, in distinction from mere private playing, is in various states made indictable, because of its tendency to affect other persons than the players themselves. Again,—

§ 853. Gaming for money — is, irrespective of place, time or person, by some of our statutes made an offense generally [1] or under special circumstances.[2] So —

Frequenting gaming-houses,— for the purpose of gaming, is by some statutes made an offense.[3] Again,—

Obtaining money — or other thing, by gaming, is another form of the offense.[4]

§ 854. Other distinctions.— Some of the statutes also make a difference whether the playing is at a game of chance or of skill;[5] whether there is betting or not;[6] whether the party offends in a single instance or habitually;[7] and, in some of the states, whether the playing is with a white person, a negro,[8] or in former times with a slave.[9]

§ 854a. Licensed.— There are statutes for licensing gaming places, and licensing other places and forbidding gaming in them, a violation whereof is made punishable.[10]

§ 855. Interpretation.— We have seen [11] that, by special provisions in some of the states, the statutes against gaming are to be interpreted liberally, contrary to the general rule for criminal statutes. In general, and with this exception, they follow the same rules of construction as other enactments or-

[1] Carper *v.* S., 27 Ohio St. 572; [Borches *v.* S., 31 Tex. Cr. R. 517, 21 S. W. R. 192; S. *v.* Shaw, 39 Minn. 153, 39 N. W. R. 305.]

[2] S. *v.* Stillwell, 16 Kan. 24; Truitt *v.* P., 88 Ill. 518; Roberts *v.* S., 32 Ohio St. 171; Tuttle *v.* S., 1 Tex. Ap. 364, 367; [Thompson *v.* S. (Tex. Cr. Ap.), 28 S. W. R. 684; Hall *v.* S. (Tex. Cr. Ap.), 34 S. W. R. 122.]

[3] Howard *v.* S., 64 Ind. 516; S. *v.* Allen, 69 Ind. 124; Bowe *v.* S., 25 Ind. 415; Hamilton *v.* S., 25 Ind. 426; [Green *v.* S. (Ind.), 7 West. R. 358.]

[4] *Post*, §§ 874, 875; Blemer *v.* P., 76 Ill. 265.

[5] S. *v.* Nates, 3 Hill (S. C.), 200.

[6] S. *v.* Purdom, 3 Mo. 114; S. *v.* Albertson, 2 Blackf. 251; Vicaro *v.* Com., 5 Dana, 504.

[7] Estes *v.* S., 2 Humph. 496; Com. *v.* Hopkins, 2 Dana, 418; Com. *v.* Moore, 2 Dana, 402.

[8] Johnson *v.* S., 8 Ga. 453; S. *v.* Nates, 3 Hill (S. C.), 200. See Wells *v.* S., 3 Lea, 70.

[9] S. *v.* Laney, 4 Rich. 193; Ward *v.* S., 37 Ala. 158. See S. *v.* Pemberton, 2 Dev. 281.

[10] Clark *v.* S., 49 Ala. 37; Aicardi *v.* S., 19 Wall. 635; Harris *v.* S., 9 Tex. Ap. 308; Eubanks *v.* S., 17 Ala. 181; *Ex parte* Chamberlaine, 8 Ellis & B. 644; Patten *v.* Rhymer, 3 Ellis & E. 1; Com. *v.* Adams, 109 Mass. 344; Houghton *v.* S., 41 Tex. 136; S. *v.* Johnson, 41 Tex. 504; P. *v.* Craycroft, 2 Cal. 243, [56 Am. D. 331.]

[11] *Ante*, § 55.

daining the like penalties.[1] Particular explanations will occur under the next sub-title; and, for the convenience of the reader, some helpful cases are referred to in a note,[2] in the order of the states.

[1] As to a few of these statutes, see *ante*, §§ 135, 221, 294, 298, 299; Crim. Law, I, § 686; [Atkins *v.* S., 95 Tenn. 474, 32 S. W. R. 391. But an officer of city seeking evidence of gambling is not guilty of violation who bets small sum to ascertain the fact, as there is no criminal intent. S. *v.* Trophy, 78 Mo. Ap. 206, 2 Mo. Ap. R. 190; Stuart *v.* S. (Tex. Cr. Ap.), 28 S. W. R. 806; Allphin *v.* S. (Tex. Cr. Ap.), 29 S. W. R. 159; Wilson *v.* S., 64 Ark. 586, 43 S. W. R. 972.]

[2] *Alabama.*— S. *v.* Whitworth, 8 Port. 434; S. *v.* Moseley, 14 Ala. 390; S. *v.* Allaire, 14 Ala. 435; Eubanks *v.* S., 17 Ala. 181; Batre *v.* S., 18 Ala. 119; Ward *v.* S., 22 Ala. 16; Smith *v.* S., 22 Ala. 54; Smith *v.* S., 23 Ala. 39; Burdine *v.* S., 25 Ala. 60; Bryan *v.* S., 26 Ala. 65; Windham *v.* S., 26 Ala. 69; Rodgers *v.* S., 26 Ala. 76; Elliott *v.* S., 26 Ala. 78; Jones *v.* S., 26 Ala. 155; Spaight *v.* S., 29 Ala. 32; Bass *v.* S., 37 Ala. 469; Eslava *v.* S., 44 Ala. 406; Miller *v.* S., 48 Ala. 122; Clark *v.* S., 49 Ala. 37; Napier *v.* S., 50 Ala. 168; Ray *v.* S., 50 Ala. 172; Phillips *v.* S., 51 Ala. 20; McInnis *v.* S., 51 Ala. 28; Campbell *v.* S., 55 Ala. 89; Wetmore *v.* S., 55 Ala. 198; Jacobi *v.* S., 59 Ala. 71; Toney *v.* S., 61 Ala. 1; Bone *v.* S., 63 Ala. 185.

Arkansas.— S. *v.* Mathis, 3 Pike, 84; Mayers *v.* S., 3 Eng. 222; Stith *v.* S., 13 Ark. 680; Norton *v.* S., 15 Ark. 71; S. *v.* Hawkins, 15 Ark. 259; S. *v.* Grider, 18 Ark. 297; S. *v.* Martin, 22 Ark. 420; *Ex parte* Tucker, 25 Ark. 567; Trimble *v.* S., 27 Ark. 355; Portis *v.* S., 27 Ark. 360; Flynn *v.* S., 34 Ark. 441; Euper *v.* S., 35 Ark. 629; Ansley *v.* S., 36 Ark. 67, [38 Am. R. 29; Mace *v.* S., 58 Ark. 79, 22 S. W. R. 1108.]

California.— P. *v.* Crayeroft, 2 Cal. 243, [56 Am. D. 331;] P. *v.* Markham, 7 Cal. 208; *Ex parte* Ah Yem, 53 Cal. 246; [Corbin *v.* Wachhorst, 76 Cal. 587, 18 Pac. R. 677.]

Dakota.— P. *v.* Sponsler, 1 Dak. 289.

[*Florida.*— Overby *v.* S., 18 Fla. 178; Hazen *v.* S., 18 Fla. 184.]

Georgia.— S. *v.* Doon, R. M. Charl. 1; Johnson *v.* S., 8 Ga. 453; Higdon *v.* Heard, 14 Ga. 255; Brown *v.* S., 40 Ga. 689; Conyers *v.* S., 50 Ga. 103, [15 Am. R. 686;] Porter *v.* S., 51 Ga. 300; Simms *v.* S., 60 Ga. 145; Mallory *v.* S., 62 Ga. 164; Kneeland *v.* S., 62 Ga. 395; [Pacetti *v.* S., 82 Ga. 207, 7 S. E. R. 867; Parmer *v.* S., 91 Ga. 152, 16 S. E. R. 937.]

Illinois.— Blemer *v.* P., 76 Ill. 265; Truitt *v.* P., 88 Ill. 518; [N. Y. etc. Exchange *v.* Mellen, 27 Ill. Ap. 556.]

Indiana.— Blanton *v.* S., 5 Blackf. 560; S. *v.* Nesa, 1 Ind. 64; Parsons *v.* S., 2 Ind. 499; Watson *v.* S., 3 Ind. 123; Wade *v.* Deming, 9 Ind. 35; S. *v.* Hope, 15 Ind. 474; S. *v.* Henderson, 47 Ind. 127; Bartender *v.* S., 51 Ind. 73; Hayes *v.* S., 55 Ind. 99; Ridgeway *v.* West, 60 Ind. 371; Ready *v.* S., 62 Ind. 1; Powell *v.* S., 62 Ind. 531; Howard *v.* S., 64 Ind. 516; Squier *v.* S., 66 Ind. 317, 604; Hamilton *v.* S., 75 Ind. 586; [Kleespies *v.* S., 106 Ind. 383; Condon *v.* S., 113 Ind. 73, 14 N. E. R. 705, 12 West. R. 199; S. *v.* Robbins (Ind.), 24 N. E. R. 978, 8 L. R. A. 438; Douglass *v.* S., 18 Ind. Ap. 289, 48 N. E. R. 9.]

Iowa.— S. *v.* Maurer, 7 Iowa, 406; S. *v.* Bishel, 39 Iowa, 42; S. *v.* Book, 41 Iowa, 550, [20 Am. R. 609;] S. *v.* Miller, 53 Iowa, 154; [S. *v.* Johnson, 108 Iowa, 245, 79 N. W. R. 62.]

Kansas.— S. *v.* Stillwell, 16 Kan. 24.

Kentucky.— Com. *v.* Burns, 4 J. J. Mar. 177; Hinkle *v.* Com., 4 Dana, 518; Ervine *v.* Com., 4 Dana, 216; Vicaro *v.* Com., 5 Dana, 504; Calvert *v.* Com., 5 B. Monr. 264; Ashlock *v.* Com., 7 B.

§ 856. Constitutionality — (Lotteries).— Some cases have raised the question of the constitutionality of statutes restrain-

Monr. 44; English *v.* Young, 10 B. Monr. 141; Roberts *v.* Com., 11 B. Monr. 3; Com. *v.* Kennedy, 15 B. Monr. 531; Conner *v.* Ragland, 15 B. Monr. 634; Ritte *v.* Com., 18 B. Monr. 35; Marston *v.* Com., 18 B. Monr. 485; Com. *v.* Branham, 3 Bush, 1; McDaniel *v.* Com., 6 Bush, 326; Brown *v.* Thompson, 14 Bush, 538, [29 Am. R. 416; Waddell *v.* Com., 84 Ky. 276, 1 S. W. R. 480; Com. *v.* Watts, 84 Ky. 537, 2 S. W. R. 123; Debo *v.* Com., 11 Ky. L. R. 413, 12 S. W. R. 266; Triplett *v.* Seelbach, 12 Ky. L. R. 661, 14 S. W. R. 948; Harper *v.* Com., 14 Ky. L. R. 163, 19 S. W. R. 737.]

Louisiana.— S. *v.* Markham, 15 La. An. 498.

Maine.— Ellis *v.* Beale, 18 Me. 337, [36 Am. D. 726.]

Maryland.— Baker *v.* S., 2 Har. & J. 5; Germania *v.* S., 7 Md. 1; Wheeler *v.* S., 42 Md. 563; [S. *v.* Dycer, 85 Md. 246, 36 Atl. R. 763.]

Massachusetts.— Com. *v.* Goding, 3 Met. 130; Com. *v.* Tilton, 8 Met. 232; Com. *v.* Drew, 3 Cush. 279; Com. *v.* Pattee, 12 Cush. 501; Com. *v.* Adams, 109 Mass. 344; [Hoyle *v.* Connell, 134 Mass. 150; Cole *v.* Groves, 134 Mass. 471.]

Michigan.— Pardee *v.* Smith, 27 Mich. 33; [Helber *v.* Schortz, 109 Mich. 669, 67 N. W. R. 913.]

Missouri.— Lowry *v.* S., 1 Mo. 722; S. *v.* Purdom, 3 Mo. 114; Ward *v.* S., 2 Mo. 120, [22 Am. D. 449;] Shropshire *v.* Glascock, 4 Mo. 536, [31 Am. D. 189;] Boynton *v.* Curle, 4 Mo. 599; Eubanks *v.* S., 5 Mo. 450; Hickerson *v.* Benson, 8 Mo. 8, [40 Am. D. 115;] S. *v.* Bates, 10 Mo. 166; O'Blennis *v.* S., 12 Mo. 311; S. *v.* Herryford, 19 Mo. 377; S. *v.* Fulton, 19 Mo. 680; S. *v.* Smith, 19 Mo. 683; S. *v.* Hayden, 31 Mo. 35; S. *v.* Lemon, 46 Mo. 375; McCoy *v.* Zane, 65 Mo. 11; S. *v.* Stogsdale, 67 Mo. 630; Lowry *v.* Rainwater, 70 Mo. 152, [35 Am. R. 420.]

[*Nebraska.*— Perry *v.* Gross, 25 Neb. 826, 41 N. W. R. 799.]

[*New Jersey.*— McClean *v.* S., 49 N. J. L. 471, 9 Atl. R. 481, 8 Cent. 936.]

New York.— Bigelow *v.* Stearns, 19 Johns. 39, [10 Am. D. 189;] Van Valkenburgh *v.* Torrey, 7 Cow. 252; [P. *v.* Todd, 51 Hun, 446, 21 N. Y. St. R. 399; P., Sturgis *v.* Fallon, 39 N. Y. Sup. 860, 4 Ap. Div. 76.]

North Carolina.— S. *v.* Terry, 4 Dev. & Bat. 185; S. *v.* Smitherman, 1 Ire. 14; S. *v.* Gupton, 8 Ire. 271; S. *v.* Black, 9 Ire. 378; S. *v.* Keisler, 6 Jones (N. C.), 73; S. *v.* Bryant, 74 N. C. 207.

Ohio.— Buck *v.* S., 1 Ohio St. 61; Veach *v.* Elliott, 1 Ohio St. 139.

Oregon.— S. *v.* Mann, 2 Oreg. 238; [S. *v.* McDaniel, 20 Oreg. 523, 26 Pac. R. 837.]

South Carolina.— S. *v.* Mathews, 2 Brev. 82; S. *v.* Nates, 3 Hill (S. C.), 200; S. *v.* Laney, 4 Rich. 193.

Tennessee.— Howlett *v.* S., 5 Yerg. 144; McGowan *v.* S., 9 Yerg. 184; S. *v.* Posey, 1 Humph. 384; Bagley *v.* S., 1 Humph. 486; Estes *v.* S., 2 Humph. 496; Smith *v.* S., 5 Humph. 163; S. *v.* Fidler, 7 Humph. 502; Fiddler *v.* S., 7 Humph. 508; Huff *v.* S., 2 Swan (Tenn.), 279; Myers *v.* S., 3 Sneed, 98; S. *v.* McLelland, 4 Sneed, 437; Johnson *v.* S., 4 Sneed, 614; Goldsmith *v.* S., 1 Head, 154; S. *v.* Blackburn, 2 Coldw. 235; Wells *v.* S., 3 Lea, 70; [Ransome *v.* S., 91 Tenn. 716, 20 S. W. R. 310, 15 Crim. Law Mag. 100; Williams *v.* S., 92 Tenn. 275, 21 S. W. R. 662.]

Texas.— Cole *v.* S., 9 Tex. 42; Randolph *v.* S., 9 Tex. 521; S. *v.* Horan, 11 Tex. 144; Barker *v.* S., 12 Tex. 273; S. *v.* Kelly, 24 Tex. 182; S. *v.* Jurgins, 31 Tex. 588; Wolz *v.* S., 33 Tex. 331; S. *v.* Roderica, 35 Tex. 507; Johnson *v.* S., 36 Tex. 198; Galbreath *v.* S., 36 Tex. 200; Herron *v.* S., 36 Tex. 285; Houghton *v.* S., 41 Tex. 136; S.

ing lotteries,[1] but it is for another connection.[2] The forbidding and punishing of gaming is clearly within the general legislative power,[3] while yet there may be unconstitutional legislation of this sort.[4]

Taxing.— In the absence of any special inhibition in the constitution, a tax on gaming is competent to legislation.[5] Even

v. Homan, 41 Tex. 155; S. *v.* Johnson, 41 Tex. 504; S. *v.* Catchings, 43 Tex. 654; Chiles *v.* S., 1 Tex. Ap. 27; Tuttle *v.* S., 1 Tex. Ap. 364; Harcrow *v.* S., 2 Tex. Ap. 511; Stone *v.* S., 3 Tex. Ap. 675; Ben *v.* S., 9 Tex. Ap. 107; Harris *v.* S., 9 Tex. Ap. 308; Whitney *v.* S., 10 Tex. Ap. 377; O'Brien *v.* S., 10 Tex. Ap. 544; [Anderson *v.* S. (Tex. Ap.), 12 S. W. R. 868, 12 Crim. Law Mag. 429; Thompson *v.* S., 37 Tex. Cr. R. 227, 38 S. W. R. 785.]

[*Utah.*— Thompson *v.* Hynds, 15 Utah, 389, 49 Pac. R. 293.]

[*Vermont.*— Ballard *v.* Brown, 67 Vt. 586, 32 Atl. R. 485.]

Virginia.— Com. *v.* Terry, 2 Va. Cas. 77; Com. *v.* Garland, 5 Rand. 652; Com. *v.* Chubb, 5 Rand. 715; Com. *v.* Wyatt, 6 Rand. 694; Windsor *v.* Com., 4 Leigh, 680; Com. *v.* Price, 8 Leigh, 757; Com. *v.* Wilson, 9 Leigh, 648; Pitman *v.* Com., 2 Rob. (Va.) 800; Com. *v.* Shelton, 8 Grat. 592; Neal *v.* Com., 22 Grat. 917; Nuckolls *v.* Com., 32 Grat. 884; [Tescollet *v.* Com., 17 Va. L. J. 271, 17 S. E. R. 546.]

[*Washington.*— Foster *v.* S., 1 Wash. 411, 25 Pac. R. 459.]

Wisconsin.— S. *v.* Lewis, 12 Wis. 434.

United States.— Aicardi *v.* S., 19 Wall. 635; U. S. *v.* Hornibrook, 2 Dil. 229.

England.— Grizewood *v.* Blane, 20 Eng. L. & Eq. 290, 11 C. B. 526; Johnson *v.* Lansley, 12 C. B. 468, 22 Eng. L. & Eq. 468; Reg. *v.* Ashton, 1 Ellis & B. 286, 16 Eng. L. & Eq. 346; Watson *v.* Martin, 10 Cox, C. C. 56; Patten *v.* Rhymer, 3 Ellis & E. 1; Gallaway *v.* Maries, 8 Q. B. D. 275; Batson *v.* Newman, 1 C. P. D. 573; Eastwood *v.* Miller, Law R. 9 Q. B. 440; Haigh *v.* Sheffield, Law R. 10 Q. B. 102; Redgate *v.* Haynes, 1 Q. B. D. 89.

[1] Com. *v.* Dana, 2 Met. 329; S. *v.* Allen, 2 McCord, 55; Freleigh *v.* S., 8 Mo. 606; S. *v.* Sterling, 8 Mo. 697; Phalen *v.* Com., 1 Rob. (Va.) 713; S. *v.* Phalen, 3 Harring. (Del.) 441; Wendover *v.* Lexington, 15 B. Mon. 258. [Offering chance in raffle does not violate law prohibiting sale of lottery ticket. Kirk *v.* S. (Miss.), 10 S. R. 577; Reilly *v.* Gray, 77 Hun, 402, 28 N. Y. Supp. 811; Irving *v.* Britton, 8 Misc. 201, 28 N. Y. Supp. 529, 49 Alb. Law J. 323; P., Lawrence *v.* Fallon, 39 N. Y. Supp. 865, 4 Ap. Div. 82.]

[2] *Post*, § 957.

[3] P. *v.* Beatty, 14 Cal. 566, 573, Baldwin, J., observing: "Similar statutes exist in many of the states, and have been carried into effect without a question of the constitutional power of the legislature." [*Ex parte* Lacy, 93 Va. 159, 24 S. E. R. 93, 31 L. R. A. 822; S. *v.* Gritzner, 134 Mo. 512, 36 S. W. R. 39; S. *v.* Burgdorfer, 107 Mo. 45, 17 S. W. R. 646, 45 Alb. L. J. 186, 14 L. R. A. 846.]

[4] Stevens *v.* S., 2 Pike, 291; S. *v.* Hanger, 5 Pike, 412; [Wright *v.* S., 23 Tex. Ap. 313, 5 S. W. R. 117; Ford *v.* S., 23 Tex. Ap. 520, 5 S. W. R. 145; Dudley *v.* Flushing Club, 14 Misc. 58, 69 N. Y. S. R. 621, 35 N. Y. Supp. 245.]

[5] Washington *v.* S., 8 Eng. 752. Compare with Stevens *v.* S., 2 Pike, 291; Gibson *v.* Pulaski, 2 Pike, 309; S. *v.* Hanger, 5 Pike, 412. As to lotteries, see S. *v.* Allen, 2 McCord, 55.

a city by-law may impose it, under the statutory authority to suppress and restrain.[1]

Municipal by-law.— Within principles already explained,[2] municipal by-laws [3] regulating or forbidding gaming within the corporate limits are good or ill according to the circumstances. A by-law licensing what a statute forbids is void.[4] A power in the charter to repress and restrain gaming implies the authority to grant licenses and forbid what is not licensed.[5]

II. Expositions of Particular Statutory Provisions.

§ 857. "Game," "gaming," "gambling."— These words in a statute are essentially alike in meaning, but there may be minor differences. In general literature, "game" is widely used to denote an innocent sport, "gaming" is sometimes yet less commonly so, and "gambling" rarely if ever; while, in other connections, these words are severally employed in the evil sense.[6] Thus flexible in their popular meaning, they have not become universally otherwise in the law; though there may be states in which their signification in the statutes is uniform and fixed. So that largely the precise legal meaning of these several terms is ascertainable only on a consideration of the connection in which they stand in the statute,[7] of the other statutes on the same subject both present and repealed,[8] and of

[1] Smith *v.* Madison, 7 Ind. 86; Merriam *v.* New Orleans, 14 La. An. 318. See *ante*, §§ 20, 21.

[2] *Ante*, § 18 *et seq.*

[3] S. *v.* Hay, 29 Me. 457; Ridgeway *v.* West, 60 Ind. 371. [Municipal by-law. *Ex parte* Lane, 76 Cal. 587, 18 Pac. R. 677; P. *v.* Hess, 85 Mich. 128, 48 N. W. R. 181; *Ex parte* Boswell, 86 Cal. 232, 24 Pac. R. 1060; Chicago *v.* Brownell, 41 Ill. Ap. 70; S. *v.* Grimes, 50 Minn. 123, 52 N. W. R. 42; Ah Hoy *v.* Spencer, 23 Oreg. 89, 41 Am. & Eng. Corp. Cas. 436, 31 Pac. R. 220; S. *v.* Flint, 63 Conn. 248, 28 Atl. R. 28; S., Milwaukee *v.* Newman, 96 Wis. 258, 71 N. W. R. 438.]

[4] S. *v.* Lindsay, 34 Ark. 372. And see Robbins *v.* P., 95 Ill. 175. [Municipal by-law. S. *v.* Quaid, 43 La. An. 1076, 10 S. R. 133; Hulett *v.* Camp, 115 Ala. 499, 22 S. R. 137; Owensboro *v.* Sparks, 99 Ky. 351, 36 S. W. R. 4.]

[5] Burlington *v.* Lawrence, 42 Iowa, 681; Winooski *v.* Gokey, 49 Vt. 282.

[6] See, among other illustrations, the extracts in Richardson's Dictionary, "Game, gamesome, gamester, gaming, gamble, gambler."

[7] *Ante*, §§ 92*d*, 93, 95*a*, 111*a*.

[8] *Ante*, § 86. Thus it was observed in South Carolina: "The general meaning of the word game is to play at any sport, but in common parlance it means more commonly to play at some game of chance for money. This latter meaning is, however, narrowed by the act of 1817, which prohibited playing at all games of chance (except whist) with or with-

the decisions of the courts;[1] the result of which is, that it is not in all particulars the same in our various states. Still,—

§ 858. **"Gaming," "gambling."**— In general, subject possibly to a few exceptions,[2] yet not many, the words "gaming" and "gambling" in our statutes are similar in meaning,[3] and either one comprehends the idea that, by a bet, by chance, by some exercise of skill, or by the transpiring of some event unknown until it occurs, something of value is, as the conclusion of premises agreed, to be transferred from a loser to a winner, without which latter element there is no gaming or gambling.[4]

out betting; ever since its passage the word game has been understood to mean to play at an unlawful game, without any reference to the fact whether anything was bet or not. S. *v.* Nates, 3 Hill (S. C.), 200.

[1] *Ante*, §§ 96, 97.

[2] Spaight *v.* S., 29 Ala. 32; S. *v.* Hall, 3 Vroom, 158.

[3] Evans *v.* Cook, 11 Nev. 69.

[4] Cases cited *post*, § 861; Bew *v.* Harston, 3 Q. B. D. 454; Williams *v.* Warsaw, 60 Ind. 457; Carper *v.* S., 27 Ohio St. 572; S. *v.* Stillwell, 16 Kan. 24; Tuttle *v.* S., 1 Tex. Ap. 364; Chiles *v.* S., 1 Tex. 27; Ansley *v.* S., 36 Ark. 67, [38 Am. R. 29;] Buckley *v.* O'Niel, 113 Mass. 193, [18 Am. R. 466;] Clark *v.* S., 49 Ala. 37; McInnis *v.* S., 51 Ala. 23; S. *v.* Bryant, 74 N. C. 207; McDaniel *v.* Com., 6 Bush, 326; S. *v.* Bishel, 39 Iowa, 42; White *v.* Buss, 3 Cush. 448; Babcock *v.* Thompson, 3 Pick. 446, 449, [15 Am. D. 235;] P. *v.* Sergeant, 8 Cow. 139; Blewett *v.* S., 34 Miss. 606; Smith *v.* S., 5 Humph. 163; Bell *v.* S., 5 Sneed, 507; Com. *v.* Taylor, 14 Gray, 26; Harrison *v.* S., 4 Coldw. 195, 198; S. *v.* Smith, Meigs, 99, [33 Am. D. 132.] In the last two cases gaming is defined to be "any contest or course of action, commenced and prosecuted in consequence of a bet or wager, and with a view to determine the bet or wager, upon the event of such contest or course of action." Another definition in this state is: "Gaming is an risk money or property on a contest or chance of any kind, where one must be loser and the other gainer." Bell *v.* S., 5 Sneed, 507; Eubanks *v.* S., 3 Heisk. 488. In another case in the same state, the following from the jury was held to be a verdict of guilty: "We find that the defendant, with some six or more other gentlemen, played at a game called tenpins or handicap. In this game no one played to beat any other gentleman, but each one had assigned to him a certain number of pins to be got with a certain number of balls, some more and some less, according as they were considered good or bad players. If the player did not get the number of pins assigned him, he was to treat to a bottle of champagne. The defendant [in the county of the indictment] did sometimes, on failing to get the number of pins allotted to him, treat to a bottle of champagne, and sometimes he did not. It was agreed by the parties, at the commencement of the playing, that the treat was a voluntary thing, and no one need do so unless he was perfectly willing. The jury further find that the defendant and the other gentlemen engaged in this play did not believe it to be gaming." Said Caruthers, J.: "What is gaming? It is defined by the act of 1799, ch. 8, § 2, to be a playing 'at any match or matches at cards, dice, billiards or

Whether the game is of skill or of chance is ordinarily immaterial.[1] In some statutory connections, gaming is said to be synonymous with betting,[2] but it is by no means so in all. The result of which is, that,—

Evil sport.— Since, in popular language, the words "gaming" and "gambling" do largely if not universally indicate an evil sport, if a statute makes either punishable, the evil form of it is commonly or always presumptively meant; the statute being construed, as legislative acts should be, harmoniously with its manifest purpose and intent.[3] That any playing to win or lose, where no valuable consideration enters into the transaction, is evil, our law seems pretty generally to have held;[4] though there may be found in the books some qualifications of so broad a proposition, or instances wherein it has been overlooked by the judges.[5] But this is believed not to be the only sort of what the law deems evil, which may enter into a sport. Thus,—

§ 859. "Unlawful game or sport"— (Cock-fighting).— A statute having made it indictable for an innholder to suffer in his house any "unlawful game or sport," one who thus per-

any other game of hazard or address for money or other valuable thing.' By the same section, to 'encourage or promote' is the same offense; and so is betting upon such hazards by subsequent acts. . . . Was this a case of unlawful gaming? We think it very clear that it was. It was a risk of a bottle of wine upon a hazard whether he knocked down the number of pins designated or not. It was not a bet with any particular individual, but with the whole company. So the game was to go around from one to another; each was to treat if he failed to come up to the requisition of the assessors, as they were called. It would certainly be gaming for two or more persons to determine, by the chance of a game at tenpins, who should pay the boy for setting up the pins, or who should treat, as much as if the same amount was staked up and won and lost upon the game. All these contrivances are regarded and intended as evasions of the law, and cannot be tolerated." Walker *v.* S., 2 Swan (Tenn.), 287, 289, 290, 291. In Massachusetts, Shaw, C. J., observed: "All gaming is unlawful by the law of this commonwealth; and it is gaming to play any game of hazard, for money or other article of value. A game of hazard to determine who shall pay for the beer or other liquor to be drank is strictly playing for money; it is to determine which party shall pay a sum of money for the other." Com. *v.* Taylor, 14 Gray, 26, 29; S. P., Com. *v.* Gourdier, 14 Gray, 390; S. *v.* Maurer, 7 Iowa, 406. And see *post*, § 860, and note.

[1] S. *v.* Miller, 53 Iowa, 154; Com. *v.* Gourdier, 14 Gray, 390.

[2] S. *v.* Fearson, 2 Md. 310; Wolz *v.* S., 33 Tex. 331.

[3] *Ante*, §§ 70, 82, 93; [McBride *v.* S., 39 Fla. 442, 22 S. R. 711.]

[4] 4 Bl. Com. 171.

[5] Bishop, Con., §§ 530–532.

mitted cock-fighting, in a case into which the ingredient of a wager appears not to have entered, was adjudged to be within the inhibition. "We are of opinion," said Shaw, C. J., "that the game or sport of cock-fighting is unlawful,[1] because it is a violation alike of the prohibitions of a statute, and of the plain dictates of the law of humanity, which is at the basis of the common law. . . . As being barbarous and cruel, leading to disorder and danger, and tending to deaden the feelings of humanity, both in those who participate in it and those who witness it, it appears to us to stand on the same footing with bull-fighting, bear-baiting, and prize-fighting with fists or dangerous weapons, all of which, we think, would be considered as unlawful games or sports."[2] Said Lord Ellenborough, C. J.: "Cock-fighting must be considered a barbarous diversion, which ought not to be encouraged or sanctioned in a court of justice."[3] At the same time these unlawful sports, other than prize-fighting,[4] are, like other gaming,[5] not indictable without the aid of a statute.[6] Now,—

"*Unlawful.*"— We thus see that "unlawful," when qualifying "game" or "gaming," is not restricted in its meaning to what had been before declared by statute to be unlawful,[7] or to what was before indictable.[8] Thus, the Kentucky act of 1833, against owners using their houses for gaming, has the words "shall permit or suffer games at faro, or any other unlawful game or games whatever, at which money or any other thing is won or lost;" and the court refused to limit their meaning in any such way, but held that the criterion to determine whether or not a game is within the prohibition is furnished by the words "won or lost;" and so an unlawful game is one at which betting is done.[9] On the whole,—

[1] So adjudged in Rex *v.* Medlor, 2 Show. 36.

[2] Com. *v.* Tilton, 8 Met. 232, 234, 235.

[3] Squires *v.* Whisken, 3 Camp. 140, 141. "A person was convicted of keeping a cockpit; and the court resolved it to be an unlawful game within the Stat. 33 Hen. 8, ch. 9, and fined him 40*s.* a day. Rex *v.* Howel, 3 Keb. 510." Jacob, Law Dict., Gaming.

[4] Crim. Law, I, §§ 260, note, 535, 632; II, § 35.

[5] *Ante*, § 846.

[6] Clark *v.* Hague, 2 Ellis & E. 281, 8 Cox, C. C. 324; Morley *v.* Greenhalgh, 3 B. & S. 374; Murphy *v.* Manning, 2 Ex. D. 307; Budge *v.* Parsons, 3 B. & S. 382.

[7] Com. *v.* Goding, 3 Met. 130.

[8] Crim. Law, II, § 178.

[9] Vicaro *v.* Com., 5 Dana, 504. And see Ervine *v.* Com., 5 Dana, 216.

§ 860. Conclusion as to "gaming," "gambling."— The conclusion as to "gaming" and "gambling," in a statute forbidding either, is that in the absence of any contrary indication they severally imply something of an unlawful nature: as, betting on the sport, being indeed ordinarily an ingredient in their signification; or a game of an evil or immoral tendency, or "unlawful," as judged of by the prior law or a contemporaneous statute. In England, therefore, where a tavern license had the proviso that the licensee "do not knowingly suffer any unlawful games or any *gaming* whatsoever," on the premises, this was held not to be infringed by allowing dominos to be played there. Said Lord Campbell, C. J.: "Parties may play at a game which is not in itself unlawful, without gaming." And he added: "If money is staked it is gaming, and a publican may be lawfully convicted for that; but this conviction does not state that such was the case."[1] Under a statute rendering void "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering," one for the sale and purchase of railway shares, whereby, according to the understanding of both parties, the shares sold are not to be delivered, but merely the "differences" are to be paid, according to the rise and fall of the market, is included.[2] It appears to have been laid down in Tennessee that there can be no gaming without a wager;[3] but, pretty clearly, this is not universal

[1] Reg. *v.* Ashton, 16 Eng. L. & Eq. 346, 1 Ellis & B. 286.

[2] Grizewood *v.* Blane, 11 C. B. 526, 20 Eng. L. & Eq. 290. [And in Illinois money paid on such a contract may be recovered from the broker as "winner." Pearce *v.* Foote, 113 Ill. 228, 55 Am. R. 414; P. *v.* Wade, 59 N. Y. Supp. 846, 59 Alb. L. J. 340. In Missouri money lost in speculation in grain on margins was held not to be upon gambling device, but as the transaction is against public policy the broker cannot recover commissions. Conner *v.* Black, 132 Mo. 150, 33 S. W. R. 783; Johnson *v.* Wallace, 167 Ill. 388, 47 N. E. R. 762; Fostenburg *v.* S., 47 Ark. 188, 1 S. W. R. 58; Bank of Augusta *v.* Cunningham, 75 Ga. 366; Clay *v.* Allen, 63 Miss. 426; Johnson *v.* Kaune, 21 Mo. Ap. 22, 3 West. R. 443; Waugh *v.* Breck, 114 Pa. St. 422, 5 Cent. 539; Beadles *v.* Ownby, 16 Lea (Tenn.), 424; Seeligson *v.* Lewis, 65 Tex. 215. It was also held in Maryland that inasmuch as making bets on horse-racing is under Maryland law by statute, and under English statute there in force there could be no recovery on a promissory note for one's share of capital to a "book-making" partnership, though where the races were to be run was no violation of law. Spies *v.* Rosenstock, 87 Md. 14, 39 Atl. R. 268, 30 Chicago Legal News, 208.]

[3] Dobkins *v.* S., 2 Humph. 424. See *ante*, §§ 857, 858.

doctrine. In other words, it is true generally, not always.[1] Hence,—

§ 861. Gaming defined.— While it is not possible that any definition of a word so flexible in meaning as this should be universally correct, still, in most circumstances and under most statutes, gaming is any sport or play carried on between two or more persons, depending on skill, chance, or the transpiring of an unknown future event, on the result of which some valuable thing is, without other consideration, to be transferred from the one to the other, or which in its course or consequences involves some other thing demoralizing or unlawful.[2]

§ 862. "Game of chance," "hazard," "skill." — Some of the statutes have the words "game of chance," or "game of hazard," — distinguishable in meaning from "game of skill." It was observed in North Carolina, that, when in 1835 the expression "game of chance" was introduced into the law by a statute, "it had no technical meaning as a legal expression. It must have been used by the legislature in the sense in which persons conversant in games, or the world at large, give to it in classing the different kinds of games."[3] But as pure games of chance are almost unknown, most of those into which chance enters being more or less influenced by skill, or mixed games, the question of the distinction between them is not very unlike that between black persons and white, already considered.[4] What preponderance of chance over skill, or skill over chance,

[1] And see *ante*, §§ 857, 859; S. *v.* Fearson, 2 Md. 310.

[2] The reader may consult, in addition to the cases already cited under this sub-title, the following cases: Cameron *v.* S., 15 Ala. 383; Swallow *v.* S., 20 Ala. 30; S. *v.* Records, 4 Harring. (Del.) 554; Com. *v.* Shelton, 8 Grat. 592; S. *v.* Smitherman, 1 Ire. 14; Howlett *v.* S., 5 Yerg. 144; Shropshire *v.* Glascook, 4 Mo. 536, [31 Am. D. 189;] Boynton *v.* Curle, 4 Mo. 599; S. *v.* Fidler, 7 Humph. 502; Fiddler *v.* S., 7 Humph. 508; Com. *v.* Terry, 2 Va. Cas. 77; Com. *v.* Stowell, 9 Met. 572; Smith *v.* S., 5 Humph. 163; Com. *v.* Garland, 5 Rand. 652; Wade *v.* Deming, 9 Ind. 35; Harbaugh *v.* P., 40 Ill. 294; S. *v.* Fulton, 19 Mo. 680; S. *v.* Smith, 19 Mo. 683; S. *v.* Hayden, 31 Mo. 35; S. *v.* Ebert, 40 Mo. 186; Hitchins *v.* P., 39 N. Y. 454; S. *v.* Cooster, 10 Iowa, 453; McDaniel *v.* Com., 6 Bush, 326; Com. *v.* Taylor, 14 Gray, 26; Com. *v.* Gourdier, 14 Gray, 390; S. *v.* Hall, 3 Vroom, 158. [Though it is not essential, under statute forbidding the keeping of a gaming room for the purpose of gaming and gambling, that the form of gaming there carried on is prohibited by law. McBride *v.* S., 39 Fla. 442, 22 S. R. 711.

[3] Ruffin, C. J., in S. *v.* Gupton, 8 Ire. 271.

[4] *Ante*, § 274.

will relegate the game to the one class or the other? "We believe," continued the court in this North Carolina case, "that, in the popular mind, the universal acceptation of 'a game of chance' is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance." And it seems to have been the idea of the court that, on the other hand, a game of skill is one in which chance has no share.[1] But this explanation, if we accept it as correct, leaves the question still open to practical doubts, some of which may be in a measure relieved as we proceed. Thus,—

Horse-race — Dog-race.— A mere horse or dog race, and no more, is not an act of gaming.[2] And it was once observed to be a "great perversion of language to call a horse-race a *gambling device.*"[3] But ordinarily a betting on a horse-race is gaming.[4] Yet it is not, on this race,[5] or on a dog-race,[6] a game of chance; or, on the other hand, it would appear, a game of skill.[7] Plainly enough, the capacity of an animal for running does not depend on either chance or human skill; although, by some, it may be deemed an exercise of skill to judge of such capacity, as one does in betting. Still,—

Pari mutuel.— In England a game was held to be of chance where the defendants were the proprietors of an instrument called a "*pari mutuel*," at which persons betting on a horse-race deposited their money; it registered the deposit, and the game depended partly on the result of the race, and partly on the number of depositors and the horse bet upon. "Whether a horse-race be in itself a game of chance or not," said Cock-

[1] S. *v.* Gupton, *supra.*

[2] Harrison *v.* S., 4 Coldw. 195. See *post*, §§ 872, 873. Under the Tennessee act of 1883 there may be a "horse-race" though there is no wager and no previous agreement to run the race. Goldsmith *v.* S., 1 Head, 154.

[3] S. *v.* Hayden, 31 Mo. 35; S. *v.* Lemon, 46 Mo. 375; [James *v.* S., 63 Md. 242.]

[4] *Post*, § 872; Godman *v.* Morley, 7 Mod. 438; s. c. *nom.* Goodburn *v.* Marley, 2 Stra. 159; Tatman *v.* Strader, 23 Ill. 493; Garrison *v.* McGregor, 51 Ill. 473, 474; [Edwards *v.* S., 8 Lea (Tenn.), 411; Dver *v.* Benson, 69 Ga. 609; Corson *v.* Neatheny, 9 Colo. 212, 11 Pac. R. 82. So also on a foot-race. Swaggard *v.* Hancock, 25 Mo. Ap. 596; Jones *v.* Cavanaugh, 149 Mass. 124, 21 N. E. R. 306; Stone *v.* Clay (C. C. A.), 61 Fed. R. 889; Miller *v.* U. S. (D. C. Ap.), 23 Wash. L. R. 209.]

[5] S. *v.* Rorie, 23 Ark. 726; Harless *v.* U. S., Morris, 169.

[6] Hirst *v.* Molesbury, Law R. 6 Q. B. 130.

[7] S. *v.* Rorie, *supra.*

burn, C. J., "we can entertain no doubt that, if some additional element of chance be introduced, the wagering on a horse-race may be converted into a game of chance."[1] Again,—

§ 863. **Tenpins** — is not a game of chance.[2] But,—

Pigeon-hole — Keno — Shuffleboard — Rondo. — "Pigeon-nole"[3] and "keno"[4] are games of chance. And, where the question was left to the jury, "shuffleboard"[5] and "rondo"[6] were severally found to be such.

§ 864. **Sorts of chance — "Same or like kind" — (Faro — Hap-hazard — Blind-hazard — Skin-cap).**— A Virginia statute made punishable "every keeper or exhibitor of any of the tables commonly called A B C, or E O, tables, or faro bank, or any other gaming-table *of the same or like kind*, under any denomination whatsoever, or whether the same be played with cards or dice, or in any other manner whatsoever." And it was held that, under the clause "of the same or like kind," a gaming-table called "hap-hazard," otherwise "blind-hazard," otherwise "skin-cap," is included. The reason was that games of chance are of two classes; in the one of which "the chances are equal, all other things being equal;" in the other, "all other things being equal, the chances are nevertheless unequal, that is, in favor of one side." Said Daniel, J.: "The standard games enumerated, so far as they are understood by this court, are of the second class; and in all three of them the chances are in favor of the exhibitor of the game or table. Now the playing charged in the information is at a game which, by the evidence, is proved to be a game wherein the chances are unequal, and in favor of the exhibitor of the table. It must, therefore, belong to the same class and be of the like kind of gaming to which the enumerated games belong. The advantages or chances in favor of the player or exhibitor of the table are not the same in each case, but in each case the chances are in

[1] Tollett *v.* Thomas, Law R. 6 Q. B. 514, 520, 521; [Com. *v.* Simonds, 79 Ky. 618.]

[2] S. *v.* Gupton, 8 Ire. 271. [Betting on game in licensed alley no violation. Rutherford *v.* S., 39 Tex. Cr. R. 137, 45 S. W. R. 579.]

[3] Com. *v.* Branham, 3 Bush, 1.

[4] Eslava *v.* S., 44 Ala. 406.

Further of keno.—Brown *v.* S., 40 Ga. 689; Trimble *v.* S., 27 Ark. 355; Portis *v.* S., 27 Ark. 360; U. S. *v.* Hornibrook, 2 Dill. 229; Miller *v.* S., 48 Ala. 122; Schuster *v.* S., 48 Ala. 199; Nuckolls *v.* Com., 32 Grat. 884.

[5] S. *v.* Bishop, 8 Ire. 266.

[6] Glascock *v.* S., 10 Mo. 508.

his favor; and this is the distinctive character which marks them as games of the same or like kind."[1] Again,—

§ 865. **"Same or like kind"** — **(Thimble — Thimbles and balls).**— In South Carolina the statute against gaming "at any faro bank, or at any other table or bank of the same or the like kind, under any denomination whatsoever," is held to include the game called "thimble," or "thimbles and balls." "If," said the court, "the prohibited games be confined to those alone in which the stake is won or lost by chance, the result would follow that the gambler who relied on the practical legerdemain of a juggler, whilst he professed that the stake depended on fortune, will escape punishment by playing falsely."[2]

§ 866. **"Other," etc.— Banking games.**— A statute having made punishable the keeper or exhibitor of "any faro bank, gaming-table, machine or contrivance used in betting, or other game of chance, whereby money or other thing is or may be won," something like the rule of limiting general words to things of the like kind with the specific[3] was applied in the construction. It was deemed "that," in the language of Stiles, J., "the object of the legislature was to suppress that species of gambling carried on by banking games, such as 'faro,' 'roulette,' and other games, where there is a fund of money offered and ready to be staked on all bets others may choose to make against the banker, on the game which he shall exhibit to entice bets." And "it should appear that the table, machine or contrivance was such as is *ordinarily* used for gambling for money or property."[4]

§ 867. **"Gambling device"** — **is a term often occurring in these statutes; as,** "set up or keep any table or gambling device commonly called A B C faro bank, E O roulette, equality, or any kind of gambling-table or gambling device, adapted, devised and designed for the purpose of playing any game of

[1] Daniel, J., in Com. *v.* Wyatt, 6 Rand. 694, 702.

[2] S. *v.* Red, 7 Rich. 8. And see Crow *v.* S., 6 Tex. 334; S. *v.* Grider, 18 Ark. 297.

[3] *Ante*, § 245 *et seq.*; [Wren *v.* S., 70 Ala. 1; P. *v.* Weithoff, 51 Mich. 203, 47 Am. R. 557.]

[4] Ritte *v.* Com., 18 B. Monr. 35, 39, 40. [The fact that there are games known by different names under the terms "banking games" does not render statute void for indefiniteness. P. *v.* Carroll, 80 Cal. 153. 22 Pac. R. 129; Miller *v.* S., 23 Wash. L. R. (D. C.) 209; Bibb *v.* S., 83 Ala. 84, 3 S. R. 711; Lyle *v.* S., 30 Tex. Ap. 118, 16 S. W. R. 761.]

chance for money or property." Under which and other like provisions,—

Cards—have been adjudged to be a gambling device.[1] And—

Keno — the same.[2]

§ 868. Changes in game.— If, after the statute is enacted, the parties change the name of a game,[3] or make mere colorable alterations in the game itself,[4] they do not thereby escape its penalties.[5]

§ 869. "Device or substitute for"—(Cards—Ramps—Dominos).— A statute made it punishable to play, under circumstances pointed out, "with cards or dice, or with any device or substitute for the same."[6] And the game of "ramps" was held to fall within the prohibition; being, in the words of Goldthwaite, J., "played with a substitute or device for cards." He said: "The game, although played with dominos, could as well be played with cards,— the dominos are shuffled, a trump is made, and the players must follow suit if they can, and if not are allowed to trump,—tricks are taken and points made. Here, then, we have a game which can be played with cards, and is played on the same principles which govern some games in cards, and in which the same cant phrases and terms are made use of. We cannot say with positive certainty, upon this evi-

[1] S. *v.* Herryford, 19 Mo. 377; S. *v.* Lewis, 12 Wis. 434. But see S. *v.* Mann, 2 Oreg. 238; [P. *v.* Gosset, 93 Cal. 641, 29 Pac. R. 246; S. *v.* Mohr, 55 Mo. Ap. 329; S. *v.* Torphy, 65 Mo. Ap. 681.]

[2] Portis *v.* S., 27 Ark. 360; Trimble *v.* S., 27 Ark. 355. See *ante*, § 863 and note.

As to gambling device, see, further, Euper *v.* S., 35 Ark. 629; Watson *v.* Martin, 10 Cox, C. C. 56; McCoy *v.* Zane, 65 Mo. 11; Toney *v.* S., 61 Ala. 1. [Wheel of fortune the same. Mims *v.* S., 88 Ga. 458, 14 S. E. R. 712. Apparatus, including telegraph instrument and blackboard, for registering bets on horse racing, the same. Com. *v.* Healey, 157 Mass. 455, 32 N. E. R. 656. Craps board the same. Bell *v.* S., 32 Tex. Ap. 187, 22 S. W. R. 687. Slot machine the same. Kolshorn *v.* S., 97 Ga. 343, 23 S. E. R. 829. Policy shop is not within said terms. Moore *v.* Chicago, 69 Ill. Ap. 571. Crack Loo within the terms. Canton *v.* Dawson, 71 Mo. Ap. 235. Wheel of fortune *not*. P. *v.* Carroll, 80 Cal. 153, 22 Pac. R. 129. Slot machine in which nickel is dropped and a drink or cigar is obtained is not gambling device. Heelman *v.* S., 6 Ohio N. P. 258. If it may win larger amount or be lost it is. S. *v.* Brown, 2 Mo. Ap. R. 183. Stock clock is. S. *v.* Grimes, 50 Minn. 123, 52 N. W. R. 42.]

[3] S. *v.* Maurer, 7 Iowa, 406.

[4] McGowan *v.* S., 9 Yerg. 184.

[5] Flynn *v.* S., 34 Ark. 441. And see and compare Smith *v.* S., 17 Tex. 191, 192; Harris *v.* S., 33 Ala. 373; S. *v.* Kelly, 24 Tex. 182; Cohen *v.* S., 17 Tex. 142; S. *v.* Grider, 18 Ark. 297; Bartender *v.* S., 51 Ind. 73.

[6] Windham *v.* S., 26 Ala. 69, 70.

dence, that the dominos were used by the appellant as a device or substitute for cards, but we are very clear that the evidence we have stated tends to establish that fact."[1]

§ 870. **"Wager" and "bet," distinguished.**— The words "wager" and "bet," as used in the law of gaming, are in substance equivalents, yet distinguishable. Perkins, J., observed that wager "means the contract by which a bet is made; and it is applied, also, to the thing or amount bet. We have found no law authority that makes it mean the subject on which a bet is laid." Consequently, a statute punishing those "who shall, by playing or betting at or upon any game or wager, or upon the result of any election, either lose or win any article of value," was held not to be violated where one lost $5 by "betting with one S. C., upon an affidavit made by P. N. against J. C., for an assault and battery with intent to kill."[2]

§ 871. **Their meaning.**— These words severally imply a risk, not solely on one side, but on both; though it need not be equal.[3] A wager is said to be complete when the offer to bet is accepted. The placing of money on the gambling-table is an offer, and the owner of the table not objecting is an acceptance, rendering the offense fully committed. It is now immaterial that the game is not played out, and so the bet is neither lost nor won.[4]

§ 872. **"Betting" and "gaming," distinguished.**—Though, under some circumstances, the terms "betting" and "gaming" are practically synonymous,[5] they are not necessarily or always so. Yet a betting on what is not a game may constitute gaming. Thus,—

Betting on horse-race.— To bet on a non-gaming horse-race may be gaming.[6] But, consistently with this view, under the statutory words, "play at any game whatever, except bowls, chess, backgammon, draughts, or any licensed game, or bet on the hands or sides of others who do play," the betting of money

[1] Bryan *v.* S., 26 Ala. 65.

[2] Smoot *v.* S., 18 Ind. 18.

[3] Quarles *v.* S., 5 Humph. 561; Jordan *v.* Kent, 44 How. Pr. 206; Lucas *v.* Harper, 24 Ohio St. 328; *post*, § 937.

[4] S. *v.* Welch, 7 Port. 463. [But putting up as a wager money against a smaller amount to be forfeited, if remainder is not put up, if forfeiture ensues from failure to put up remainder, there is no violation. Rich *v.* S., 38 Tex. Cr. R. 199, 42 S. W. R. 291, 38 L. R. A. 719.]

[5] *Ante*, §§ 858–861.

[6] *Ante*, § 862.

on a horse-race was in Virginia held not to be prohibited.[1] A contrary conclusion was reached in Indiana;[2] also in Maine, under a statute differently expressed.[3] So —

Betting on an election — may be gaming,[4] or not,[5] according to the statutory terms and the views of the particular court. And —

§ 873. Further as to horse-racing.— Horse-racing is, in some of the states, generally by reason of protecting statutes, specially favored; so that wagers upon the result are collectible in the courts.[6] But in other states the contrary view is taken; moreover, in many there are statutes intended to suppress or control both racing and wagers.[7] A race with mares, or with mules, is a "horse-race" within these enactments.[8]

No penalty.— Where the forbidding statute is silent as to the punishment, the racing is made thereby an indictable misdemeanor at the common law.[9]

§ 874. Betting "money."— The thing forbidden to be bet is by some of the statutes "money"— a word which ordinarily signifies only what is legal tender.[10] So that the betting of what is not coin is not within this provision.[11] Still the Maryland court held the deposit of a note of the Bank of Virginia, as a

[1] Com. *v.* Shelton, 8 Grat. 592. See also S. *v.* Moseley, 14 Ala. 390; Bagley *v.* S., 1 Humph. 486. Compare with Neal *v.* Com., 22 Grat. 917.

[2] Wade *v.* Deming, 9 Ind. 35. See S. *v.* Lovell, 10 Vroom, 463.

[3] Ellis *v.* Beale, 18 Me. 337, [36 Am. D. 726.] See also Bledsoe *v.* Thompson, 6 Rich. 44, [57 Am. D. 777;] S. *v.* Blackburn, 2 Coldw. 235. [In Massachusetts an apparatus for registering bets on horse-races, consisting of telegraph instrument and blackboard, was held to be a gambling device, and ticket seller, telegrapher and board-marker all indictable for exhibiting, etc. Com. *v.* Hawley, 157 Mass. 455, 32 N. E. R. 656.]

[4] *Post*, § 936.

[5] S. *v.* Henderson, 47 Ind. 127; S. *v.* Smith, Meigs, 99, [33 Am. D. 132.]

[6] Barret *v.* Hampton, 2 Brev. 226; Kirkland *v.* Randon, 8 Tex. 10, [58 Am. D. 94;] McElroy *v.* Carmichael, 6 Tex. 454; Dunman *v.* Strother, 1 Tex. 89, [46 Am. D. 97.] See McElroy *v.* Chancellor, 8 Tex. 270; Johnson *v.* Lansley, 12 C. B. 468, 22 Eng. L. & Eq. 468.

[7] S. *v.* Posey, 1 Humph. 384; Gibbons *v.* Gouverneur, 1 Denio, 170; Bledsoe *v.* Thompson, 6 Rich. 44, [57 Am. D. 777;] Van Valkenburgh *v.* Torrey, 7 Cow. 252; Ellis *v.* Beale, 18 Me. 337, [36 Am. D. 726;] Lewis *v.* Littlefield, 15 Me. 233; Huff *v.* S., 2 Swan (Tenn.), 279; Myers *v.* S., 3 Sneed, 98; Watson *v.* S., 3 Ind. 123. And see *ante*, § 848; [Bride *v.* Clark, 161 Mass. 130, 36 N. E. R. 745.]

[8] Goldsmith *v.* S., 1 Head, 154.

[9] Redman *v.* S., 33 Ala. 428. See *ante*, § 138; Crim. Law, I, § 237.

[10] *Ante*, § 346.

[11] Horton *v.* S., 8 Eng. 62; Johnston *v.* S., Mart. & Yerg. 129.

wager or bet, to be a deposit of "money" within the act of 1838 (ch. 392).[1] And, in harmony with the general doctrine, the betting of checks or counters of a faro bank, agreed by the parties to be representatives of money between themselves, is adjudged to be a betting of money.[2] It is the same also where the loser is to pay the liquor bill for the company, or to pay for the use of the table, or the like; the thing bet being deemed money.[3]

§ 875. Betting "valuable thing."— In some of the statutes, a term to denote the subject of the wager is "valuable thing."[4] It need be of no intrinsic worth, being valuable if it will bring value. Such is even a written memorandum of a sort not collectible in law. It, as in the cases mentioned in the last section, need only represent value as between the parties.[5]

§ 876. Setting up or permitting gaming[6]**—("Enticing").** Under a statute making it an offense to "set up or keep" any gambling device designed, etc., for "playing any game of chance for money or other property, and" to "induce, entice or permit any person to bet or play at or upon any such gaming-table," it was held that there might be a complete enticing though no money was bet or won.[7] If the statute requires the

[1] Doyle *v.* Baltimore, 12 Gill & J. 484. To the like effect, Flynn *v.* S., 34 Ark. 441; Porter *v.* S., 51 Ga. 300.

[2] Ashlock *v.* Com., 7 B. Monr. 44; Walton *v.* S., 14 Tex. 381. And see *ante*, § 846; S. *v.* Welch, 7 Port. 463.

[3] Bachellor *v.* S., 10 Tex. 258, 262; Hitchins *v.* P., 39 N. Y. 454; Com. *v.* Taylor, 14 Gray, 26, 29; Ward *v.* S., 17 Ohio St. 32; Stone *v.* S., 3 Tex. Ap. 675; S. *v.* Book, 41 Iowa, 550, [20 Am. R. 609.] See S. *v.* Leighton, 3 Fost. (N. H.) 167; P. *v.* Sergeant, 8 Cow. 139; Com. *v.* Gourdier, 14 Gray, 390; McDaniel *v.* Com., 6 Bush, 326; S. *v.* Cooster, 10 Iowa, 453; Mallory *v.* S., 62 Ga. 164; McInnis *v.* S., 51 Ala. 23; Simms *v.* S., 60 Ga. 145; S. *v.* Hall, 3 Vroom, 158; Harbaugh *v.* P., 40 Ill. 294.

License of game.— The licensing of a game may render harmless a betting thereon. Hawkins *v.* S., 33 Ala. 433; Blewett *v.* S., 34 Miss. 606, 614. But the license must be valid. Schuster *v.* S., 48 Ala. 199. And see *ante*, § 858, note; [Alexander *v.* S., 99 Ind. 450; Murphy *v.* Rogers, 151 Mass. 118, 24 N. E. R. 35. *Contra*, P., Healey *v.* Forbes, 52 Hun, 30, 22 N. Y. S. R. 278; Smith *v.* S., 28 Tex. Ap. 102, 12 S. W. R. 412; Hay *v.* Reid, 85 Mich. 296, 48 N. W. R. 507; Hall *v.* S. (Tex. Ap.), 34 S. W. R. 122.]

[4] *Ante*, § 346, note; Hamilton *v.* S., 75 Ind. 586.

[5] Gibbons *v.* P., 33 Ill. 442, 446. And see Nuckolls *v.* Com., 32 Grat. 884; S. *v.* Bishel, 39 Iowa, 42.

[6] *Ante*, §§ 852, 854.

[7] S. *v.* Fulton, 19 Mo. 680; S. *v.* Smith, 19 Mo. 683. See *ante*, § 867. [Does not embrace billiard playing. Wortham *v.* S., 59 Miss. 179; Bobel *v.*

gambling device to be in a house "belonging" to the defendant, "or by him occupied, or of which he has at the time the possession or control," it is a sufficient defense that he had sublet the premises to a third person, who had the exclusive right and possession.[1] But if the letting was for the purpose of the unlawful use, it will avail nothing.[2]

§ 877. Suffering minors — (Mistake of age). — Under the statutes making punishable the suffering of minors to play at gaming,[3] it is a sufficient defense that, after due diligence and proper inquiry, the defendant honestly believed the person not to be a minor, but to have attained his majority;[4] though, on the other hand, this has been denied.[5] It is the same question of mistake of fact which the author has discussed in other connections.[6]

§ 878. Place of gaming. — The place of the gaming is under some of the statutes an element in the offense.[7] Various terms to designate it have already been explained; as, "*public place*,"[8] "*public house*,"[9] "*outhouse*,"[10] or "*outhouse where people resort*."[11]

P., 173 Ill. 19, 50 N. E. R. 322. *Contra*, S. *v.* Oswald, 59 Kan. 508, 53 Pac. R. 525; S. *v.* Merchant, 15 R. I. 539, 9 Atl. R. 902.]

[1] S. *v.* Ebert, 40 Mo. 186; Scott *v.* S., 29 Ga. 263. And see Robinson *v.* S., 24 Tex. 152. See, as to the Arkansas statutes and their interpretation, S. *v.* Stillwell, 20 Ark. 96; Stith *v.* S., 13 Ark. 680. As to Indiana, see S. *v.* Hope, 15 Ind. 474; [Diebel *v.* S., 68 Miss. 725. 9 S. R. 354; Borches *v.* S., 31 Tex. Cr. R. 517, 21 S. W. R. 192.]

[2] Com. *v.* Adams, 109 Mass. 344; [Stevenson *v.* S., 83 Ga. 575, 10 S. E. R. 234; Morgan *v.* S., 117 Ind. 569, 19 N. E. R. 154; McPherson *v.* Simmons, 63 Ark. 593, 40 S. W. R. 78.]

[3] *Ante*, § 852.

[4] Stern *v.* S., 53 Ga. 229, 230, [21 Am. R. 266; Bird *v.* S. (Ind.), 2 West. R. 226; Taylor *v.* S. (Ind.), 5 West. R. 673.]

[5] Com. *v.* Emmons, 98 Mass. 6.

[6] *Ante*, §§ 596*a*, 596*b*, 631*a*, 632, 632*a*, 663–665; Crim. Law, I, §§ 301–310; [S. *v.* Johnson, 44 Mo. Ap. 88.]

[7] *Ante*, § 221. And see Bass *v.* S., 37 Ala. 469.

[8] *Ante*, § 298; Purcell *v.* Com., 14

[9] *Ante*, § 299; [Skinner *v.* S., 87 Ala. 105, 6 S. R. 399; Cole *v.* S., 28 Tex. Ap. 536, 13 S. W. R. 859; Galloway *v.* S. (Tex. Cr. R.), 26 S. W. R. 67; Graham *v.* S. (Ala.), 16 S. R. 934; Humphreys *v.* S. (Tex. Cr. R.), 30 S. W. R. 1066; Turberville *v.* S., 37 Tex. Cr. R. 145, 38 S. W. R. 1010; Douglass *v.* S., 18 Ind. Ap. 289, 48 N. E. R. 9.]

[10] *Ante*, § 291; Smith *v.* S., 37 Ala. 472; [Stockton *v.* S. (Tex. Cr. R.), 44 S. W. R. 509.]

[11] *Ante*, § 291; Swallow *v.* S., 20 Ala. 30; S. *v.* Norton, 19 Tex. 102, 205; Wheelock *v.* S., 15 Tex. 260; Cain *v.* S., 30 Ala. 534; [Sisk *v.* S., 28 Tex. Ap. 432, 13 S. W. R. 647; Downey *v.* S., 90 Ala. 644, 8 S. R. 869; Pickens *v.* S. (Ala.), 14 S. R. 672; Armstrong *v.* S. (Tex. Cr. R.), 31 S. W. R. 664; Hopkins *v.* S. (Tex. Cr. R.), 33 S. W. R. 975.]

Then we have, as probably not needing explanation, such expressions as "house where spirituous liquors are retailed,"[1] "saloon,"[2] "the premises,"[3] "public gambling-house,"[4] "highway" (meaning a public way in distinction from a private one),[5] "place."[6] There are other statutes against gaming in particular places, in distinction from gaming generally; but they have not led to expositions of doctrine rendering advisable a further consideration of the topic.[7]

Grat. 679; Com. *v.* Sylvester, 13 Allen, 247; Lowrie *v.* S., 43 Tex. 602; [Dickey *v.* S., 68 Ala. 508; Foster *v.* S., 84 Ala. 451, 4 S. R. 833; S. *v.* Brast, 31 W. Va. 380, 7 S. E. R. 11; Dailey *v.* S., 27 Tex. Ap. 569, 11 S. W. R. 636; Comer *v.* S., 26 Tex. Ap. 509, 10 S. W. R. 106; Franklin *v.* S., 91 Ala. 23, 8 S. R. 678; Borches *v.* S., 31 Tex. Cr. R. 517, 21 S. W. R. 192; Gomprecht *v.* S., 36 Tex. Cr. R. 436, 37 S. W. R. 734; Goldstein *v.* S. (Tex. Cr. R.), 35 S. W. R. 289; Nichols *v.* S., 111 Ala. 58, 20 S. R. 564; Ford *v.* S. (Ala.), 26 S. R. 503; White *v.* S., 39 Tex. Cr. R. 137, 45 S. W. R. 579; Crutcher *v.* S., 39 Tex. Cr. R. 233, 45 S. W. R. 594.]

[1] Napier *v.* S., 50 Ala. 168; Ray *v.* S., 50 Ala. 172; Phillips *v.* S., 51 Ala. 20; Johnson *v.* S., 36 Tex. 198; Galbreath *v.* S., 36 Tex. 200; Harcrow *v.* S., 2 Tex. Ap. 511. A statute made punishable the keeping of a "billiard-table in connection with a house where spirituous liquors are retailed, as an appendage thereto;" and the construction was that the room for gaming need not be under the same roof with the other, but it is sufficient that the two constitute one establishment and are contiguous. Smith *v.* S., 22 Ala. 54. And see S. *v.* Smitherman, 1 Ire. 14; [Watson *v.* S., 13 Tex. Ap. 479; Stebbins *v.* S., 22 Tex. Ap. 32, 2 S. W. R. 617; Springfield *v.* S. (Tex. Ap.), 12 S. W. R. 1010; McCalman *v.* S., 96 Ala. 98, 11 S. R. 408; Koenig *v.* S. (Tex. Cr. R.), 26 S. W. R. 835; Wuster *v.* S. (Tex. Cr. R.), 26 S. W. R. 839.]

[2] O'Brien *v.* S., 10 Tex. Ap. 544; [Snow *v.* S., 50 Ark. 557, 9 S. W. R. 306.] And see Kitson *v.* Ann Arbor, 26 Mich. 325; S. *v.* Mansker, 36 Tex. 364.

[3] S. *v.* Black, 9 Ire. 378.

[4] Lockhart *v.* S., 10 Tex. 275; Rice *v.* S., 10 Tex. 545. And see Buck *v.* S., 1 Ohio St. 61; [Stevenson *v.* S., 83 Ga. 575. 10 S. E. R. 234; Com. *v.* Adams, 160 Mass. 310, 31 N. E. R. 851; Com. *v.* Blankinship, 165 Mass. 40, 42 N. E. R. 115; Wortelsky *v.* S. (Tex. Cr. R.), 33 S. W. R. 1079; Toll *v.* S., 40 Fla. 169, 23 S. R. 942.]

[5] Mills *v.* S., 20 Ala. 86; Crim. Law, II. § 1266. And see *ante*, § 298.

[6] Eastwood *v.* Miller, Law R. 9 Q. B. 440; Haigh *v.* Sheffield, Law R. 10 Q. B. 102; Bows *v.* Fenwick, Law R. 9 C. P. 339; Gallaway *v.* Maries, 8 Q. B. D. 275.

[7] See Com. *v.* Price, 8 Leigh, 757; Mount *v.* S., 7 Sm. & M. 277; Buck *v.* S., 1 Ohio St. 61; Stith *v.* S., 13 Ark. 630; Blanton *v.* S., 5 Blackf. 560; Calvert *v.* Com., 5 B. Monr. 264; Baker *v.* S., 2 Har. & J. 5; S. *v.* Records, 4 Harring. (Del.) 554; S. *v.* Fearson, 2 Md. 310; S. *v.* Mathis, 3 Pike, 84; Roberts *v.* Com., 11 B. Monr. 3; [S. *v.* Norwood, 94 N. C. 935; S. *v.* Eaton, 85 Me. 237, 27 Atl. R. 126; Ransome *v.* S., 91 Tenn. 716, 20 S. W. R. 310, 15 Crim. Law Mag. 100; Swigert *v.* P., 154 Ill. 284, 40 N. E. R. 462, 27 Chic. Leg. News, 211; S. *v.* Metcalf, 65 Mo. Ap. 681, 2 Mo. Ap. R. 1269; Cochran *v.* S., 102 Ga. 631, 59 S. E. R. 438. It has been held that an agent of a firm

§ 879. **"Common gambler."** — There are analogies[1] for the proposition that, for one to be a "common gambler" under a statute, he must have gambled in at least three specific instances, which should be shown against him, with other facts. But a Kentucky case holds a single instance sufficient, when taken in connection with circumstances, like the display of gaming implements. Said Underwood, J.: "While many acts of gaming may be palliated, so as to show that the general conduct and practices of an individual are not such as to constitute him a *common gambler;* on the other hand, a single act may be attended with such circumstances as to justify a conviction." But evidence that the defendant "was and is by reputation a common gambler" was adjudged incompetent.[2] This offense, like any other, should be proved as committed in the county of the indictment.[3]

§ 880. **Felony or misdemeanor.** — There are, or have been, statutes making some aggravated forms of gaming felony.[4] But generally in our states it is misdemeanor.[5]

§ 881. **Assisting at game.** — Under a statute to punish those who should "set up or keep" the forbidden device, or "induce or permit any person or persons to bet any money or other thing" thereon, it was held that one to be within the inhibition need not personally bet; and, if he deals the cards, he commits the offense, though he has no interest in the profits of the game.[6] Likewise one who procures another to lay a wager for his profit,[7] or bets

beyond state limits, who takes orders for the firm, may be criminally liable under statute prohibiting bucket shops. Soby *v.* P., 134 Ill. 66, 18 Crim. Law Mag. 63, 25 N. E. R. 109. See also P. *v.* Hess, 85 Mich. 128, 48 N. W. R. 181.]

[1] *Post*, § 1018; Crim. Law, I, § 1102; II, § 65.

[2] Com. *v.* Hopkins, 2 Dana, 418. And see S. *v.* Markham, 15 La. An. 498; Howard *v.* S., 64 Ind. 516.

[3] Bowe *v.* S., 25 Ind. 415; Hamilton *v.* S., 25 Ind. 426.

[4] *Ante*, § 135; Hayes *v.* S., 55 Ind. 99; [Bibb *v.* S., 83 Ala. 84, 3 S. R. 711; Bibb *v.* S., 84 Ala. 13, 4 S. R. 275.]

[5] P. *v.* Shear, 7 Cal. 139; Hayes *v.* S., *supra;* [S. *v.* Shaw, 39 Minn. 153, 39 N. W. R. 305.]

[6] Com. *v.* Burns, 4 J. J. Mar. 177. [Or keeping watch to prevent detection. Earp *v.* S. (Tex. Ap.), 13 S. W. R. 888. But simply holding the bets in a game of craps for a compensation of five cents each alternate throw, and having no interest otherwise, is not keeping or exhibiting, etc. Chappell *v.* S., 26 Tex. Ap. 310, 11 S. W. R. 411.]

[7] Williams *v.* S., 12 Sm. & M. 58. But see, on this general doctrine, O'Blennis *v.* S., 12 Mo. 311; English *v.* Young, 10 B. Monr. 141.

with money which another furnishes,[1] is equally guilty as though he staked personally his own money,[2] — a doctrine liable to be varied by the special terms of the statute.[3]

[1] Iseley *v.* S., 8 Blackf. 403. And see, on this point and the last, Com. *v.* Drew, 3 Cush. 279; Hinkle *v.* Com., 4 Dana, 518; S. *v.* Purdom, 3 Mo. 114; Ward *v.* S., 22 Ala. 16; [Atkins *v.* S., 95 Tenn. 474, 32 S. W. R. 391; S. *v.* De Boy, 117 N. C. 702, 23 S. E. R. 167; Douglass *v.* S., 18 Ind. Ap. 280, 48 N. E. R. 9; Letz *v.* S. (Tex. Ap.), 21 S. W. R. 371.]

[2] And see Stone *v.* S., 3 Tex. Ap. 675. For other points, see Elliott *v.* S., 26 Ala. 78; Johnson *v.* S., 4 Sneed, 614.

[3] *Ante*, § 145; Bass *v.* S., 37 Ala. 469; [Jeffries *v.* S., 61 Ark. 308, 32 S. W. R. 1080; Varnells *v.* Com., 83 Ky. 193.]

CHAPTER LI.

GAMING — THE PROCEDURE.

§§ 882, 883. Introduction.
884–892. Particular forms of gaming.
893–917. Particular questions.
918–926. Specially of betting on games.
927–930. Specially of horse-racing and the like.

§ 882. What for this chapter.— By reason of the great numbers and diversities of the statutes, we shall in this chapter, as in the last, keep within general doctrines, and references to the cases which will enable the reader to trace them for himself into their details; assuming that he has before him the books local to his state.

§ 883. How chapter divided.— We shall consider, I. The procedure for some particular forms of gaming; II. Particular questions of procedure; III. Specially of betting on games; IV. Specially of horse-racing and the like.

I. The Procedure for Some Particular Forms of Gaming.

§ 884. Indictment in general.— The indictment for each of the several forms of offense is drawn after the general rules for the indictment on statutes, and upon the particular statutory terms, to all of which it must conform.[1]

§ 885. Fraudulent winning.— In England the statute of 9 Anne, ch. 14, which appears to have been in force until 1845, made it an offense to win "any sum or sums of money or other valuable thing," by "any fraud or shift, cosenage, circumven-

[1] *Post*, §§ 908, 909; S. *v.* Jeffrey, 33 Ark. 136; Zook *v.* S., 47 Ind. 463; Alexander *v.* S., 48 Ind. 394; Gallagher *v.* S., 26 Wis. 423; Carper *v.* S., 27 Ohio St. 572; S. *v.* Allen, 69 Ind. 124; Johnson *v.* S., 36 Tex. 198; Donniger *v.* S., 52 Ind. 326; Com. *v.* Edds, 14 Gray, 406; S. *v.* Cooster, 10 Iowa, 453; Perez *v.* S., 48 Ala. 356; S. *v.* Alvey, 26 Tex. 155; S. *v.* Arnold, 37 Tex. 409; S. *v.* Shult, 41 Tex. 548; Longworth *v.* S., 41 Tex. 508; S. *v.* Howery, 41 Tex. 506; Elsberry *v.* S., 41 Tex. 158; Roberts *v.* S., 32 Ohio St. 171; Davis *v.* S., 32 Ohio St. 24; Howard *v.* S., 64 Ind. 516; S. *v.* Homan, 41 Tex. 155; Galbreath *v.* S., 36 Tex. 200; Herron *v.* S., 36 Tex. 285; S. *v.* Roderica, 35 Tex. 507; S. *v.* Jurgins, 31 Tex. 588; S. *v.* Stogsdale, 67

tion, deceit or unlawful device, or ill practice whatsoever, in playing at or with cards, dice, or any," etc. And it was a good indictment thereon to say that the defendant, at a time and place specified, by fraud, etc., as above, in playing at cards, to wit, stating the names of the game and of the person played with, did win and acquire to himself a large sum of money, to wit, saying how much [of the property of such person,[1]] etc., concluding as for a statutory misdemeanor.[2]

§ 886. The evidence.— Archbold[3] observes that, to sustain this indictment, the defendant must be shown to have won the money, or some part of it,[4] by the averred fraud.[5] And a "variance between the indictment and evidence as to the game played (if stated) would be fatal." Also, if the thing won is alleged to be bills of exchange, the proof must be so.[6]

§ 887. Winning more than sum named.— The statute of Anne also made indictable those who should, "at any one time or sitting, win of any one or more person or persons whatsoever above the sum or value of ten pounds." And it was adequate in allegation to say that, at a specified time and place, the defendant, by playing at and with cards, at a game and with a person named, did win of him at one time and sitting above the sum and value of ten pounds, that is to say, the sum of sixty pounds [of his moneys,[7]] etc.[8]

§ 888. The evidence.— The exact sum won need not be proved as laid; it must simply be shown to be over ten pounds, for if less the offense was not committed.[9] The winning is at

Mo. 630; Wheeler *v.* S., 42 Md. 563; Batre *v.* S., 18 Ala. 119; Eubanks *v.* S., 17 Ala. 181; Sheppard *v.* S., 1 Tex. Ap. 304; Lindsey *v.* S., 48 Ala. 169; King *v.* S., 3 Tex. Ap. 7; Com. *v.* Crupper, 3 Dana, 466; S. *v.* Ames, 10 Mo. 743; S. *v.* Keeslering, 12 Mo. 665; S. *v.* Austin, 12 Mo. 576; Campbell *v.* S., 2 Tex. Ap. 187; Rice *v.* S., 3 Kan. 141; McGaffey *v.* S., 4 Tex. 156; Carr *v.* S., 50 Ind. 178; S. *v.* Thomas, 50 Ind. 292; Territory *v.* Copely, 1 New Mex. 571; S. *v.* Anderson, 30 Ark. 131; Leath *v.* Com., 32 Grat. 873; Moore *v.* S., 65 Ind. 213; Gibbons *v.* P., 33 Ill. 442.

[1] Unnecessary. Reg. *v.* Moss, Dears. & B. 104, 7 Cox, C. C. 200.

[2] Archb. Crim. Pl. & Ev. (10th Lond. ed.) 657. Under the Illinois statute, Blemer *v.* P., 76 Ill. 265. See S. *v.* Stillwell, 16 Kan. 24.

[3] Id. 657, 658.

[4] See Rex *v.* Darley, 1 Stark. 359.

[5] See Rex *v.* Rogier, 2 D. & R. 431, 1 B. & C. 272.

[6] Rex *v.* Darley, *supra*.

[7] Probably unnecessary, as see *ante*, § 885, note.

[8] Archb. Crim. Pl. & Ev. (10th Lond. ed.) 658.

[9] Crim. Pro., I, § 433*b*; Rex *v.* Darley, 1 Stark. 359.

one sitting where the company does not separate, though the playing should not be continuous, as where dinner intervenes; "to lose ten pounds at one time," said Blackstone, J., is to lose it by a single stake or bet."[1]

§ 889. **Permitting gaming by minors.**—The statutes on this subject[2] are not in uniform terms; and, whatever they may be, the indictment must duly cover them.[3] It must set out, for example, that a game was played, and with whom, or allege an excuse for not naming him.[4] And where the playing was charged to be with "persons" unknown, and it was proved to have been with one "person," the variance was adjudged fatal.[5] If the statute is silent as to the defendant's knowledge of the minority, there need be neither allegation nor proof of such knowledge, while yet the want of it will in the proper circumstances constitute a good defense.[6] The fact of minority must be proved as a part of the state's *prima facie* case,[7] the "congregating" of minors where this is an element of the offense,[8] and the same of all the rest.[9]

§ 890. **Permitting or setting up gambling device or place.** Where the thing forbidden is the permitting of a gambling device on one's premises, it is sufficient to charge that the defendant did there permit such device, specifying it; without alleging, what is not a necessary part of the offense, that there was gaming thereon.[10] The indictment should as far specify the place as the statute does.[11] The chief rule, in all

[1] Bones *v.* Booth, 2 W. Bl. 1226.

[2] *Ante*, § 877.

[3] Zook *v.* S., 47 Ind. 463; Donniger *v.* S., 52 Ind. 326; Powell *v.* S., 62 Ind. 531; Ready *v.* S., 62 Ind. 1; Manheim *v.* S., 66 Ind. 65; Bond *v.* S., 52 Ind. 457; Conyers *v.* S., 50 Ga. 103, [15 Am. R. 686;] Green *v.* Com., 5 Bush, 327; S. *v.* Ward, 57 Ind. 537.

[4] Zook *v.* S., *supra;* Alexander *v.* S., 48 Ind. 394.

[5] Moore *v.* S., 65 Ind. 213.

[6] Crim. Pro., I, §§ 522, 523; *ante*, §§ 675, 877; Com. *v.* Emmons, 98 Mass. 6.

[7] *Ante*, § 482; Com. *v.* Emmons, *supra.*

[8] Powell *v.* S., *supra.*

[9] Conyers *v.* S., *supra;* Bartender *v.* S., 51 Ind. 73; Squier *v.* S., 66 Ind. 317, 604; Hipes *v.* S., 73 Ind. 39.

[10] S. *v.* Scaggs, 33 Mo. 92; S. *v.* Thomas, 50 Ind. 292. And see S. *v.* Whitworth, 8 Port. 434; [Keith *v.* S., 90 Ind. 89; Bobel *v.* P., 173 Ill. 19. An indictment for keeping a device known as a "nickel in the slot machine," held sufficient without specifying the manner in which said device is operated. Kalshorn *v.* S. (Ga.), 23 S. E. R. 829.]

[11] S. *v.* Mansker, 36 Tex. 364.

cases of this sort, is to cover duly the statutory terms.[1] And the proofs must sustain all the essential allegations.[2]

§ 891. Permitting gaming.— The indictment for this form of the offense is substantially the same as for the last. The statutory terms must be duly and formally covered.[3] And the proofs must establish the essential allegations.[4]

§ 892. Permitting gambling table to be exhibited.— An indictment for this offense, if it covers the statutory terms, is good when it says that, at a time and place stated, the defendant, being the owner of, etc., specifying the building, etc., did then and there unlawfully, etc., permit and suffer a certain gambling table, called, etc., to be exhibited and carried on in the said premises.[5]

II. Particular Questions of Procedure.

§ 893. Negativing exceptions and provisos.—We saw, in another connection,[6] what exceptions and provisos in a statute must, as general doctrine, be negatived in an indictment, and what need not be. Within the distinctions there laid down

[1] S. *v.* Bullion, 42 Tex. 77; Wheeler *v.* S., 42 Md. 563; Enright *v.* S., 58 Ind. 567; Hanrahan *v.* S., 57 Ind. 527; Rice *v.* S., 3 Kan. 141; Territory *v.* Copely, 1 New Mex. 571; S. *v.* Fulton, 19 Mo. 680; S. *v.* Smith, 19 Mo. 683; Truitt *v.* P., 88 Ill. 518; Montee *v.* Com., 3 J. J. Mar. 132; S. *v.* Foster, 2 Mo. 210; S. *v.* Kesslering, 12 Mo. 565; S. *v.* Austin, 12 Mo. 576; S. *v.* Fletcher, 18 Mo. 425; Stoltz *v.* P., 4 Scam. 168; Campbell *v.* S., 2 Tex. Ap. 187; [Com. *v.* Walker, 163 Mass. 226; S. *v.* Thompson, 4 S. D. 95; S. *v.* Desroche, 47 La. An. 651, 17 S. R. 209; S. *v.* King (N. H.), 34 Atl. R. 261; S. *v.* Krueger (Mo.), 35 S. W. R. 604; S. *v.* Lynch, 88 Me. 195, 33 Atl. R. 978; McBride *v.* S., 39 Fla. 442, 22 S. R. 711.]

[2] S. *v.* Cooster, 10 Iowa, 453; Rice *v.* S., 3 Kan. 141; Harris *v.* S., 5 Tex. 11; Chase *v.* P., 2 Colo. 509; S. *v.* Howery, 41 Tex. 506; S. *v.* Whitworth, 8 Port. 434.

[3] S. *v.* Middleton, 11 Iowa, 246; Com. *v.* Fraize, 5 Bush, 325; Perez *v.* S., 48 Ala. 356; Enwright *v.* S., 58 Ind. 567; Montee *v.* Com., 3 J. J. Mar. 132; Com. *v.* Lampton, 4 Bibb, 261; Buford *v.* Com., 14 B. Monr. 24; McGaffey *v.* S., 4 Tex. 156; S. *v.* Crowder, 39 Tex. 47; S. *v.* Noyes, 10 Fost. (N. H.) 279; S. *v.* Kennedy, 1 Ala. 31; S. *v.* Noland, 29 Ind. 212; Metz *v.* Com., 2 Met. (Ky.) 14; Com. *v.* Bolkom, 3 Pick. 281; Com. *v.* Arnold, 4 Pick. 251; Com. *v.* Pattee, 12 Cush. 501; Com. *v.* Stowell, 9 Met. 572; S. *v.* Brice, 2 Brev. 66.

[4] Redgate *v.* Haynes, 1 Q. B. D. 89; Chase *v.* P., 2 Colo. 509; Com. *v.* Bolkom, *supra;* O'Brien *v.* S., 10 Tex. Ap. 544; Schooler *v.* S., 57 Ind. 127.

[5] Clark *v.* S., 19 Ala. 552. [As to necessity for alleging ownership of building, see S. *v.* Grimes, 77 N. W. R. 4.]

[6] Crim. Pro., I, §§ 631–641.

some of the statutes against gaming require the negation,[1] others do not.[2]

§ 894. Name of third person playing.— Commonly, to identify the particular instance, the indictment should by the better opinion allege the name of the third person with whom the game was played, if known; or, if not known, say that it is to the jurors unknown.[3] But this is not required by all our courts under every form of the statutory provision; nor is it easy to derive from the cases an exact rule as to when such name becomes indispensable.[4] But, on principle, where the transaction is otherwise identified, or where the playing is not of the essence of the offense, the giving of the players' names should not be deemed important; as, for example,—

§ 895. For permitting gaming-tables. — Under the Alabama statute against permitting gaming-tables to be exhibited on one's premises, it is unnecessary, we have seen,[5] to allege the name of the person by whom the particular table complained of was exhibited.[6] So likewise, in this form of the offense, the names of the players on the table or other device need not be averred.[7]

[1] Holt *v.* Com., 2 Bush, 33, 35.

[2] Clark *v.* S., 19 Ala. 552; Romp *v.* S., 3 Greene (Iowa), 276. See *ante*, §§ 606, 755; [Colchell *v.* S., 23 Tex. Ap. 584.]

[3] Crim. Pro., I, §§ 546–552, 566, 570; Butler *v.* S., 5 Blackf. 280; S. *v.* Irvin, 5 Blackf. 343; Zook *v.* S., 47 Ind. 468; Alexander *v.* S., 48 Ind. 394; Donniger *v.* S., 52 Ind. 326; Bond *v.* S., 52 Ind. 457; S. *v.* Maxwell, 5 Blackf. 230; Groner *v.* S., 6 Fla. 39; Barkman *v.* S., 13 Ark. 703; Jester *v.* S., 14 Ark. 552; Buck *v.* S., 1 Ohio St. 61; Davis *v.* S., 22 Ga. 101, 102. See also Moffatt *v.* S., 6 Eng. 169.

[4] Green *v.* P., 21 Ill. 125; Coggins *v.* S., 7 Port. 263; Romp *v.* S., 3 Greene (Iowa), 276; Johnson *v.* S., 36 Tex. 198; Roberts *v.* S., 32 Ohio St. 171; [Schweizer *v.* Terr. (Okl.), 47 Pac. R. 1094.]

[5] *Ante*, § 892.

[6] Clark *v.* S., 19 Ala. 552.

[7] S. *v.* Thomas, 50 Ind. 292; Chase *v.* P., 2 Colo. 509; Com. *v.* Crupper, 3 Dana, 466. In Indiana an indictment charged "that M., on, etc., at, etc., and continuously from that day until the day of the finding of this bill of indictment, had and possessed a house, a room, a shed, and a tenement, situate in said county, and that the said M. there, during all the time aforesaid, did keep and suffer his said house, room, shed, and tenement, to be used and occupied for gaming, contrary," etc. And this was held to be good; while, to sustain it, no more need be proved than that the defendant kept any one of the places during the time and for the purpose alleged. The gambling need not be shown by direct evidence; it may be inferred from circumstances. McAlpin *v.* S., 3 Ind. 567. See also Bowe *v.* S., 25 Ind. 415; Hamilton *v.* S., 25 Ind. 426; Com. *v.* Branham, 3 Bush, 1; Com. *v.* Fraize, 5 Bush, 325; S. *v.* Lewis, 12 Wis. 434; Frisbie *v.* S., 1 Oreg. 264.

§ 896. Name of game.—Where the names of the players, the date, and the locality are alleged, and in other respects the statutory terms are covered, there would appear to be a sufficient identification of the transaction without adding the name of the game. And so, in general, are the authorities;[1] while yet, if the name is given, it must be proved, to avoid a variance.[2] And under numerous statutes, more or less in the way of describing the game is required.[3] There are even statutes under which it has been held necessary to give the name of the game, or aver it as unknown.[4]

§ 897. Name of device.— Where the statute declares a particular thing by name — for example, "faro "— to be a "game," then forbids the betting at such "gaming-table or bank," an indictment is good which alleges that the defendant "did bet at a gaming bank commonly called a faro-bank;" for the court judicially knows that to be a game which the statute has specified as such. But under other statutory terms the allegation must be more or less varied from this model.[5]

§ 898. Thing played for — (Money).— Where the playing for a particular thing — as, for example, "money "[6] — is an element in the offense, it must be alleged. But if neither the punishment nor the jurisdiction of the tribunal depends on the sum, the indictment need not say how much;[7] otherwise it must specify the sum.[8] Still,—

[1] Groner *v.* S., 6 Fla. 39. To the like effect see S. *v.* Maxwell, 5 Blackf. 230; S. *v.* Ross, 7 Blackf. 322; Johnston *v.* S., 7 Sm. & M. 58; Dean *v.* S., Mart. & Yerg. 127; S. *v.* Grace, 21 Ark. 227; Com. *v.* Crupper, 3 Dana, 466; Campbell *v.* S., 2 Tex. Ap. 187; [S. *v.* Grimes, 77 N. W. R. 4; Downey *v.* S., 115 Ala. 108].

[2] S. *v.* Anderson, 30 Ark. 131. An indictment for unlawfully playing at cards is supported by proof of betting at a game of faro. Gibboney *v.* Com., 14 Grat. 582. Where the charge was an unlawful playing with cards, to wit, at the game of "all fours," of "loo" and of "whist," it was held that the defendant must be shown to have played at some one of the games specified. Windsor *v.* Com., 4 Leigh, 680; [Baker *v.* S. (Tex. Cr. Ap.), 35 S. W. R. 666.]

[3] S. *v.* Gitt Lee, 6 Oreg. 425; Webster *v.* S., 8 Blackf. 400. See S. *v.* Ritchie, 2 Dev. & Bat. 29.

[4] S. *v.* Jeffrey, 33 Ark. 136.

[5] S. *v.* Burton, 25 Tex. 420; Com. *v.* Monarch, 6 Bush, 301; S. *v.* Lewis, 12 Wis. 434; Com. *v.* Monarch, 6 Bush, 298; S. *v.* Blair, 41 Tex. 30; Blair *v.* S., 32 Tex. 474; S. *v.* Bristow, 41 Tex. 146; Ben *v.* S., 9 Tex. Ap. 107.

[6] *Ante*, § 874.

[7] Moffatt *v.* S., 6 Eng. 169; Com. *v.* Tiernan, 4 Grat. 545; S. *v.* Ward, 9 Tex. 370; [Collins *v.* S., 70 Ala. 19.]

[8] Long *v.* S., 13 Ind. 566; [Stearns *v.* S. (Md.), 32 Atl. R. 282.]

§ 899. Needless mention of sum.— In those cases wherein the sum is not required to be stated, no harm will come from averring it. And proof of a different sum will sustain the allegation.[1]

§ 900. "Valuable thing."— Under the statutory term "valuable thing,"[2] differing from "money," the indictment must be more specific,[3] and say what the particular valuable thing was.[4] And,—

§ 901. Proof of thing — ("Money").— Though money need not always be proved in amount as alleged,[5] the thing, whatever it is, must be of the averred kind. If, for example, the accusation is that the defendant won $5, it is not made good by showing that he won a promissory note for $5, because such note is not money.[6] Nor is the charge that money was bet sustained by proof of the betting of any other property.[7] If the money was seen lying on the table where the defendant and others were playing, the jury may infer that it was bet on the game.[8]

§ 902. Place of gaming.— Where the place at which the gaming is carried on — as "public place," "public house," or the like — is an element of the offense,[9] a charge simply that it was in the county is not sufficient; the particular statutory place must also be specified.[10] But the name of its owner need not be added;[11] or, if given, it need not be proved.[12] If the statutory term is general the indictment must be made more specific; if specific, the statutory word alone will suffice in allegation.[13] To illustrate,—

"*Outhouse.*"— Where the expression in the statute was "outhouse where people resort," the averment was held suffi-

[1] Medlock *v.* S., 18 Ark. 363; Parsons *v.* S., 2 Ind. 499; Com. *v.* Garland, 3 Met. (Ky.) 478.

[2] *Ante*, § 875.

[3] Crim. Pro., I, §§ 568–570; *ante*, §§ 426, 440; [Mallory *v.* S., 62 Ga. 164.]

[4] Anthony *v.* S., 4 Humph. 83, 85.

[5] *Ante*, §§ 898, 899.

[6] Tate *v.* S., 5 Blackf. 174; *ante*, §§ 346, 874.

[7] Hale *v.* S., 8 Tex. 171.

[8] Rice *v.* S., 10 Tex. 545. And see Wilcox *v.* S., 26 Tex. 145; St. Louis *v.* Sullivan, 8 Mo. Ap. 455; S. *v.* Andrews, 43 Mo. 470.

[9] *Ante*, § 878.

[10] S. *v.* Langford, 3 Ire. 354; Shihagan *v.* S., 9 Tex. 430; Hord *v.* Com., 4 Leigh, 674, [26 Am. D. 340. See Keith *v.* S., 90 Ind. 89.]

[11] S. *v.* Atkyns, 1 Ala. 180.

[12] Wilson *v.* S., 5 Tex. 21; Prior *v.* S., 4 Tex. 383. Yet query, and see *post*, § 911; Crim. Pro., I, § 488*b*.

[13] Crim. Pro., I, §§ 566–584; *ante*, §§ 426, 440; P. *v.* Saviers, 14 Cal. 29; S. *v.* Atkyns, *supra*.

cient which laid the game "in a certain outhouse to which divers people did then and there resort."[1] So —

"*House of entertainment*"—"*House for retailing*," *etc.*— To lay the offense simply as in "a house of entertainment,"[2] or "house for retailing spirituous liquors,"[3] will suffice where these are the statutory words. But —

§ 903. "**Public place**"—"**Public house.**"— The terms "public place" and "public house" are alone, respectively, too indefinite; the indictment must be more specific.[4] Yet, in Alabama, a statute has made the general expression adequate.[5] Now,—

§ 904. **Form of specific.**— Where the gaming was alleged to have occurred "near McFadden's grocery, at a public place at Black Jack Springs in Fayette county," the description of the "public place" of the statute was held to be adequate.[6] And it was the same where the allegation was that the defendant did play "at a certain game with cards at the county jail in the town of G. in H. county, said jail being then and there a public place."[7] So also it was sufficient to say that the accused "did unlawfully play at a game with cards at a public house; to wit, in the back room of the storehouse of S.," adding time and venue.[8] But it was adjudged inadequate to say, "at the grocery of D. & C.," there being no averment that the grocery was a "public place," or a "place of public resort."[9]

§ 905. **Time — (Place for retailing liquors).**— Where the statutory place was "any tavern, inn, storehouse for retailing spirituous liquors," etc., an allegation that the defendant, "in the county aforesaid, did play at cards in a storehouse where

[1] S. *v.* Norton, 19 Tex. 102; [Otto *v.* S. (Tex. Cr. Ap.), 25 S. W. R. 285; Cole *v.* S., 28 Tex. Ap. 536, 13 S. W. R. 859; Bacchus *v.* S., 18 Tex. Ap. 15.]

[2] Linkous *v.* Com., 9 Leigh, 608.

[3] Sublett *v.* S., 9 Tex. 53. And see Rodgers *v.* S., 26 Ala. 76.

[4] S. *v.* Jurgins, 31 Tex. 588, 589; S. *v.* Fuller, 31 Tex. 559; Elsberry *v.* S., 41 Tex. 158; S. *v.* Barns, 25 Tex. 654; Millican *v.* S., 25 Tex. 664. And see Com. *v.* Perrigo, 3 Met. (Ky.) 5; Bosshard *v.* S., 25 Tex. Supp. 207.

[5] Roquemore *v.* S., 19 Ala. 528; Flake *v.* S., 19 Ala. 551. See also Burnett *v.* S., 30 Ala. 19.

[6] S. *v.* Lopez, 18 Tex. 33.

[7] S. *v.* Arnold, 37 Tex. 409.

[8] Sheppard *v.* S., 1 Tex. Ap. 304. And see Manheim *v.* S., 66 Ind. 65.

[9] Roberts *v.* Com., 10 Leigh, 686. See McGaffey *v.* S., 4 Tex. 156. And see, as to this question, *ante*, §§ 897, 903.

spirituous liquors are retailed," was adjudged ill; because it did not appear from this, as it ought, that the storehouse was a place where spirituous liquors were retailed at the time when the playing occurred.[1] But the following was sustained: "That Peter Royal, late of, etc., in a certain house for retailing spirituous liquors, in the town of Huntsville and county of Walker, known as Harvey Randolph's grocery, on, etc., did play at a certain game with cards, upon which money was then and there bet, contrary," etc.[2] [In Kansas it is held that an averment of the particular county and state is sufficiently particular as to place.[3]]

§ 906. "Highway or other public place."—Under the statute quoted in an earlier section,[4] where the expression was "any public house or highway, or any *other* public place," an allegation of playing "at a public place" was adjudged not sustained by proof of a playing in a "highway."[5]

§ 907. Law or fact.— Where all the facts are agreed, it is plainly enough, in principle, a question of law whether or not the place in controversy is within the statutory terms.[6] But commonly the facts are not agreed; and then the court instructs the jury in the meaning of the particular term, and they are to say whether or not the place is within it. Possibly some of the cases go a little further than this — if so, too far — in remitting the question to the jury.[7]

§ 908. Statutory terms.— The general doctrine as to how closely an indictment on a statute must copy its words is explained elsewhere.[8] Under the present head,—

"*Gaming*" — "*Gambling.*" —Where "gaming" was the statutory word, "gambling" in the indictment was held not to be ill as a substitute.[9]

[1] S. *v.* Coleman, 3 Ala. 14.

[2] Royal *v.* S., 9 Tex. 449. And see Coggins *v.* S., 7 Port. 263; Reeves *v.* S., 9 Tex. 447; Wortham *v.* Com., 5 Rand. 669.

[3] [S. *v.* Oswald (Kan.), 53 Pac. R. 525.]

[4] *Ante*, § 298.

[5] Bush *v.* S., 18 Ala. 415; [Withers *v.* S., 21 Tex. Ap., 210.]

[6] Crim. Pro., I, §§ 989*a*, 989*b*.

[7] S. *v.* Alvey, 26 Tex. 155; Cherry *v.* S., 30 Tex. 439.

[8] Crim. Pro., I, §§ 606–622.

[9] S. *v.* Nelson, 19 Mo. 393. ["Gaming" and "gambling" are practically synonymous terms as used in the statute. McBride *v.* S., 39 Fla., 22 S. R. 711; S. *v.* Mohr, 55 Mo. Ap. 329. For legal definition of term "bet" see Long *v.* S., 22 Tex. Ap. 194.]

"*Faro-bank*" — "*Faro.*" — A statute having made it an offense to exhibit "any faro-bank," an allegation in the words "gambling-table commonly called faro" was sustained.[1]

"*With*" — "*At.*" — "With" and "at," in such phrases as playing a "game *with* cards," and "game *at* cards," are admissible substitutes for each other.[2]

§ 909. Expanding beyond statutory words. — We have seen elsewhere when, in general, an indictment on a statute must be expanded beyond its terms.[3] Under most of the statutes against gaming, the allegations need only cover the statutory words.[4] But there are exceptions. Thus,—

"*Like kind.*" — A Virginia statute made punishable the keeping or exhibiting of "a gaming-table commonly called A B C, or E O table, or faro-bank, or a table of the like kind, under any denomination, whether the game or table be played with cards, dice or otherwise." And said the court: "Where the offense charged is the exhibition of any of the gaming-tables enumerated, nothing more need be averred; for the statute makes exhibiting of any of the gaming-tables named a penal offense. And therefore the offense is sufficiently described by the name set forth in the statute, and no further description is necessary; being one of the enumerated games, the exhibition of it is unlawful. Where the offense charged is for keeping and exhibiting a game not enumerated, there must be some averment showing it to be one of the unequal games belonging to the same class with the enumerated games." Again: "The charge that the game is unlawful does not cure the defect. The offense must be so charged as to appear to be unlawful; otherwise the allegation that an act was unlawful would dispense with all averments showing it was unlawful. As was held in Roberts' Case and Bishop's Case,[5] the words 'unlawful' or 'contrary to law' do not serve to enlarge or extend the force and effect of the terms employed to describe the act, so as to

[1] Brown *v.* S., 5 Eng. 607; [Toney *v.* S., 61 Ala. 1.]

[2] Holland *v.* S., 3 Port. 232; S. *v.* Shult, 41 Tex. 548. See Ray *v.* S., 50 Ala. 172; S. *v.* Huston, 12 Tex. 245.

[3] Crim. Pro., I, §§ 624–630; *post*, § 942.

[4] *Ante*, § 884; P. *v.* Beatty, 14 Cal. 566; Spratt *v.* S., 8 Mo. 247; S. *v.* Ward, 9 Tex. 370; Crain *v.* S., 14 Tex. 634; Reeves *v.* S., 9 Tex. 447; [S. *v.* Wilson (Wash.), 36 Pac. R. 967; S. *v.* Desroche, 47 La. An. 651, 17 S. R. 209.]

[5] Roberts *v.* Com., 10 Leigh, 686; Bishop *v.* Com., 13 Grat. 785. See *post*, § 922.

make the act unlawful when it does not appear to be so by the description itself."[1]

§ 910. Variance.— We have seen something of variance[2] in these cases.[3] Among the adjudged points are —

Persons playing.— The winning and playing must be proved to have been between the persons alleged. Thus, where the charge was that the defendant won from A., B. and C., proof of a winning by him and another, as partners, from A. and C., as partners, was held to present a fatal variance.[4] And so it is where the allegation is of a winning or losing with several persons named, and the facts disclose the name of a part only of them.[5] Likewise an averment that A. lost is not supported by proof that A. and others lost jointly.[6] Again, one count charged that the defendant and four other persons did "bet together and against each other;" and the other count, that he and the other four "did bet together." The proof was that the other four played the game, while he stood by and bet with one of them; three bet together, one did not bet. And it was held that there could be no conviction; for, needlessly complicated though the allegation was, it must be in form proved.[7]

§ 911. Owner of place.— Where the offense was set out as committed at the booth of Peter Spinner, and it appeared in evidence to have been at the booth of one Clark, and Spinner had no interest or agency in this booth, the variance was adjudged fatal,[8] — a conclusion perhaps not quite in accord with a doctrine explained a little way back.[9]

§ 912. Joinder of defendants.— Offenders may be indicted jointly for this offense on the same principles as for other crimes.[10] They are not to be charged *separaliter*, except where the transactions are separate and distinct;[11] and then, it seems, this nearly obsolete method is permissible, though not to be

[1] Huff *v.* Com., 14 Grat. 643, 650, 651. See also Bryan *v.* S., 26 Ala. 65.

[2] Crim. Pro., I, §§ 483–488*c*.

[3] *Ante*, §§ 896, 899, 901, 902, 906.

[4] Wilcox *v.* S., 7 Blackf. 456.

[5] Iseley *v.* S., 8 Blackf. 403.

[6] Jackson *v.* S., 4 Ind. 560.

[7] Hany *v.* S., 4 Eng. 193. And see Jester *v.* S., 14 Ark. 552. [See Goodman *v.* S., 41 Ark. 228.]

[8] Com. *v.* Butts, 2 Va. Cas. 18.

[9] *Ante*, § 902.

[10] Crim. Pro., I, § 463 *et seq.*; Com. *v.* McGuire, 1 Va. Cas. 119; Galbreath *v.* S., 36 Tex. 200; Herron *v.* S., 36 285; S. *v.* Homan, 41 Tex. 155; S. *v.* Roderica, 35 Tex. 507; Parker *v.* S., 26 Tex. 204.

[11] Covy *v.* S., 4 Port. 186.

commended.[1] Where the indictment is joint against two, and the proof is that one played with a particular third person on one occasion, and the other with another person on another occasion, and no joint guilt is shown, both cannot be convicted.[2]

§ 913. Statutory modifications of procedure.— In some of the states there are statutes special to gaming, simplifying the forms of procedure; as,—

Indictment.— As early as 1824 it was provided in Tennessee that, in this offense, "no presentment or indictment shall be quashed for want of form; and in all such cases it shall be sufficient to charge the general name of the game at which the defendant or defendants may have played, without setting forth and describing with or against whom they may have bet or played." And the following, drawn on a statute not given in the report, was held to be good: "That A., late of, etc., on, etc., at, etc., was guilty of unlawful gaming, by then and there wagering and betting money on a certain unlawful game and match at cards, contrary to the form of the statute."[3] Again,—

§ 914. Continued.— In this condition of the laws it was adjudged sufficient to say that the defendant on, etc., at, etc., "with force and arms, did unlawfully encourage and promote a certain unlawful game and match at cards for money; and then and there unlawfully did play for and bet money at the said game and match at cards, contrary," etc.[4]

§ 915. Evidence — (Witnesses).— We have a few special provisions for compelling evidence,— not of a general character.[5]

§ 916. Limitations.— The general principles governing statutes of limitations[6] apply in gaming. The burden is on the state to prove the offense within the statutory period, not on the defendant to show that it is barred.[7] If the statute against

[1] Crim. Pro., I, § 476; S. *v.* Homan, *supra*. And see Parker *v.* S., *supra*.

[2] Elliott *v.* S., 26 Ala. 78. And see Lindsey *v.* S., 48 Ala. 169.

[3] S. *v.* McBride, 8 Humph. 66.

[4] Dean *v.* S., Mart. & Yerg. 127. And see Dobkins *v.* S., 2 Humph. 424; S. *v.* McBride, 8 Humph. 66, 67, 68.

[5] Kneeland *v.* S., 62 Ga. 395; S. *v.* Henderson, 47 Ind. 127, overruled in Frazee *v.* S., 58 Ind. 8; Batre *v.* S., 18 Ala. 119. And see Ward *v.* S., 2 Mo. 120, [22 Am. D. 449;] S. *v.* Quarles, 13 Ark. 307; Orr *v.* S., 18 Ark. 540; Higdon *v.* Heard, 14 Ga. 255.

[6] *Ante*, § 257 *et seq.*

[7] *Ante*, § 264; Manning *v.* S., 35 Tex. 723; S. *v.* Waters, 1 Strob. 59; Stevens *v.* S., 3 Pike, 66, 70.

gaming provides the punishment of both fine and imprisonment, the limitations statute may in a particular case have run as to the one and not as to the other.[1]

§ 917. Other points.— Some other points connected with the pleading and evidence appear in the cases cited in the note,[2] but no special explanations of them are deemed important here.

Recognizance.— A recognizance has been deemed not good which simply binds the party to answer to a charge of "gaming;" because "gaming is not of itself alone an indictable offense."[3] And it is the same of one to answer to a charge of "playing at a game of cards."[4] But one to appear and answer to an indictment for keeping a gaming-table was sustained.[5]

III. Specially of Betting on Games.

§ 918. Already.— Under the last sub-title much of what would be appropriate under the present one has been explained.

§ 919. Indictment.— The indictment, which will vary with the statute, is ordinarily sufficient if it covers the statutory terms in a manner to make the offense affirmatively appear.[6] Counts for exhibiting a faro-bank and for betting on the game may be joined.[7]

§ 920. Thing bet.— Commonly the thing bet should be stated.[8] Under which rule the words "goods, wares and merchandise, being valuable things," not describing anything more specifically, were held to be too indefinite.[9] But,—

[1] S. *v.* Dent, 1 Rich. 469. And see *ante*, § 261*d*.

[2] Harris *v.* S., 31 Ala. 362; S. *v.* Stallings, 3 Ind. 531; Com. *v.* Tiernan, 4 Grat. 545; S. *v.* Howe, 1 Rich. 260; Stockden *v.* S., 18 Ark. 186; Durham *v.* S., 1 Blackf. 33; Ervine *v.* Com., 5 Dana, 216; Crain *v.* S., 14 Tex. 634; Willis *v.* Warren, 1 Hilton, 590; S. *v.* Noland, 29 Ind. 212; Nuckolls *v.* Com., 32 Grat. 884; Robinson *v.* S., 24 Tex. 152.

[3] Com. *v.* West, 1 Dana, 165; S. *v.* Cotton, 6 Tex. 425.

[4] Cotton *v.* S., 7 Tex. 547. And see McDonough *v.* S., 19 Tex. 293; Bailes *v.* S., 20 Tex. 498.

[5] Whitfield *v.* S., 4 Pike, 171.

[6] Warren *v.* S., 18 Ark. 195, 198; Drew *v.* S., 5 Eng. 82; Graham *v.* S., 1 Pike, 171; S. *v.* Holland, 22 Ark. 242; Booth *v.* S., 26 Tex. 203; Ben *v.* S., 9 Tex. Ap. 107; Anderson *v.* S., 9 Tex. Ap. 177; S. *v.* Bristow, 41 Tex. 146; S. *v.* Blair, 41 Tex. 30; [Fortenburg *v.* S., 47 Ark. 188; Com. *v.* Walker, 163 Mass. 226.]

[7] S. *v.* Holland, *supra*.

[8] *Ante*, §§ 898–901; Warren *v.* S., 18 Ark. 195; Bone *v.* S., 63 Ala. 185; Napier *v.* S., 50 Ala. 168; Ray *v.* S., 50 Ala. 172.

[9] S. *v.* Kilgore, 6 Humph. 44, 45. See Bagley *v.* S., 1 Humph. 486.

§ 921. Continued.— In some of our states there are statutes rendering generally or in particular circumstances this averment unnecessary.[1] So that, for example, it was adjudged sufficient to say that the defendant "unlawfully did bet at a faro-bank, the said faro-bank being then and there kept and exhibited for the purpose of gaming."[2] And the same was held of the allegations that the defendant "did bet at a certain gaming bank, then and there exhibited and kept, called monte;"[3] and that the defendant bet money "at a certain gambling device called rondeau."[4]

§ 922. Describing game.— If the game at which was the betting is one of those forbidden by name in the statute, the indictment need only mention it by the name. But if it is pointed to simply by such words as "of the like or similar kind, or of any other description, although not named," the indictment for betting at it must so far describe it as to bring it affirmatively within the statutory inhibition. Simply to say, for example, that the defendant betted "upon and against a certain gambling device, commonly called the blind tiger," where the words "blind tiger" are not in the enactment, is inadequate.[5]

§ 923. Person bet with.— The question of naming or not such person is within principles already explained.[6] It was in one case in Arkansas adjudged unnecessary to allege that the defendant bet with any particular individual.[7] But under another provision of the act, making it punishable "if any person shall be guilty of betting any money," etc., the court required the name of the player to be given to identify the transaction,[8] — a rule afterward changed by a statute which declared it unnecessary to set out the name of the players.[9]

§ 924. Locality.— If, by construction of the statute, the betting is equally punishable whether the playing is in the same

[1] Harrison *v.* S., 15 Tex. 239; Jacobson *v.* S., 55 Ala. 151; Mitchell *v.* S., 55 Ala. 160.

[2] Blair *v.* S., 32 Tex. 474.

[3] McKissick *v.* S., 2 Tex. 356. [See also Thompson *v.* S. (Tex. Cr. Ap.), 28 S. W. R. 684.]

[4] S. *v.* Mann, 13 Tex. 61. See also Estes *v.* S., 10 Tex. 300; S. *v.* Prewitt, 10 Tex. 310; Ramey *v.* S., 14 Tex. 409; Cohen *v.* S., 17 Tex. 142.

[5] S. *v.* Grider, 18 Ark. 297. See *ante*, § 909.

[6] *Ante*, §§ 894, 895.

[7] Drew *v.* S., 5 Eng. 82; s. p., in Missouri, S. *v.* Kyle, 10 Mo. 389.

[8] Parrott *v.* S., 5 Eng. 574; Barkman *v.* S., 18 Ark. 703.

[9] Orr *v.* S., 18 Ark. 540.

or another county, only the betting, not also the playing, is required to be charged as in the county of the indictment.[1]

§ 925. The nature of the game,— as, for example, where the betting is at a faro-bank,— need not be particularized.[2]

§ 926. Adequate.— In Missouri, the averments that the defendant "did unlawfully bet a sum of money, to wit, fifty cents, at and upon a game of chance, played with and by means of half-dollars and cracks in the floor of a house, which said half-dollars and cracks were then and there a gambling device, adapted, etc., for the purpose of playing games of chance for money and property," were adjudged sufficient.[3]

IV. Specially of Horse-racing and the Like.

§ 927. On highway — (Indictment).— The indictment on a statute forbidding horse-racing "along a public highway"[4] need not set out the *termini* of the way.[5] Under some of the statutes, if there are two defendants, it must be charged that they ran "together;"[6] to omit which is not always fatal after verdict.[7]

§ 928. In proof of highway,— it is *prima facie* sufficient to show that the racing was on a road leading from one town to another in the county.[8]

§ 928a. Variance.— A charge that the defendant suffered his horse to be run in a horse-race is not sustained by proof that he rode a horse, not his own, in the race.[9]

§ 929. Betting on horse-race.— In Tennessee, an indictment alleging that the defendant "unlawfully did bet $20 upon a horse-race, and . . . said horse-race was not run upon a track or path kept for the purpose of horse-racing," was held to be insufficient, because, by the statute, the running of the race was an element in the offense, and this indictment does not show that it was run.[10] But an indictment in slightly varied

[1] S. *v.* Kyle, 10 Mo. 389; [Withers *v.* S., 21 Tex. Ap. 210.]

[2] S. *v.* Ames, 1 Mo. 524. And see *ante*, § 896.

[3] S. *v.* Flack, 24 Mo. 378.

[4] Watson *v.* S., 3 Ind. 123.

[5] S. *v.* Armstrong, 3 Ind. 139; S. *v.* Burgett, 1 Ind. 479; S. *v.* Brown, 1 Ind. 532. And see Myers *v.* S., 1 Ind. 251.

[6] S. *v.* Catchings, 43 Tex. 654; Lewellen *v.* S., 18 Tex. 538.

[7] King *v.* S., 3 Tex. Ap. 7.

[8] Watson *v.* S., 3 Ind. 123.

[9] Robb *v.* S., 52 Ind. 216.

[10] Dobkins *v.* S., 2 Humph. 424. Yet,

terms,— namely, that the defendant "did bet on a horse-race money, etc.; said race not being run on a legally licensed track,"— was held good under a statute declaring it a misdemeanor "to make any bet or wager for money."[1]

§ 930. Betting on shooting-match.— The indictment for betting on a shooting-match must, in Tennessee, to render apparent its unlawfulness under the statute, charge that the shooting was within two hundred yards of a public road of the first or second class.[2]

in an earlier case, an indictment in nearly the same terms was held to be adequate. S. *v.* Posey, 1 Humph. 384.

[1] S. *v.* Blackburn, 2 Coldw. 235.

[2] S. *v.* Bess, 5 Coldw. 55.

CHAPTER LII.

BETTING ON ELECTIONS.

§§ 931, 932. Introduction.
933–937. Law of the offense.
938–949. The procedure.

§ 931. Related to last chapter.— The subject of this chapter is within the principles of the last. Its separate treatment here is simply from convenience.

§ 932. How divided.— We shall consider, I. The law of the offense; II. The procedure.

I. The Law of the Offense.

§ 933. In civil jurisprudence.— Without the aid of any statute, betting on an election is contrary to the policy of the law, and the sum bet cannot be recovered [1] in an action against either the party or the stakeholder.[2] There are also in some of the states statutes to enforce this doctrine.[3]

§ 934. Criminal by statute.— Pretty generally in our states, statutes have made such betting a crime. Their terms vary: as, in Kentucky, they are or have been, "shall wager or bet any sum of money, or other thing, upon the election of any of the

[1] Bishop, Con., §§ 529–532.

[2] Ball *v.* Gilbert, 12 Met. 397; Worthington *v.* Black, 13 Ind. 344; Murdock *v.* Kilbourn, 6 Wis. 468; Duncan *v.* Cox, 6 Blackf. 270; Lloyd *v.* Leisenring, 7 Watts, 294; Wagonseller *v.* Snyder, 7 Watts, 343; Columbia Bank, etc. Co. *v.* Haldeman, 7 Watts & S. 233, [42 Am. D. 229;] Harper *v.* Crain, 36 Ohio St. 338, 343, [38 Am. R. 589;] Gilmore *v.* Woodcock, 70 Me. 494; Brush *v.* Keeler, 5 Wend. 250; Cooper *v.* Brewster, 1 Minn. 94; Barham *v.* Livingston, 12 La. An. 618; Bevil *v.* Hix, 12 B. Monr. 140; Guyman *v.* Burlingame, 36 Ill. 201; Nudd *v.* Burnett, 14 Ind. 25; Sipe *v.* Finarty, 6 Iowa, 394; Craig *v.* Andrews, 7 Iowa, 17; Wheeler *v.* Spencer, 15 Conn. 28; Gardner *v.* Nolen, 3 Harring. (Del.) 420; Wroth *v.* Johnson, 4 Har. & McH. 284; Bunn *v.* Riker, 4 Johns. 426, [4 Am. D. 292.] But see Morgan *v.* Pettit, 3 Scam. 529. And see *ante*, §§ 848, 872, 873; Pulver *v.* Burke, 56 Barb. 390; Johnston *v.* Russell, 37 Cal. 670.

[3] Hickman *v.* Littlepage, 2 Dana, 344; Morgan *v.* Pettit, 3 Scam. 529; Com. *v.* Moore, 2 Dana, 402; Givens *v.* Rogers, 11 Ala. 543. And see Conner *v.* Raglan, 15 B. Monr. 634; Com. *v.* Avery, 14 Bush, 625, [29 Am. R. 429. In Missouri it is held that where two persons placed wagers on an election,

officers" mentioned in a previous section, "within six months next before the election;"[1] in Alabama, "make any bet or wager of money, or other thing of value, upon any election;"[2] in Indiana, "bet or wager any money or other valuable property on the result of any election."[3]

§ 935. Election over.— The foregoing Alabama provision was held not applicable to a betting after the election is over.[4] But in Mississippi, under words slightly different,— namely, "upon the *result* of any election,"— the court deemed that a betting after the votes have been cast and before the result is ascertained, is, while less mischievous than a betting before they are cast, within the words and sufficiently within the spirit of the act, therefore adjudged it punishable.[5]

What elections.— In the absence of special terms, these statutes do not extend to elections for state officers in other states, or to unauthorized elections within the state;[6] but they do, to an election in another state for officers of the United States,[7] or, *a fortiori*, for the like in the state of the prosecution.[8]

§ 936. "Game" and "gaming."— We have seen that these words are in meaning specially flexible.[9] Under the somewhat varying Indiana statutes, betting on an election has been held to be and not to be a "game."[10]

and thereafter settled by the loser giving his note in lieu of the valuables placed with the stakeholder, that though in fact a new contract, it is void because growing out of an illegal transaction. Woolfolk *v.* Duncan, 80 Mo. Ap. 421. But it is held in Walsh *v.* Trebilcock, 23 Can. S. C. 695, that the loser of a bet upon an election cannot recover of the stakeholder after the latter has paid it over to the winner, as the parties are *in pari delicto*. See also Lewis *v.* Bruton, 74 Ala. 317, 49 Am. R. 816.]

[1] Com. *v.* Kirk, 4 B. Monr. 1.

[2] Givens *v.* Rogers, 11 Ala. 543. For the Ohio law, see Veach *v.* Elliott, 1 Ohio St. 139.

[3] Bicknell, Crim. Pr. 425, referring to Laws 1857, p. 35, 2 G. & H. 465, note f.

[4] S. *v.* Mahan, 2 Ala. 340.

[5] Miller *v.* S., 33 Miss. 356. [69 Am. D. 351.]

[6] Hickerson *v.* Benson, 8 Mo. 8, [40 Am. D. 115.]

[7] Miller *v.* S., 33 Miss. 356; Gregory *v.* King, 58 Ill. 169, [11 Am. R. 56,] overruling Smith *v.* Smith, 21 Ill. 244, [74 Am. D. 100,] and Morgan *v.* Pettit, 3 Scam. 529.

[8] McClurken *v.* Detrich, 33 Ill. 349; Quarles *v.* S., 5 Humph. 561; *ante*, § 205. And see Williams *v.* S., 12 Sm. & M. 58. See further on the matter of this section, Com. *v.* Kennedy, 15 B. Monr. 531.

[9] *Ante*, §§ 857–861.

[10] Hizer *v.* S., 12 Ind. 330; Woodcock *v.* McQueen, 11 Ind. 14; Frazee *v.* S., 58 Ind. 8, overruling S. *v.* Henderson, 47 Ind. 127; [Schlosser *v.* Smith, 93 Ind. 33.]

§ 937. What the betting.— A bet implies risk to both parties.[1] Therefore a sale of goods on a fair valuation, to be paid for when a particular candidate is elected, is not a wager; for the purchaser can in no event sustain a loss.[2] But where the agreed price is above their value, the buyer is liable to lose the difference between the two sums, therefore the transaction is a wager.[3] And there are cases which hold generally, that any promise to pay money if a person named is elected to office is a wagering contract, not enforcible.[4] Illustrations of bet are, that a particular candidate will receive a specified number of votes,[5] that he will beat another candidate,[6] and that the result of the election will be so or so.[7] An agreement between parties that the one who fails in an estimate shall make the other a present of a coat is a bet.[8]

II. The Procedure.

§ 938. Course of discussion.— We shall consider: First, the indictment; secondly, the evidence.

First. **The indictment:**—

Winning.— The allegation may be, if so the statutory terms are covered, that the defendant, at a time and place mentioned, did unlawfully win and take from a person named one hat [of the value of, etc.],[9] by then and there unlawfully betting and wagering with him for the said hat upon the result of a certain election had and held on, etc.[10] It has been adjudged ill to charge that, at a specified time and place, the defendant did "win" money on the "result" of an election subsequently held.[11]

§ 939. Betting.— Where it is a statutory offense to " wager or bet" "any money or other valuable thing" " upon the result of any election," the allegation may be that, at a time and place specified, the defendant bet, with a person named, a fifty-

[1] *Ante*, § 871. The contingency is determined when the vote is cast, though the official count and returns have not been made. Hizer *v.* S., 12 Ind. 330.

[2] Quarles *v.* S., 5 Humph. 561.

[3] Givens *v.* Rogers, 11 Ala. 543; Parsons *v.* S., 2 Ind. 499.

[4] Craig *v.* Andrews, 7 Iowa, 17; Sipe *v.* Finarty, 6 Iowa, 394; Nudd *v.* Burnett, 14 Ind. 25.

[5] Com. *v.* Kirk, 4 B. Monr. 1.

[6] Com. *v.* Pash, 9 Dana, 31.

[7] S. *v.* Cross, 2 Humph. 301.

[8] Cain *v.* S., 13 Sm. & M. 456.

[9] See *ante*, §§ 427, 444.

[10] Hizer *v.* S., 12 Ind. 330; Bicknell, Crim. Pr. 427.

[11] S. *v.* Windell, 60 Ind. 300.

dollar bank-note against a horse, upon the result of an election to be held, etc.[1] Or —

§ 940. Continued.— The form may be that, at a time and place alleged, the defendant did lay a wager and bet of fifty dollars with one B. that C. would be elected governor of, etc., at an election to be held, etc., the said C. being then and there a candidate nominated for public office, to wit, the office of, etc.[2]

§ 941. Averment of election.— Speaking of the form epitomized in the last section, Sergeant, J., said: "The objection is that the indictment does not aver that there was an election for governor about to be held in October, 1838; but it avers that the defendant made a bet dependent on an election for governor to be held in October, 1838. We think the fair implication is, not only that such bet was made, but that the election was to held at that time; and that the commonwealth would be bound in this charge to prove both these facts."[3]

§ 942. Expanding beyond statutory words.— On the question of expanding the allegation beyond the words of the statute,[4] we have from Kentucky some intimations which perhaps may not be deemed in accord with the first two of the forms just indicated. The statute made punishable any one who "shall wager or bet any sum of money, or anything of value, upon any election under the constitution and laws of this commonwealth, or under the constitution and laws of the United States." And Marshall, C. J., observed: "It is not a penal offense, under any statute, to bet that a certain individual will not be elected to a certain office at a certain election, unless he is a candidate for that office, or is voted for to fill it, or is intended or expected to be voted for, or is expected to be a candidate for it. It is not a statutory offense to bet that a man will not be a candidate for a particular office; and, unless he be a candidate, or be voted for or proposed, it may not be an offense to bet either that he will or that he will not be elected." So, proceeding on this interpretation, the court held it insuffi-

[1] Miller *v.* S., 33 Miss. 356, [69 Am. D. 351.] And see Williams *v.* S., 12 Sm. & M. 58; *ante*, § 935. In 2 Morris, State Cases, 1809, the form, in substance, given in the next section of the text, as approved in Pennsylvania, is inserted for use in Mississippi.

[2] Sherban *v.* Com., 8 Watts, 212, [34 Am. D. 460.]

[3] Sherban *v.* Com., 8 Watts, 212, 213, [34 Am. D. 460.] And see, under the title "Election offenses," *ante*, § 828 *et seq.*

[4] Crim. Pro., I, §§ 623–630; *ante*, §§ 447, 796, 909.

cient simply to set out a bet that, at an approaching election specified, a particular person named will or will not be elected. The allegation must go further and state that this person was a candidate, or was voted for, or was in some manner proposed for the office at the election.[1] Now,—

§ 943. As to which,— the conclusion of the court would seem legitimately to follow from its interpretation of the statute. But so strict a rendering is believed, on principle, not to be required. If, before the political parties had held any preliminary meetings, one person should bet with another that an individual named would not be elected to the office, the evil meant to be prevented by the statute would be done; and the offense thus committed ought not to be deemed in law to be taken away, should the former person, stimulated by his interest in the bet, spread so many falsehoods about the individual as to preclude his being even talked of afterward for a candidate. Such a case coming, therefore, within the policy of the law, as well as its words, would not demand expansion in the allegation beyond the statutory terms.

§ 944. Name of person with whom the bet.— By what is believed to be the current of decision, and it is submitted in principle,[2] the indictment should state the name of the person with whom the bet was made, if known; or if unknown, aver it to be so.[3] Yet an indictment was sustained which charged that two defendants did "unlawfully bet and wager a sum of money, to wit, one hundred dollars, on the result of an election which was held," etc.; for it sufficiently appeared that the betting was with each other,[4]— a form not to be commended.

§ 945. Value.— The value of the thing bet should be mentioned if necessary to its description or an element affecting the punishment. Otherwise it need not be.[5]

§ 946. Summary.— The indictment must state when the election was to be held.[6] But it need not add that the law required

[1] Com. *v.* Shouse, 16 B. Monr. 325, [63 Am. D. 551.]

[2] *Ante*, §§ 894–897; *post*, § 1037.

[3] Lewellen *v.* S., 18 Tex. 538; S. *v.* Little, 6 Blackf. 267. In Tennessee this averment is held not to be necessary; a statute there providing that "it shall be sufficient to charge the general name of the game, without setting forth and describing with or against whom they may have bet or played." S. *v.* Trotter, 5 Yerg. 184. See S. *v.* Smith, Meigs, 99, [33 Am. D. 132;] *post*, § 1037.

[4] S. *v.* Smith, 24 Mo. 356, 357.

[5] *Ante*, § 938, and places there referred to; *post*, § 949.

[6] Lewellen *v.* S., 18 Tex. 538.

it to be held then.[1] It must also say what was the purpose of the election; that is, whether for president, for governor, or the like.[2] An averment that "there was an election held in the state of Tennessee for president and vice-president of the United States of America" was adjudged to be sufficient, though, in exact language, it was for electors of president and vice-president; for, said Caruthers, J., "it is in substance for president and vice-president."[3] But, under the national constitution, presidential electors and the president and vice-president are chosen at different elections, held at different times and places; so that, where the charge was betting on a state election for presidential electors, and the proof was of a bet that the state would vote for a particular presidential candidate, there was adjudged to be a fatal variance.[4]

§ 947. Secondly. **The evidence:—**

Parol — Writing.— The result of a presidential election was adjudged to be provable by parol. For, among other reasons, said Thacher, J.: "Such a matter of great public interest is universally known throughont the land, and can, therefore, be proved or disproved with absolute certainty by parol proof."[5] Probably, in most of the states, it is immaterial to the offense what the result is; for which reason there is no occasion either to allege or prove it. If the terms of the bet are in writing, the writing should be produced.[6]

§ 948. **Time of bet.**— Where, from the dates in the indictment, the bet appears to have occurred before the election was held, it is still no variance to prove a bet made afterward, before the result was known.[7]

§ 949. **Value.**— The value of the thing bet must, when necessarily alleged,[8] be so far proved as to make the offense and its punishment appear.[9] But it need not be proved, or proved as laid, where it is not an ingredient in the crime and the averment is surplusage.[10]

[1] S. *v.* Banfield, 22 Mo. 461.
[2] Bellair *v.* S., 6 Blackf. 104.
[3] Porter *v.* S., 5 Sneed, 358, 359.
[4] Gamble *v.* S., 35 Miss. 222.
[5] Williams *v.* S., 12 Sm. & M. 58, 63. And see, as to Indiana, Hizer *v.* S., 12 Ind. 330.
[6] Caldwell *v.* S., 63 Ind. 283; Frazee *v.* S., 58 Ind. 8.
[7] Miller *v.* S., 33 Miss. 356, [69 Am. D. 351.] See *ante*, § 935.
[8] *Ante*, § 945.
[9] Crim. Pro., I, § 488*b*.
[10] Com. *v.* McAtee, 8 Dana, 28.

CHAPTER LIII.

LOTTERIES.

§ 950. Introduction.
951–960. Law of the offense.
961–966. The procedure.

§ 950. How chapter divided.—We shall consider, I. The law of the offense; II. The procedure.

I. The Law of the Offense.

§ 951. General and historical.—Lotteries are a species of gaming.[1] Formerly they were in our states permitted, and even established and licensed by law, as a means of raising money for worthy objects. But their evils were immense; both in the woes inflicted on the weak-minded and credulous, who were induced to buy chances in them, to be followed by bitter disappointments; and in their baneful effects on those termed "lucky," who drew the prizes. Later, under the influence of a healthier public sentiment, they are pretty generally forbidden.

§ 952. Meaning of "lottery."—"By statute 10 and 11 Will. 3, ch. 17," observes Blackstone, "all lotteries are declared to be public nuisances, and all grants, patents or licenses for the same to be contrary to law. But, as state lotteries have, for many years past, been found a ready mode of raising the supply, an act was made, 19 Geo. 3, ch. 21, to license and regulate the keepers of such lottery offices."[2] Whence, and from an inspection of the statute books of the mother country, we learn that the term "lottery" has long been familiar to her laws. Yet we appear not to have derived from the English books any definings of it helpful in the interpretations of our statutes. So that, in the absence of adjudications of our own, our courts look, for its meaning, to the popular use.[3] But by repeated de-

[1] Thomas *v.* P., 59 Ill. 160; Bell *v.* S., 5 Sneed, 507, 509; [*Ex parte* Kameta (Oreg.), 60 Pac. R. 894.]

[2] 4 Bl. Com. 168.

[3] Dunn *v.* P., 40 Ill. 465; U. S. *v.* Olney, 1 Abb. (U. S.) 275, and other cases cited to this section; [P. *v.* Noelke, 94 N. Y. 137, 46 Am. R. 128; S. *v.* Harmon, 60 Mo. Ap. 48.]

cisions they have to some extent given bounds to it; until, if not with absolute, yet with proximate, accuracy,—

How defined.— A lottery may be defined to be any scheme whereby one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine.[1]

[1] Consult and compare Holoman *v.* S., 2 Tex. Ap. 610, [28 Am. R. 439;] Randle *v.* S., 42 Tex. 580; S. *v.* Randle, 41 Tex. 292; S. *v.* Lovell, 10 Vroom, 458, 463; Chavannah *v.* S., 49 Ala. 396; S. *v.* Clarke, 33 N. H. 329, [66 Am. D. 723;] Negley *v.* Devlin, 12 Abb. Pr. (N. S.) 210; Thomas *v.* P., 59 Ill. 160; Com. *v.* Manderfield, 1 Pa. Leg. Gaz. R. 37; Com. *v.* Manderfield, 8 Phila. 457; Reg. *v.* Harris, 10 Cox, C. C. 352; France *v.* S., 6 Bax. 478; S. *v.* Bryant, 74 N. C. 207; U. S. *v.* Hornibrook, 2 Dill. 239; Buckalew *v.* S., 62 Ala. 334, [34 Am. R. 22;] Hull *v.* Ruggles, 56 N. Y. 424; Swain *v.* Bussell, 10 Ind. 438; Rolfe *v.* Delmar, 7 Rob. (N. Y.) 80; Dunn *v.* P., 40 Ill. 465; Almshouse *v.* American Art Union, 3 Seld. 228; P. *v.* American Art Union, 3 Seld. 240, 13 Barb. 577; P. *v.* Payne, 3 Denio, 88; S. *v.* Pinchback, 2 Mill, 128; Wooden *v.* Shotwell, 3 Zab. 465; Com. *v.* Chubb, 5 Rand. 715. See Com. *v.* Garland, 5 Rand. 652; [Cross *v.* P., 18 Colo. 321, 32 Pac. R. 821; Hudelson *v.* S., 94 Ind. 426, 48 Am. R. 171; U. S. *v.* Wallis, 58 Fed. R. 942; Yellowstone Kit *v.* S., 88 Ala. 196, 7 S. R. 338, 16 Am. St. R. 38, 7 L. R. A. 599.] In U. S. *v.* Olney, 1 Abb. (U. S.) 275, in an opinion by Deady, J., various definitions of the word "lottery" are collected, as follows:

Worcester's Dictionary.— "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 in money or other articles."

Webster's Dictionary.— "A disposition of prizes by lot or chance."

Bouvier's Law Dictionary.— "A scheme for the distribution of prizes by chance."

Anderson's Law Dictionary.

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

American 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."

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

And the learned judge explains: "All these authorities agree that, where there is a distribution of prizes — something valuable — by chance or lot, 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." Pages 278, 279. Again: "If persons *already* owning family plate, pictures, or other property not susceptible of division, or even equal division, choose to distribute by an appeal to lot what has thus come to them *before* they had any scheme of so distributing it, they are not within the definition of a lottery, nor liable to this special tax. They have not given a valuable consideration for *the chance* of obtaining something of much greater value — a prize."

§ 953. Chance to draw more than paid.— No one would ever patronize a lottery unless the scheme showed that in some possible contingency more might be drawn out than was paid in. So that the question whether this element is essential becomes unimportant, because it can never practically arise.[1]

§ 954. By whom lot cast.— Commonly the managers of the lottery work the scheme whereby the lot is determined.[2] But a scheme worked by the ticket holders or by third persons would seem equally to be a lottery, though the question is perhaps not absolutely settled.[3]

§ 955. Blanks — Property.— To constitute a lottery there need be no blanks;[4] but there must be some property disposed of by lot.[5]

Page 281. For another collection of definitions, see Fleming *v.* Bills, 3 Oreg. 286.

[1] Where the tickets were sold for a shilling, and every holder was to receive something which, it was contended, was worth the shilling, but there were chances of prizes of greater value, M. Smith, J., ruled that the scheme was a lottery. "Whether," he said, "the full value of the shilling was or was not received by the subscribers, the case comes equally within the mischief against which the act prohibiting lotteries was directed, inasmuch as the subscribers were induced to part with their money in the hope of obtaining not only their alleged shilling's worth, but something of much greater value, the right to which was to be ascertained by chance." Reg. *v.* Harris, 10 Cox, C. C. 352. And see U. S. *v.* Olney, 1 Abb. (U. S.) 275; Wooden *v.* Shotwell, 3 Zab. 465, 4 Zab. 789; Seidenbender *v.* Charles, 4 S. & R. 151, [8 Am. D. 682.] In a Tennessee Case, Caruthers, J., said: "A lottery is a game of hazard, in which small sums are ventured for the chance of obtaining greater." Bell *v.* S., 5 Sneed, 507, 509. [And see Stoddart *v.* Sagar, [1895] 2 Q. B. 474, 15 R. 579; Kohn *v.* Koehler, 96 N. Y. 362, 48 Am. R. 628; S. *v.* Moren, 48 Minn. 555, 51 N. W. R. 618; McLanahan *v.* Mott, 73 Hun, 131, 25 N. Y. S. 892; Com. *v.* Wright, 137 Mass. 250, 50 Am. R. 306.]

[2] For example, Marks *v.* S., 45 Ala. 36; Warren *v.* S., 46 Ala. 549; Thomas *v.* S., 59 Ill. 160; S. *v.* Shorts, 3 Vroom, 398; [P. *v.* Elliott, 74 Mich. 264, 41 N. W. R. 916, 16 Am. St. R. 640, 3 L. R. A. 403.]

[3] Fleming *v.* Bills, 3 Oreg. 286; Dunn *v.* P., 40 Ill. 465; S. *v.* Clarke, 33 N. H. 329, [66 Am. D. 723;] Holoman *v.* S., 2 Tex. Ap. 610, [28 Am. R. 439.] See Buckalew *v.* S., 62 Ala. 334, [34 Am. R. 22; S. *v.* Mercantile Ass'n, 45 Kan. 351, 25 Pac. R. 984, 11 L. R. A. 430. As to "nickel-in-the-slot" machine, see City of New Orleans *v.* Collins (La. An.), 27 S. R. 532; Loiseau *v.* S., 114 Ala. 34, 22 S. R. 138, 62 Am. St. R. 84; Prendergast *v.* S. (Tex. Cr. R.), 57 S. W. R. 850.]

[4] Wooden *v.* Shotwell, 3 Zab. 465; Reg. *v.* Harris, 10 Cox, C. C. 352.

[5] P. *v.* Payne, 3 Denio, 88. [See Long *v.* S., 73 Md. 527, 21 Atl. R. 683, 25 Am. St. R. 606, 12 L. R. A. 89; S. *v.* Boneil, 42 La. An. 1110, 8 S. R. 298, 21 Am. St. R. 413, 10 L. R. A. 60.]

Illustrations — of schemes which have been held to be lotteries are the "American Art Union,"[1] a "gift sale" of books,[2] a "prize concert,"[3] and "auction pools," "French pools" and "combination pools" upon a horse-race.[4] Again,—

§ 956. Right to buy chance values.— It is a lottery where one sells cards in envelopes, the contents of which the purchaser does not know, except that each card contains a list of articles which he may buy for one dollar, and the values of the articles on the respective cards differ. "The element of chance lies," said Lawrence, J., "not in what the holder of the envelope may knowingly do with his card and dollar after he has purchased his envelope, but in the purchase of the envelope itself, which, it is represented to him by the advertisement, may contain a card or ticket that will give him the right to buy for one dollar an article worth hundreds of dollars, or may contain a card that will only give him the right to buy something so valueless as not to be worth buying at any price."[5] So also —

Town lots.— A scheme for disposing of town lots, whereby some are sold and others are reserved to be distributed by lot among the buyers of the former, the chance of getting a reserved lot being among the inducements to the purchase, is a lottery.[6] Likewise —

[1] Almshouse *v.* American Art Union, 3 Seld. 228. Compare with P. *v.* American Art Union, 3 Seld. 240; New York *v.* American Art Union, 32 How. Pr. 341. For analogous cases, see Thomas *v.* P., 59 Ill. 160; Marks *v.* S., 45 Ala. 36, followed in Warren *v.* S., 46 Ala. 549. And see Boyd *v.* S., 61 Ala. 177.

[2] S. *v.* Clarke, 33 N. H. 329, [66 Am. D. 723;] Bell *v.* S., 5 Sneed, 507, 509.

[3] Com. *v.* Thacher, 97 Mass. 583. And see Negley *v.* Devlin, 12 Abb. Pr. (N. S.) 210.

[4] S. *v.* Lovell, 10 Vroom, 458, 463. [As to horse-racing, see P. *v.* Fallon, 152 N. Y. 12, 46 N. E. R. 296, 57 Am. St. R. 492, 37 L. R. A. 227; *In re* Dwyer, 35 N. Y. S. 884, 14 Misc. R. 204. For other devices, see Davenport *v.* City of Ottawa, 54 Kan. 711, 39 Pac. R. 708, 45 Am. St. R. 303; Reeves *v.* S., 105 Ala. 120, 17 S. R. 104; Barry *v.* S., 39 Tex. Cr. R. 240, 45 S. W. R. 571.]

[5] Dunn *v.* P., 40 Ill. 465, 468; [S. *v.* Lumsden, 89 N. C. 572.]

[6] U. S. *v.* Olney, 1 Abb. (U. S.) 275. "It matters not," said Deady, J., "even if the purchaser was to receive the *full value* of his money in any event. As a matter of fact the money was paid for the chance of the prize also, and would not have been paid without this inducement." Page 280. And see *ante*, § 953, note. [Further as to town-lot schemes, see Paulk *v.* Jasper Land Co., 116 Ala. 178, 22 S. R. 495; Jackson Steel Nail Co. *v.* Marks, 4 Ohio Cir. Ct. 343; Lander *v.* Peoria, etc. Society, 71 Ill. Ap. 475; Chancy Park Land Co. *v.* Hart, 104 Iowa, 592, 73 N. W. R. 1059; Lynch *v.* Rosenthal, 144 Ind. 86, 42 N. E. R. 1108, 55

Gift exhibition.— A gift exhibition conducted as follows was adjudged to be a lottery: Each patron bought a ticket at the door with a number on it. An exhibitor, at the close of the exhibition, called at will a number, and the person whose ticket bore it came forward. If the former liked his appearance, or thought he would advertise the show well, he presented him with one of the articles advertised as gifts; or, at the option of the former, the distribution of presents could be dispensed with. It was urged for the defendants that their keeping things so under their control, and dispensing only gifts, prevented the scheme from being a lottery. But the court deemed that the principle of the lottery, chance, controlled the whole proceeding; as, whether a man's number would be called, whether the exhibitor would fancy his appearance, and whether he would be in the mood to make any distribution of prizes.[1]

§ 957. Constitutional questions.— The legislation against lotteries has raised some constitutional questions; among which one of great importance is —

Making penal after franchise granted.— When the legislature has granted to private persons the right to raise money by a lottery, some have deemed the grant a contract, which cannot be annulled by a statute making the lottery a crime, especially after it is accepted by the grantees and a consideration paid.[2]

Am. St. R. 168, 31 L. R. A. 835; Washington Glass Co. *v.* Nusbaugh, 19 Ind. Ap. 105, 49 N. E. R. 178.]

[1] S. *v.* Shorts, 3 Vroom, 398, 401. The programme of an entertainment in England stated that, at its conclusion, the proprietor will "distribute amongst his audience a shower of gold and silver treasures on a scale utterly without parallel, besides a shower of smaller presents, all of which will be impartially divided amongst the audience, and given away." The audience was admitted on pay. The seats were numbered. At the time for distribution he called out the numbers of the seats, one after another, giving an article to each occupant, until all the articles were distributed. And this was held to be a lottery. Morris *v.* Blackman, 2 H. & C. 912. [See Barclay *v.* Pearson, 3 Reports, 388, [1893] 2 Ch. 154; S. *v.* Overton, 16 Nev. 136; McDonald *v.* U. S., 63 Fed. R. 426, 12 C. C. A. 339; S. *v.* Mumford, 73 Mo. 647, 39 Am. R. 532; Com. *v.* Emerson, 165 Mass. 146, 42 N. E. R. 559; S. *v.* Willis, 78 Me. 70.]

[2] Kellum *v.* S., 66 Ind. 588, [overruled in the later case of S. *v.* Woodward, 89 Ind. 110, 46 Am. R. 160;] State Lottery Co. *v.* Fitzpatrick, 3 Woods, 222; S. *v.* Miller, 50 Mo. 129; S. *v.* Sterling, 8 Mo. 697; S. *v.* Hawthorn, 9 Mo. 389. See Mississippi Society of Arts, etc. *v.* Musgrove, 44 Miss. 820, [7 Am. R. 723;] Broadbent *v.* Tuskaloosa, etc. Ass'n, 45 Ala. 170; S. *v.* France, 72 Mo. 41; Kitchen *v.* Greenabaum, 61 Mo. 110.

But, contrary to this view, the legislative right to make penal the lottery to the practical annihilation of the charter was maintained by the courts of a part of the states;[1] and subsequently the supreme court of the United States, the tribunal having the ultimate jurisdiction over the question, has so settled it. "The contracts which the constitution protects," said Waite, C. J., "are those which relate to property rights, not governmental." And "all agree that legislation cannot bargain away the police power of the state."[2]

Penalty in form of tax.— A penalty for carrying on a lottery cannot be imposed by a statute declaring it to be a tax, and authorizing the tax collectors, in default of payment, "to

[1] Moore *v.* S., 48 Miss. 147, [12 Am. R. 367;] S. *v.* Morris, 77 N. C. 512; Phalen *v.* Com., 1 Rob. (Va.) 713. And see Randle *v.* S., 42 Tex. 580; [S. *v.* Woodward, 89 Ind. 110, 46 Am. R. 160.]

[2] Stone *v.* Mississippi, 101 U. S. 814, 817, 820. The learned chief justice added, quoting: "Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the state; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." Referring to Metropolitan Board of Excise *v.* Barrie, 34 N. Y. 657, 668; Boyd *v.* Alabama, 94 U. S. 645. He proceeded: "The question is, therefore, directly presented, whether, in view of these facts, the legislature of a state can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. [See *ante*, §§ 39*a*, 40.] The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. . . . The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.' They may create corporations, and give them, so to speak, a limited citizenship; but, as citizens, limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality." Pages 819, 820. And see Phalen *v.* Virginia, 8 How. (U. S.) 163.

issue execution as in other cases of defaulters." The liability must first be determined by the verdict of a jury.[1]

Seizure of materials.— The Massachusetts statute[2] authorizing magistrates to issue warrants for the seizure of lottery tickets, or materials for a lottery, unlawfully in possession, is constitutional.[3]

§ 958. Advertising.— There are statutes, not requiring special expositions, against advertising lotteries;[4] also —

Having or selling.— Against having for sale or selling lottery tickets[5] and the like.[6] Now,—

§ 959. Foreign lotteries.— Within the reasons of these provisions are advertisements, tickets, and the like, of lotteries conducted in other states, where they are lawful. The enticement to our citizens, and its consequences, are the same as where the drawings are at home. Therefore statutes in general terms forbidding things of this sort are construed as applying to these foreign lotteries the same as to domestic. And the statutes are not unconstitutional.[7]

§ 960. Construction of the statutes.— Various questions have arisen upon the construction of these statutes.[8] Thus,—

[1] S. *v.* Allen, 2 McCord, 55.

[2] R. S., ch. 142.

[3] Com. *v.* Dana, 2 Met. 329. And see *post*, § 959.

[4] *Ante*, § 207; Com. *v.* Clapp, 5 Pick. 41; Com. *v.* Hooper, 5 Pick. 42; P. *v.* Charles, 3 Denio, 212, 610; S. *v.* Sykes, 28 Conn. 225; Charles *v.* P., 1 Comst. 180; [Hudelson *v.* S., 94 Ind. 426, 48 Am. R. 171; Hart *v.* P., 26 Hun, 396; S. *v.* Moore, 63 N. H. 9, 56 Am. R. 478; Louisville Courier-Journal Co. *v.* Com., 92 Ky. 22, 17 S. W. R. 163; S. *v.* Kaub, 90 Mo. 196, 2 S. W. R. 276; Caminada *v.* Hulton, 64 L. T. 572.]

[5] *Ante*, § 205; S. *v.* Scribner, 2 Gill & J. 246; Com. *v.* Chubb, 5 Rand. 715; Com. *v.* Dana, 2 Met. 329; P. *v.* Payne, 3 Denio, 88; Phalen *v.* Com., 1 Rob. (Va.) 713; P. *v.* Warner, 4 Barb. 314; P. *v.* Sturdevant, 23 Wend. 418; Salomon *v.* S., 27 Ala. 26; Salomon *v.* S., 28 Ala. 83; Fontaine *v.* S., 6 Baxt. 514. As to the civil action, see McNight *v.* Biesecker, 13 Pa. St. 328; Wilkinson *v.* Gill, 10 Hun, 156; Edelmuth *v.* McGarren, 4 Daly, 467; Lanahan *v.* Pattison, 1 Flip. 410; [Smith *v.* S., 68 Md. 168, 11 Atl. R. 758; Ford *v.* S., 85 Md. 465, 37 Atl. R. 172, 60 Am. St. R. 337, 41 L. R. A. 551.]

[6] Freleigh *v.* S., 8 Mo. 606; Com. *v.* Chubb, 5 Rand. 715; S. *v.* Pinchback, 2 Mill, 128; S. *v.* Mace, 5 Md. 337; Com. *v.* Lottery Tickets, 5 Cush. 369; Morton *v.* Fletcher, 2 A. K. Mar. 137, [12 Am. D. 366.]

[7] Charles *v.* P., 1 Comst. 180; S. *v.* Sykes, 28 Conn. 225; Wilkinson *v.* Gill, 10 Hun, 156; Rolfe *v.* Delmar, 7 Rob. (N. Y.) 80. See also Com. *v.* Harris, 13 Allen, 534; *ante*, § 205. [See Mackie *v.* Persian Investment Corp., 44 Ch. Div. 306; *Ex parte* Shobert, 70 Cal. 632, 11 Pac. R. 786, 59 Am. R. 432; Kohn *v.* Koehler, 96 N. Y. 362, 48 Am. R. 628; Ballock *v.* S., 73 Md. 1, 20 Atl. R. 184, 25 Am. St. R. 559, 8 L. R. A. 671.]

[8] S. *v.* First District Judge, 32 La.

Against policy, strict.— Where lotteries are contrary to the general policy and laws of the state, no uncertain or doubtful terms in a municipal charter will be construed to authorize them in the particular locality;[1] as,—

Disposal of property.— If it empowers the corporators to dispose of property "in any manner they deem best," it does not operate to enable them to do it by means of a lottery, where prohibited by the general law.[2]

II. The Procedure.

§ 961. Indictment in general.— The statutes and the offenses under them are so numerous and diverse that no general form for the indictment becomes possible. The particular statute must be duly followed, according to the rules for indictments on statutes.[3]

Joinder.— The joinder of defendants and offenses must conform to the same rules of pleading as in other cases.[4]

An. 719; Com. *v.* Harris, 13 Allen, 534; Miller *v.* Com., 13 Bush, 731; Hill *v.* S., 49 Ala. 395; Albertson *v.* S., 5 Tex. Ap. 89; [S. *v.* Voss, 49 La. An. 444, 21 S. R. 596, 62 Am. St. R. 653; Lawrence *v.* Simmons (Ky.), 9 S. W. R. 163, 1 L. R. A. 172; Barry *v.* S., 39 Tex. Cr. R. 240, 45 S. W. R. 571; City of Seattle *v.* Chin Let, 19 Wash. 38, 52 Pac. R. 324.]

[1] Boyd *v.* S., 53 Ala. 601; [S. *v.* Woodward, 89 Ind. 110, 46 Am. R. 160; Henderson *v.* S., 95 Ga. 326, 22 S. E. R. 537.]

[2] S. *v.* Krebs, 64 N. C. 604. [For statute against using the mails for purpose of sending lottery circulars, etc., see U. S. *v.* Duff, 19 Blatch. C. Ct. 9; Commeford *v.* Thompson, 2 Flip. C. Ct. 611; U. S. *v.* Moore, 19 Fed. R. 89; U. S. *v.* Dauphin, 20 Fed. R. 625; U. S. *v.* Mason, 22 Fed. R. 707; U. S. *v.* Zeisler, 30 Fed. R. 499. Act of congress March 2, 1895, prohibited the carrying from one state to another any paper purporting to be or to represent a ticket, chance or share in or dependent upon a lottery, etc. See U. S. *v.* Ames, 95 Fed. R. 453; France *v.* U. S., 164 U. S. 676, 17 S. Ct. 219, 41 L. ed. 595.]

[3] Crim. Pro., I, § 593 *et seq.;* Com. *v.* Harris, 13 Allen, 534; Miller *v.* Com., 13 Bush, 731; S. *v.* Yoke, 9 Mo. Ap. 582; S. *v.* Sykes, 28 Conn. 225; U. S. *v.* Noelke, 17 Blatch. 554; France *v.* S., 6 Bax. 478; Com. *v.* Bierman, 13 Bush, 345; Com. *v.* Bull, 13 Bush, 656; Com. *v.* Manderfield, 8 Phila. 457; Pickett *v.* P., 8 Hun, 83; Roediger *v.* Simmons, 14 Abb. Pr. (N. S.) 256; Com. *v.* Manderfield, 1 Pa. Leg. Gaz. R. 37; S. *v.* Barker, 2 Gill & J. 246; Com. *v.* Gillespie, 7 S. & R. 469, [10 Am. D. 475;] P. *v.* Sturdevant, 23 Wend. 418; Charles *v.* P., 1 Comst. 180; Com. *v.* Lottery Tickets, 5 Cush. 369; U. S. *v.* Patty, 9 Bis. 429; [Twist *v.* S., 111 Ind. 499, 12 N. E. R. 1005; Com. *v.* Sheedy, 159 Mass. 55, 34 N. E. R. 84; S. *v.* Dennison (Neb.), 82 N. W. R. 628.]

[4] Miller *v.* Com., 13 Bush, 731; Fontaine *v.* S., 6 Bax. 514; S. *v.* McWilliams, 7 Mo. Ap. 99; [*Ex parte* Hawkins, 89 Ala. 103, 8 S. R. 19.]

§ 962. Selling ticket.— In general, an indictment for this offense, simply following the statute, is good.[1] But the individual statute and special facts must be duly taken into the account.[2] It was in one case adjudged sufficient to say that the defendant, at a time and place mentioned, "did wilfully, unlawfully and knowingly sell, vend, and cause to be sold and vended, what are commonly known and called lottery policies, the particulars whereof are unknown to the jurors aforesaid; and did then and there sell and vend divers of such lottery policies to divers persons, to the jurors aforesaid unknown." The facts thus averred to be unknown, and so not given, were deemed to be but of description, and not of the essence of the offense.[3]

§ 962a. Advertising.— The indictment for advertising tickets or a lottery should be framed with reference to the particular statute and facts, and the general rules of pleading. For example, it should probably set out the tenor of the advertisement, though possibly not all courts will so hold.[4] And in proper cases averments and innuendoes should be added, as in libel, to make plain and point the meaning of whatever is not distinctly on its face within the inhibition.[5]

§ 963. Having with intent.— The charge of having lottery tickets in possession, with the intent to sell them, need not be expanded beyond the statutory words to say that the selling was intended to be within the state.[6]

§ 964. Setting on foot — (Names and description). — According to a New York case, the indictment for setting on foot a lottery need not set out the tickets sold, or the names of the purchasers, where they are, and are alleged to be, unknown to the grand jury. Yet, in the absence of such allegation, it should describe the lottery; nor is it sufficient in excuse

[1] Com. *v.* Bull, 13 Bush, 656; France *v.* S., 6 Bax. 478; S. *v.* McWilliams, 7 Mo. Ap. 99; [Smith *v.* S., 40 Fla. 203, 23 S. R. 854.]

[2] S. *v.* Barker, 2 Gill & J. 246; Com. *v.* Manderfield, 8 Phila. 457; S. *v.* McWilliams, 7 Mo. Ap. 99; France *v.* S., 6 Bax. 478; Fontaine *v.* S., 6 Bax. 514; S. *v.* Sykes, 28 Conn. 225; Com. *v.* Thacher, 97 Mass. 583; Com. *v.* Harris, 13 Allen, 534; S. *v.* Shorts, 3 Vroom, 398; Dunn *v.* P., 40 Ill. 465. And see *post*, § 965. [S. *v.* Kaub, 19 Mo. Ap. 149.]

[3] Pickett *v.* P., 8 Hun, 83, 84; [Dunn *v.* P., 27 Hun, 272.]

[4] Crim. Pro., I, §§ 559–563; II, §§ 403, 404, 789, 790, 808, 915.

[5] S. *v.* Sykes, 28 Conn. 225.

[6] Com. *v.* Dana, 2 Met. 329. For a like point, see Com. *v.* Clapp, 5 Pick. 41. And see, as to following the statute, S. *v.* Kennon, 21 Mo. 262; [S. *v.* Collins (N. J. L.), 43 Atl. R. 896.]

merely to say that the name of the lottery is to the grand jury unknown.[1] But in Massachusetts, where a statute made punishable "every person who shall, in any house, shop or building, owned or occupied by him or under his control, knowingly permit the setting up, managing or drawing of any such lottery," it was adjudged sufficient simply to aver that the defendant, in a house occupied by him, "did unlawfully and knowingly permit, in the dwelling-house and building then and there actually used and occupied by him, the setting up of a lottery in which certain articles of personal property and of value were disposed of by the way of a lottery." There was no need to say also that the lottery was not authorized by law, or to give its name, or describe the articles disposed of, or mention their value, or the names of their owners, or of the persons who received them as prizes.[2] Further as to which question,—

§ 965. Details in allegation of sale of tickets.— It has been held sufficient to allege that, at a time and place specified, the defendant sold to a person named "a part of a ticket, to wit, one-quarter part of a ticket, in a certain lottery not authorized by the legislature of the state, without any description of the ticket or of the lottery to which it belonged.[3] Even the name of the purchaser has been adjudged not necessary to be given.[4] But this sort of question is a little variable, depending on the special terms of the statute and the views of the particular tribunal.[5]

§ 966. Evidence.— The tickets, on an indictment for selling them, should, if possible, be produted.[6] Printed envelopes for

[1] P. *v.* Taylor, 3 Denio, 91, 99; [P. *v.* Wolff, 14 Ap. Div. 73, 43 N. Y. S. 421, 12 N. Y. Cr. R. 80; Bueno *v.* S., 40 Fla. 160, 23 S. R. 862; S. *v.* Martin, 68 N. H. 463, 44 Atl. R. 605.]

[2] Com. *v.* Horton, 2 Gray, 69. And see Com. *v.* Bierman, 13 Bush, 345; [Com. *v.* Sullivan, 146 Mass. 142, 15 N. E. R. 491.]

[3] S. *v.* Follet, 6 N. H. 53. See *ante*, § 962; [S. *v.* Boneil, 42 La. An. 1110, 8 S. R. 298, 21 Am. St. R. 418, 10 L. R. A. 60; P. *v.* Noelke, 94 N. Y. 137, 46 Am. R. 128.]

[4] S. *v.* Yoke, 9 Mo. Ap. 582; [Prendergast *v.* S. (Tex. Cr. R.), 57 S. W. R. 850.]

[5] And see S. *v.* Barker, 2 Gill & J. 246; Com. *v.* Gillespie, 7 S. & R. 469, [10 Am. D. 475;] P. *v.* Sturdevant, 23 Wend. 418; France *v.* S., 6 Bax. 478; Com. *v.* Manderfield, 1 Pa. Leg. Gaz. R. 87, 8 Phila. 457; [Anderson *v.* S. (Tex. Cr. R.), 39 S. W. R. 109.]

[6] Whitney *v.* S., 10 Ind. 404.

them, and handbills advertising them, found on the defendant's counter and bearing his name, are admissible.[1]

Other questions — connected with the evidence, the indictment and the practice, are considered in the cases cited in the note.[2]

[1] Dunn *v.* P., 40 Ill. 465.

[2] Salomon *v.* S., 28 Ala. 83; U. S. *v.* Noelke, 17 Blatch. 554; Com. *v.* Frankfort, 13 Bush, 185; Com. *v.* Bierman, 13 Bush, 345; Com. *v.* Bull, 3 Bush, 656; Miller *v.* Com., 13 Bush, 731; S. *v.* Ochsner, 9 Mo. Ap. 216; S. *v.* Houston, 30 La. An. 1174; *Ex parte* Tompkins, 58 Ala. 71; Charles *v.* P., 1 Comst. 180; P. *v.* Warner, 4 Barb. 314; Com. *v.* Hooper, 5 Pick. 42; Swan *v.* S., 29 Ga. 616; Com. *v.* Harris, 13 Allen, 534; Com. *v.* Lottery Tickets, 5 Cush. 369; [C. *v.* Brockway, 150 Mass. 322, 23 N. E. R. 101; C. *v.* Gorman, 164 Mass. 549, 42 N. E. R. 94; S. *v.* Russell, 17 Mo. Ap. 16; S. *v.* Rotschild, 19 Mo. Ap. 187; S. *v.* Williams, 44 Mo. Ap. 302; S. *v.* Pomeroy, 130 Mo. 489, 32 S. W. R. 1002.]

CHAPTER LIV.

DRUNKENNESS.

§ 967. Introduction.
968–973*b*. Law of the offense.
974–982. The procedure.

§ 967. Elsewhere — we have considered the effect of drunkenness on the criminality of acts committed under its influence.[1]

Here — we are to inquire after the crime of drunkenness.

How chapter divided. — The order will be, I. The law of the offense; II. The procedure.

I. The Law of the Offense.

§ 968. At common law, — a mere act of private drunkenness is not, as elsewhere explained, indictable.[2] But —

Nuisance. — One drunk in public is a sort of public nuisance; and, it seems, that to be a common drunkard and be abroad intoxicated is indictable at the common law, — a doctrine not firmly established.[3] The Tennessee court even held that a single act of drunkenness, public and notorious, is within the principle;[4] the North Carolina, that to such act there must be added some annoyance to the public.[5] Again, —

§ 969. Drunkenness in office — (Juror — Justice of peace). Drunkenness by an official person in the discharge of official duties is, in some circumstances, and, it is believed, generally, a punishable malfeasance under the unwritten law.[6] So that,

[1] Crim. Law, I, § 397 *et seq.*

[2] Crim. Law, I, § 399.

[3] S. *v.* Waller, 3 Murph. 229; and the cases cited in the notes next following.

[4] Smith *v.* S., 1 Humph. 396. But a statute afterward provided that no one "shall be subject to presentment or indictment for single acts of intoxication or drunkenness, unless he shall, whilst so intoxicated, commit some other indictable offense." And this is held to protect a single instance of drunkenness, though public and notorious. Hutchison *v.* S., 5 Humph. 142. But such single act is indictable since the adoption of the code. S. *v.* Smith, 3 Heisk. 465. See also *post*, § 974.

[5] S. *v.* Deberry, 5 Ire. 371; S. *v.* Waller, 3 Murph. 229.

[6] Crim. Law, I, § 459 *et seq.*; II, §§ 971–982.

for example, a grand juror is indictable at the common law for getting drunk when on duty, thereby "disqualifying himself for the discharge of the office of a juror."[1] And in Virginia it was adjudged that drunkenness by a justice of the peace, while performing his official functions, is a misbehavior furnishing cause to amerce him and remove him from office.[2]

§ 970. Statutes.— We have in more or less of our states statutes against specified forms of drunkenness; particularly against being a —

"*Common drunkard*" — "*Habitual drunkard.*"— The two expressions, "common drunkard" and "habitual drunkard," are equivalents.[3] There is said to be no "fixed rule" defining such drunkard. "Occasional acts of drunkenness" are not enough;[4] nor, on the other hand, need the party be always, or even daily, drunk.[5] One case holds, following some analogies,[6] that, at least, three specific instances of being drunk must be shown.[7] And still the drunkenness must be "habitual" or "common;" so that simply to be drunk three times within a given period does not constitute a common drunkard.[8] As to —

§ 971. Disturbing public.— One to be a common drunkard need not disturb the public by his drunkenness.[9] Nor need he be drunk in public; at least, it is sufficient that his drunkenness occurred in another's room in the house wherein he resides.[10] Moreover —

§ 972. From what drinks — (Chloroform — Opium).—The drunkenness must proceed from some form of the liquors popu-

[1] Pennsylvania *v.* Keffer, Addison, 290. And see Crim. Pro., I, §§ 869, 925.

[2] Com. *v.* Alexander, 4 Hen. & M. 522, 1 Va. Cas. 156; Com. *v.* Mann, 1 Va. Cas. 308; [McComas *v.* King, 81 Ind. 327. Other states have statutory provisions in respect to conductors, engineers and drivers of public vehicles; *e. g.*, see Arizona, Idaho and California.]

[3] Com. *v.* Whitney, 5 Gray, 85, 86; Com. *v.* McNamee, 112 Mass. 285.

[4] Ludwick *v.* Com., 18 Pa. St. 172; S. *v.* Robinson, 111 Ala. 482.]

[5] 1 Bishop, Mar., Div. & S., § 813; Com. *v.* McNamee, *supra.*

[6] *Ante*, § 879, and the places there referred to.

[7] S. *v.* Kelly, 12 R. I. 535.

[8] Com. *v.* Whitney, *supra;* S. *v.* Pratt, 34 Vt. 323; Mapes *v.* P., 69 Ill. 523; [N. W. L. Ins. Co. *v.* Muskegon Bank, 122 U. S. 507; Brown *v.* Brown, 38 Ark. 328; Dunn *v.* Dunn, 62 Cal. 176; Gallagher *v.* P., 120 Ill. 183, 11 N. E. R. 334; Gurley *v.* Butler, 83 Ind. 501; Rude *v.* Nass, 79 Wis. 330, 24 Am. St. R. 717.]

[9] Com. *v.* Conley, 1 Allen, 6, 7.

[10] Com. *v.* Miller, 8 Gray, 484.

larly termed intoxicating. A similar inebriety from chloroform [1] or opium [2] does not come within the statutory term.

§ 973. Public drunkenness — (Way).— There are variously-worded statutes against public drunkenness.[3] One making it punishable to be found drunk in any street, alley, or other public place, has been held to extend only to these localities within the compact parts of cities and villages, not including a highway in the country.[4]

§ 973a. "Permit drunkenness." — To "permit" a thing is to suffer it in another. One does not "permit drunkenness" who simply gets drunk himself.[5]

§ 973b. By-law.— A town, by statute authorized to prevent "riots, noise, disturbance," etc., and "preserve peace and order," may provide by ordinance for the arrest and punishment of persons found drunk.[6]

II. The Procedure.

§ 974. Indictment for nuisance at common law.— The allegations for this form of the offense[7] should conform to what the pleader believes the court will hold the law to be. They may be, for example, that, at a time and place specified, the defendant was "openly and notoriously drunk, to the disturb-

[1] Com. *v.* Whitney, 11 Cush. 477.

[2] 1 Bishop, Mar., Div. & S., § 813; [Youngs *v.* Youngs, 3 Ill. Ap. 224, affirmed in 130 Ill. 234; Dawson *v.* Dawson, 23 Mo. Ap. 170. See following cases as to "drug habit" being made habitual drunkenness by statute and as to the constitutionality of such legislation: *In re* House, 23 Colo. 94; City of Baltimore *v.* Keeley Institute, 81 Md. 107, 31 Atl. R. 437; Burt *v.* Burt, 168 Mass. 205; Foreman *v.* Hennepin Co., 64 Minn. 374, and Keeley Institute Co. *v.* Milwaukee, 95 Wis. 161, 60 Am. St. R. 105.]

[3] Hill *v.* P., 20 N. Y. 363; Evans *v.* S., 59 Ind. 563; S. *v.* Moriarty, 74 Ind. 103; S. *v.* Waggoner, 52 Ind. 481; *ante*, § 968; [S. *v.* Wild, 88 Ind. 308; S. *v.* Sevier, 117 Ind. 338, 20 N. E. R. 245; S. *v.* Brown, 38 Kan. 390, 16 Pac. R. 259; S. *v.* Locker, 50 N. J. L. 512, 14 Atl. R. 749; S. *v.* Austin, 62 Vt. 291, 19 Atl. R. 117; S. *v.* White, 64 Vt. 372, 24 Atl. R. 250; P. *v.* Com'rs, 46 Hun (N. Y.), 507; *Ex parte* Schmidt, 24 S. C. 363.]

[4] S. *v.* Stevens, 36 N. H. 59; [S. *v.* Carville (Me.), 14 Atl. R. 942; Com. *v.* Cheney 141 Mass. 102, 6 N. E. R. 724; Ford *v.* Breen, 173 Mass. 52; S. *v.* Flynn, 16 R. I. 10, 11 Atl. R. 170; Bordeaux *v.* S., 31 Tex. Cr. R. 37, 19 S. W. R. 603; Murchison *v.* S., 24 Tex. Ap. 8, 5 S. W. R. 508; S. *v.* Ryan, 70 Wis. 686, 36 N. W. R. 823.]

[5] Warden *v.* Tye, 2 C. P. D. 74.

[6] Bloomfield *v.* Trimble, 54 Iowa, 399, 37 Am. R. 212; [City of St. Joseph *v.* Harris, 59 Mo. Ap. 122; Chafin *v.* Waukesha Co., 62 Wis. 463.]

[7] *Ante*, § 968.

ance of the public peace," etc.[1] Yet simply the former clause of these quoted words has been adjudged inadequate.[2]

§ 975. Drunk in public place.— On a statute making it punishable to be "found in any public place in a state of intoxication," an indictment was held good which alleged that on, etc., at, etc., the defendant was "found in a public street, highway and sidewalk, situated, etc., unlawfully in a state of intoxication."[3]

§ 976. Drunkenness in office — should be charged according to the terms of the statute. An allegation as against a private person will not justify the special penalty.[4]

§ 977. Charging as nuisance.— Whatever be the true doctrine as to alleging a nuisance to have been "to the common nuisance," etc.,[5] nothing of the sort is required or customary in the class of cases now under contemplation. Even —

"*Common drunkard.*"— The statutory offense of being a common drunkard does not necessarily come within the principle of a common nuisance;[6] so that assuming the conclusion "to the common nuisance" to be indispensable in all nuisances, it is not in this offense.[7] Now,—

§ 978. How aver "common drunkard."— Where the statute simply makes it punishable to be a "common drunkard," with no further particularization or description of the offense, it is pretty plainly sufficient to allege that on, etc., at, etc., the defendant was a common drunkard, concluding as for any ordinary statutory misdemeanor;[8] though it has been widely the practice to add words pointing to the elements of the crime.[9] The case is like that of "common scold," "common barrater," and some others, explained elsewhere.[10]

[1] Tipton *v.* S., 2 Yerg. 542.

[2] Smith *v.* S., 1 Humph. 396.

[3] S. *v.* Waggoner, 52 Ind. 481; S. P., S. *v.* Moriarty, 74 Ind. 103; [Rosenstein *v.* S., 9 Ind. Ap. 290, 36 N. E. R. 252; S. *v.* Welch, 88 Ind. 308; S. *v.* Brown, 38 Kan. 390, 16 Pac. R. 259. *Contra*, S. *v.* McLoon, 78 Me. 420, 6 Atl. R. 601. Not a joint offense so that two can be charged in a single complaint under city ordinance. S. *v.* Deaton, 92 N. C. 788.]

[4] Carpenter *v.* S., 6 Bax. 535. In Mississippi, if the official term expires before judgment, the case can go no further. Stubbs *v.* S., 53 Miss. 437.

[5] Crim. Pro., II, §§ 863, 864.

[6] *Ante*, § 971.

[7] Com. *v.* Boon, 2 Gray, 74; referring to Com. *v.* Smith, 6 Cush. 80.

[8] Com. *v.* Whitney, 5 Gray, 85; Com. *v.* Foley, 99 Mass. 498. And see Com. *v.* Miller, 8 Gray, 484; Com. *v.* McNamara, 116 Mass. 340.

[9] S. *v.* Kelly, 12 R. I. 525; Com. *v.* Boon, 2 Gray, 74; Com. *v.* Whitney, 5 Gray, 85.

[10] Crim. Pro., I, § 494; II, §§ 99, 100, 199, 200.

§ 979. Whether allege as continuing.— As this offense can be committed either on one day or on many days, it is within principles involved in some others already explained;[1] whereby the pleader may allege it to have been committed on a given day, or with a *continuando*, at his election. Then,—

As to proof.— Though one day only should be averred, the proof may be of drunkenness on any other day, or any number of other days.[2] Still, by reason of a doctrine peculiar to Massachusetts,[3] it is in this state held that the evidence must be restricted to one day.[4]

§ 980. Follow statute.— Within the rule of following the statute,[5] —

"*Violation of decency.*"—Where the statute made the offense consist in "being intoxicated under such circumstances as to amount to a violation of decency," it was adjudged adequate to say, in allegation, "indecently drunk."[6] But,—

"*Found.*"— Under the statutory expression "found intoxicated," the word "found" cannot be omitted.[7]

§ 981. Second offense.— Under a statute providing a heavier punishment for the second or third conviction than the first, the indictment, when such former convictions are relied on, must allege them.[8] Nor is legislation, dispensing with this allegation, valid under our constitutions.[9] It was deemed adequate to say that the defendant, on a day and before a court named, "was duly and legally convicted of the crime of drunkenness committed at" a specified time and place, etc. And thereon a copy of the record of the former conviction could be introduced in evidence.[10]

§ 982. Evidence — (Opinion of witness).— A non-expert witness may testify that the defendant was intoxicated; he cannot be restricted to stating demeanor.[11]

[1] *Ante*, §§ 703, 722, 734.

[2] *Ante*, § 703; Crim. Pro., I, §§ 397, 402. And see S. *v.* Kelly, 12 R. I. 535.

[3] Crim. Pro., I, § 402 and note.

[4] Com. *v.* Foley, 99 Mass. 499. See Com. *v.* Wolcott, 110 Mass. 67; Com. *v.* Whitney, 5 Gray, 85.

[5] Crim. Pro., I, § 608 *et seq.*

[6] Alexander *v.* Card, 3 R. I. 145.

[7] S. *v.* Bromley, 25 Conn. 6.

[8] Crim. Law, I, § 961; [Com. *v.* Hughes, 133 Mass. 496; Com. *v.* Morrissey, 157 Mass. 471.]

[9] Com. *v.* Harrington, 130 Mass. 35.

[10] Com. *v.* Miller, 8 Gray, 484.

[11] S. *v.* Huxford, 47 Iowa, 16; P. *v.* Eastwood, 4 Kern. 562. See Armor *v.* S., 68 Ala. 173.

CHAPTER LV.

SELLING INTOXICATING LIQUOR—THE LAW.

§ 983. Introduction.
984–988*b*. History and policy of this legislation.
989–998. Constitutionality, and further of its forms.
999–1006. The license.
1006*a*–1032. Expositions of statutes and doctrines.

§ 983. How chapter divided.— We shall consider, I. The history and policy of this legislation; II. The constitutionality of it, and further of its forms; III. The license; IV. Expositions of statutes and doctrines.

I. The History and Policy of this Legislation.

§ 984. Lawful at common law — (Inn — Ale-house — Tippling house).— It is at the common law lawful to keep a properly-regulated inn, ale-house or tippling house; which severally are indictable only when disorderly.[1] Hence, *a fortiori*, the simple selling of intoxicating drinks is not a common-law crime. But,—

§ 985. Under statutes — (English — American).— From an early period in English legislation, during ante-colonial times and thence downward to the present day with us, statutes, in various forms of provision, have been enacted as aids to the suppression of enormous evils[2] which the use or abuse of ine-

[1] Crim. Law, I, §§ 318, 504, 505, 1113–1118; 1 Hawk. P. C. (Curw. ed.), p. 714, § 1 *et seq.*; Rex *v.* Marriot, 4 Mod. 144; Rex *v.* Ivyes, 2 Show. 468; Stephens *v.* Watson, 1 Salk. 45; Rex *v.* Randall, 3 Salk. 27; Crown Point *v.* Warner, 3 Hill (N. Y.), 150; Rex *v.* Faulkner, 1 Saund. 249; s. c. *nom.* Rex *v.* Fawkner, 2 Keb. 506, pl. 79; Com. *v.* McDonough, 13 Allen, 581.

[2] For example, in 1606, it was in the preamble of 4 Jac. 1 (ch. 5), declared that "the loathsome and odious sin of drunkenness, of late grown into common use," is "the root and foundation of many other enormous sins; as, bloodshed, stabbing, murder, swearing, fornication, adultery, and such like, to the great dishonor of God and of our nation, the overthrow of many good arts and manual trades, the disabling of divers workmen, and the general impoverishing of many good subjects, absolutely wasting the good creatures of God." And three years later it was in like manner de-

briating liquors has wrought. Indeed, the old English enactments of this sort are numerous, and they have largely been the models for legislation in our states.[1]

§ 986. Scope of statutes.—The statutory provisions, whereof the leading ones will be indicated in the course of this and the next three chapters, are numerous and in some degree variable. Their aims have been such as the following; namely, to prevent the sale of intoxicating liquor except in quantities so large as to preclude its purchase for mere tippling; or to prevent its sale to be drunk on the premises where sold. Under which head it is not uncommon, while making specific sales penal, to declare it penal also to be a common seller. Only in rare instances is the purchaser rendered punishable.[2] Other statutes forbid all sales in any quantities, by persons not specially authorized; others, the selling to special classes of persons, such as minors and common drunkards. And whatever the form of the inhibition, there is reserved for licensed persons or for agents of a municipality the right to vend generally, or in the larger quantities, or for specified purposes.

§ 987. Difficult of enforcement.— It appears from the terms of some of the old English statutes that their enforcement was found practically difficult. And all who are familiar with the doings of offenders and courts at the present day with us know that the same still remains true. In this country their constitutionality has been strenuously and perseveringly denied, their rightfulness, their expediency,— all have been cast as obstructions in their way. "And," said Tarbell, J., in the Mississippi court, after quoting these observations of the author, "he might have truthfully added that there is no law which is as resolutely resisted by the utmost ingenuity of the human mind and by the ablest talent as the statutes regulating the traffic

clared in 7 Jac. 1 (ch. 10), that "notwithstanding all former laws and provisions already made, the inordinate and extreme vice of excessive drinking and drunkenness doth more and more abound, to the great offense of Almighty God and the wasteful destruction of God's good creatures."

[1] Leading enactments of the early times are 12 Edw. 2, ch. 6; 11 Hen. 7, ch. 2; 5 & 6 Edw. 6, ch. 25; 1 Jac. 1, ch. 9; 4 Jac. 1, ch. 4; 4 Jac. 1, ch. 5; 7 Jac. 1, ch. 10; 21 Jac. 1, ch. 7; 1 Car. 1, ch. 4; 3 Car. 1, ch. 3.

[2] Crim. Law, I, § 658, and note.

in intoxicating liquor."[1] One of the consequences whereof is that, sitting under this unaccustomed pressure, the courts have, at some points, though not as a general fact, departed from the line of adjudication indicated by principle. The departure has not always, or even perhaps more frequently, been in favor of defendants; for, when judges are unduly pressed, and anxious to do their exact duty, it but accords with all observations of human nature that, at times, they will resist the pressure by an *uprightness which leans* the other way.

§ 988. The "Maine law." — One of the noted forms of the enactment, widely discussed as a question of legislative policy and justice, and long and strenuously resisted in the courts, is familiarly known as "The Maine Law." Its history is the following: In the summer of 1847 there was drafted in Massachusetts a petition to the legislature, praying this body, among other things, to "abolish all licenses and licensing whatever of the traffic in intoxicating liquors, prohibit entirely the sale thereof in all cases where a license is now required to authorize the same;" and "require the courts on reasonable complaint to issue a warrant against any and all persons suspected of selling intoxicating liquors contrary to law, commanding the officer to proceed against the place suspected and seize all intoxicating liquors, and all casks, demijohns, and other vessels in which the same may be contained, and all articles used in the traffic found upon the premises, and hold the same to be confiscated and destroyed in case of a conviction." This petition, numerously signed, was in the following winter presented to the legislature; and a committee, to whom it was referred, reported a bill in substantial conformity to its prayer. It provided, among other things, for the licensing of persons in the several cities and towns to sell "alcohol, pure, mixed and combined, to be used in the arts and for medicinal and sacramental purposes;" and it forbade, under penalties, all other sales. It also made penal the keeping of the liquor by non-licensed persons with the intent to sell it; and the letting of buildings to be used, or suffering their use, for the unlawful sale. And it directed that all liquor kept for sale contrary to its provisions should be seized; and, on conviction of

[1] Riley *v.* S., 43 Miss. 397, 420, 2 Morris, State Cas. 1632, 1654.

the offender, forfeited. Its destruction, after forfeiture, asked in the petition, was not provided for.[1] The bill passed the house, but failed in the senate. Afterward, in 1851, the legislature of Maine adopted the measure, including the destruction feature, yet incumbered by some peculiarities of procedure, intended to avoid those delays to which all real justice is necessarily subject. Other states followed; among them, at a later period, the one wherein the measure originated, Massachusetts.

§ 988a. Policy of this legislation.— The making of the offense of selling to consist in the buyer's purpose to drink the liquor, or allow it to be drank, without regard to place or circumstances, was a wide departure from former legislation, wherein the wrong lay in temptations to idleness, wastefulness, tippling, and public disorder. Said the chairman of the committee, Mr. Emmons, in reporting the bill:[2] "The sale of alcohol in its various forms, pure, mixed, and combined, is, we believe, proper in itself, and necessary for the public convenience; but, to be used as a beverage, it is never necessary,— it is ever wrong, corrupting to the morals of the community, and tending to poverty, misery and crime. Alcohol is good, intoxicating drink is ruinous. This distinction, we think, should fully appear on the face of every statute. But in the law of the Revised Statutes, and in the acts supplementary thereto, it does not appear; they permitting the granting to innholders and common victualers licenses to retail alcohol to be used as a beverage, 'for the public good.' Public opinion, we are happy to know, is in advance of this law; which appears from the fact that, dur-

[1] I have before me the "Report" of the committee, with the bill. The latter was entitled "An act regulating the sale of alcohol, and prohibiting intoxicating drink," constituting House Document No. 62. The report is dated March 4, 1848. There was also a supplemental report by the committee, proposing some slight amendments. This also was printed. There are likewise before me two pamphlets, the one entitled "Speech of Francis W. Emmons, of Sturbridge, on regulating the sale of alcohol, and prohibiting intoxicating drink, delivered in the Massachusetts legislature April 15, 1848;" and the other entitled "Concluding remarks of, etc. [as before], delivered in the Massachusetts legislature April 18, 1848." Mr. Emmons was chairman of the committee; and, as such, reported the bill. I am thus particular, simply to set right a question of history. The credit or disgrace of devising this form of legislation belongs, so far as it attaches to any person in modern times, not to any inhabitant of Maine, but of Massachusetts.

[2] See the last note.

ing the last year, no licenses have been granted under it, in thirteen out of the fourteen counties in this commonwealth." Now, as everybody is aware, while large classes of people hold this opinion of alcohol as a beverage, others do not. And it is reasonable to inquire, whether, when they of the affirmative become the majority in a state, it is within the rightful province of legislation to punish the men who furnish to the minority what they deem essential to their health and happiness; or, otherwise expressed, whether it is the proper function of a government to deny, to sane and grown-up people, the privilege of drinking in private what the majority deem to be — or what truly is — harmful. This sort of question has agitated the world in all ages whereof history has enlightened us. The view of it which this committee maintain, and which has controlled all the legislative bodies that have adopted the measure, is venerable with years. In former times it was well-nigh universal. One illustration is in the rule which has been exercised over religious beliefs. There is no woe possible to man comparable to eternal damnation in the world to come. And governments, urged by a public sentiment which never doubted that without certain religious dogmas no man can be saved, have forbidden the rejection of them, and visited the wrong-thinkers with the heaviest penalties. But, over seas of blood thus shed, the world has paused and thought. The result of which has been that, by almost universal consent, men are now permitted, as of conceded right, to make secure to themselves the damnation of the future life, if they will. Yet still there remains a powerful public sentiment which urges the governments to compel people to do what their own private interests require as pertaining to this life. For example, in England and many of our states, there are statutes, and in other states there is a constant clamor to have statutes enacted, virtually forcing all sick persons to employ the sort of medical assistance which the majority approve. Now, in opposition to all this, there is another view, which, it is submitted, is the true one; namely, that every man is born with the inalienable right, the full exercise whereof is simply to be deferred till he reaches the age of majority, to damn himself both for this world and the world to come. It is believed that the Maker has committed to each one, not to the state, the

care of himself. The limit of which proposition is, that no one has the right to injure another or the public, or to entice another, during the forming period of minority, or a period of weakened or deranged mental faculties, to what the state or the parent deems injurious to himself. It is proper, therefore, to compel by legislation, and the more stringent the better, all who offer or render services in the way of medical help to abstain from every false holding-out as to their education, competency or society connections; but not worthy to be tolerated to preclude any human being from proposing to do, or doing, honestly and under no untrue pretensions, what he can for the sick, or a sick man from employing whatever well-meant offices he chooses. So, on the present question, assuming all the worst things ever said against intoxicating drinks to be true, it is still the natural and inalienable right of every sane and capable person arrived at majority to procure them, and ruin himself by their use; but not, to exercise the right at times, places and in a manner to injure another or the community. It is but the common course of legislation, and its obvious duty, so to regulate the exercise of individual rights of every sort as to promote the common good, yet not to destroy them. Such is the principle. But it is not the author's purpose here to draw the minuter lines, and say just what, should public sentiment require, legislation may properly do, and where it should decline to go, as respects the present question. The distinction to be borne in mind is between the two dissimilar jurisdictions of legislation and persuasion.

§ 988b. Making inhibitions effectual.— So much of the Massachusetts, or Maine, law above described as pertains to methods merits very different comment. It is a familiar rule of action that whatever is worthy to be done should be done well. Therefore, whenever a selling is prohibited, it is in the highest degree judicious to make punishable also the keeping of the liquor with the intent to sell it. The provision is in no degree unjust to the offender, and it is helpful to the state. Still more potent, and equally just, is the authority to seize and confiscate the liquor. The destruction feature, introduced into the original Massachusetts petition and into the statute of Maine, violates a fundamental principle of political economy. It being admitted that alcohol is useful, at least in the arts, the state to

which it is forfeited should not destroy it, but dispose of it for the useful purpose.[1]

[1] I wish to add a personal explanation. It is known to some, though probably not to the majority of my readers, that the original suggestion for what is described in the text as the Massachusetts, or Maine, law proceeded from me; that I drafted the Massachusetts petition, and during the session of the legislature assisted Mr. Emmons, who was not of the legal profession, in drawing the bill. This was while I was a young lawyer in practice, before my life of legal authorship began. The petition was nominally the work of a committee; yet my recollections do not enable me certainly to say that the destruction clause, in distinction from the simple forfeiture of the liquor, was inserted by way of compromise between conflicting views. I cannot call to memory a time when I did not think of it as indicated in the text. But the other part of what the text disapproves I certainly did believe in then. At the time of this writing, I count about thirty-five years during which I have been observing and at intervals thinking upon the subject. The change of opinion has been slow, and especially was it long in passing the region of doubt. Whether or not the result stated in the text is right, I believe it to be, and on it I am willing to rest. But why say anything on the subject? I certainly would not cast obstructions in the way of the hosts of earnest men and women, who, guided by such light as they have, are disinterestedly laboring to banish drunkenness with its enormous evils from the country. But it is useless to remove one wrong by ordaining another. No legislation, founded on unsound principles, can accomplish a permanent good, whatever be the present seeming. The drinks which a minority of the people deem essential, however pernicious we assume them to be in fact, and however condemned by the majority, cannot be altogether thrust by law beyond the practical reach of those who desire them, without violating fundamental and indispensable principles of legislation. The sure remedy is to convince the minority of their universally pernicious nature. And there are other remedies less absolute, yet more practicable. One is to procure laws, and their enforcement, doing away with all adulterations of intoxicating drinks; for it is well known that adulterations, quite beyond the pure liquors, create the physical conditions which impel to drunkenness. Nothing is more completely within the sphere of legislation than such laws; all honest interests cry out for them; and men who will not lend their influence to their enactment should not complain of others, who object to a departure of legislation from its rightful jurisdiction. Again, the right of self-ruin — or, as applied to this question, to drink either moderately or to destruction — may, like the beneficent rights, and even more than they, be justly regulated by legislation. Men, for example, may be restrained from congregating and enticing each other to evil ways, and nothing is more completely within the sphere of legislation than to forbid and punish all public tippling and liquor nuisances and whatever leads thereto. Beyond this, if they who do not approve of the popular temperance measures of the past will do what their own judgments will on reflection dictate,— namely, discourage and refrain from all mere social drinking, and take, and offer to others, intoxicating drinks simply as they do cold water, beef steak, and physic,

II. The Constitutionality of this Legislation, and further of its Forms.

§ 989. Distinction as to constitutional.— Though a statute should be found to be in conflict with sound principles of legislation as just explained, the consequence does not necessarily follow that it is unconstitutional or otherwise void. Our constitutions have withheld from the legislative bodies certain specified functions,[1] but they have no broad terms in negation of the power to violate correct principles of legislation. Hence, in general, a legislature can effectively do whatever the constitution does not by its words or their interpreted effect forbid.[2] Now,—

Doctrine as to constitutional, defined.— It being a legislative function to regulate the public order, and to provide punishments for all violations of the regulations, the legislative body has of necessity the right and duty to judge of what the public order should be, and what specific regulations will comport with sound principles and what will not; and there is no other power with jurisdiction to revise and reverse the decision. Hence whatever the legislature ordains on this subject is constitutional, unless found to be in conflict with some specific provision of the constitution of the state or of the United States. As to which,—

§ 990. United States constitution — (Police power).— The police power of the states is always held to be within their control, not subject to interference from the national government.[3] This power "extends," in the words of Bradley, J., "to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals."[4] It therefore includes the regulation or prohibition of the sale of

to supply an admitted need,— the future generations will not grow up with so much craving for pure and unadulterated liquors as will produce anything like the drunkenness we now witness. Every man knows that the stomach is the laboratory of the physical system. And to put into it, whenever one meets a friend, or at other times when it or the system does not call, anything, in itself good or bad, is a wrong, which, sooner or later, will be avenged. When it is ordinary food, the result is a dyspeptic; when it is intoxicating drink, the product is a drunkard.

[1] *Ante*, § 33 *et seq.*

[2] *Ante*, §§ 38–41.

[3] New York *v.* Miln, 11 Pet. 102, 132; Conway *v.* Taylor, 1 Black, 603; U. S. *v.* Dewitt, 9 Wall. 41; Thorpe *v.* Rutland, etc. R. R. Co., 27 Vt. 140, [62 Am. D. 625.]

[4] Beer Co. *v.* Massachusetts, 97 U. S.

intoxicating drinks; placing the subject within the jurisdiction of the states, to the exclusion of the United States.[1] At the same time, a state cannot exercise this right in a way conflicting with any superior function of the general government. Hence —

Non-imported and imported liquors.— While this doctrine applies in full force to domestic liquors, and to foreign after leaving the importer's possession, it is conceded, yet perhaps not conclusively adjudged, that, if congress imposes a duty on the importation of foreign liquors, a state cannot punish the sale of them in the original packages and in the hands of the original importers. But this is the limit of the exception;[2]

25, 33; [Harrison *v.* S., 91 Ala. 62, 10 S. R. 30; Tinker *v.* S., 96 Ala. 115, 11 S. R. 383.]

[1] Id.; Bartemeyer *v.* Iowa, 18 Wall. 129; S. *v.* Lovell, 47 Vt. 493; Com. *v.* Certain Intoxicating Liquors, 115 Mass. 153; Fell *v.* S., 42 Md. 71, [20 Am. R. 83;] Prohibitory Amendment Cases, 24 Kan. 700; *Ex parte* Marshall, 64 Ala. 266; [Com. *v.* Fowler, 96 Ky. 166, 33 L. R. A. 839; Burnside *v.* Lincoln Co., 86 Ky. 423, 6 S. W. R. 276; Welsh *v.* S., 126 Ind. 71, 25 N. E. R. 883; City of Indianapolis *v.* Bieler, 138 Ind. 30, 36 N. E. R. 857; Woodford *v.* Hamilton, 139 Ind. 485, 39 N. E. R. 47; Knowlton *v.* Doherty, 87 Me. 518, 33 Atl. R. 18; Kuhn *v.* Detroit, 70 Mich. 534, 38 N. W. R. 470; Fragessa *v.* Gray, 73 Md. 250, 20 Atl. R. 905, 9 L. R. A. 780; Arrowsmith *v.* Hamering, 39 Ohio St. 573; *Re* Boyle, 190 Pa. St. 577, 42 Atl. R. 1025. It is not a valid exercise of police power to deny to a saloon-keeper the right to register as a voter as a means of enforcing liquor law. Smith *v.* S., 90 Ga. 133, 15 S. E. R. 682; Goodman *v.* S., 90 Ga. 137, 15 S. E. R. 683. It is competent for legislature to say that beverage containing more than one per cent. alcohol shall be deemed intoxicating. Com. *v.* Brelsford, 161 Mass. 61, 36 N. E. R. 677. The following federal cases are cited also to this note: Foster *v.* Kansas, 112 U. S. 201; Crowley *v.* Christensen, 137 U. S. 86, 11 S. Ct. 13; Crutcher *v.* Railway Co., 141 U. S. 47, 11 S. C. 851; Brennan *v.* City, etc., 153 U. S. 289, 14 S. C. 851; Walling *v.* Michigan, 116 U. S. 446. See also P., Einsfold *v.* Murray, 149 N. Y. 367, 32 L. R. A. 344; S. *v.* Gerhardt, 145 Ind. 439, 33 L. R. A. 313; Wright *v.* Newark Com'rs, 59 N. J. L. 358, 37 L. R. A. 292. But a statute providing that no person without a state license shall "keep in his possession for another spirituous liquors" is unconstitutional. S. *v.* Gilman, 33 W. Va. 146, 6 L. R. A. 847, 10 S. E. R. 283.

[2] The License Cases, 5 How. (U. S.) 504 (including Thurlow *v.* Massachusetts, 5 How. (U. S.) 504; Fletcher *v.* Rhode Island, 5 How. (U. S.) 504); S. *v.* Robinson, 49 Me. 285, 287; S. *v.* Shapleigh, 27 Mo. 344; Brown *v.* Maryland, 12 Wheat. 419; Ingersoll *v.* Skinner, 1 Denio, 540; Com. *v.* Blackington, 24 Pick. 352; City Council *v.* Ahrens, 4 Strob. 241; Com. *v.* Kimball, 24 Pick. 359, [35 Am. D. 326;] Smith *v.* P., 1 Park. Cr. 583; P. *v.* Quant, 2 Park. Cr. 410; Wynhammer *v.* P., 20 Barb. 567; Bradford *v.* Stevens, 10 Gray, 379; Hilson *v.* Lott, 40 Ala. 123; Tiernan *v.* Rinker, 102 U. S. 123; S. *v.* Allmond, 2 Houst. 612.

and it has even been adjudged in a state tribunal, it would seem correctly, that the importer may be punished by the state law, if, while yet he has not broken the original packages, he holds them with the intent to break them, and then to sell in quantities less than a package.[1] In reason, the questions considered in this paragraph should depend somewhat on the terms of the United States statute. Doubtless the power of congress to regulate commerce, given by the constitution, includes the jurisdiction to determine what articles may be imported; so that a state cannot forbid a sale of the original and unbroken packages, by the original importer, within its borders. But, as mere taxation does not imply a license,[2] the mere imposition of a duty, and no more, is not such an authority to import as should be construed to take from any state the same right to regulate or restrain the sale of the article which it would have if it were a domestic manufacture. Should this view be adopted, still it would not entitle the state to prohibit the transportation of the imported packages through its territory to another state for sale. Practically, of late, the state statute commonly makes the exception in favor of imported liquors in such form as the legislative body deems correct; and this will be controlling though it should concede more than necessary to the importer.[3] But when the state statute has not the exception in terms, it and the constitution of the United States are construed together, and the latter creates whatever exception the courts deem it to require.[4]

[1] S. *v.* Blackwell, 65 Me. 556. The terms of the Massachusetts statute of 1869 rendered this lawful. Richards *v.* Woodward, 113 Mass. 285.

[2] *Post*, § 991; Youngblood *v.* Sexton, 32 Mich. 406, [20 Am. R. 654.]

[3] Richards *v.* Woodward, 113 Mass. 285, compared with S. *v.* Blackwell, 65 Me. 556; Com. *v.* Edwards, 12 Cush. 187; Jones *v.* Hard, 32 Vt. 481.

[4] *Ante*, §§ 82, 86, 89, 90. See Hinson *v.* Lott, 40 Ala. 123.

[Legislation both federal and state and decisions since the former edition of this work appeared, within the scope of the author's text, have greatly added to the body of the law on this subject, and would seem to warrant a very extended reference. As, however, the cases herein specially referred to should themselves be read for a comprehensive understanding of the questions involved, only their main features will be stated, and chronological reference made, so we may understand how the legislation came to be enacted or was influenced so to be. In Mugler *v.* Kansas, 123 U. S. 623, the fullest recognition of the right of the state, by virtue of its police power, to prohibit, regulate or restrict in its limits manufacture, sale and use of intoxicating liquors and to abate, as a nuisance, property

§ 990a. **With Indian tribes.**— The power "to regulate commerce" extends to that "with the Indian tribes."[1] Under which power congress may forbid the introduction of spiritu-

used in illegal manufacture or traffic, is announced, the power of the state being said to be plenary. In Kidd *v.* Pearson, 128 U. S. 1, it was ruled that manufacture, though only for exportation beyond the limits of the state, did not come under the shelter of the interstate commerce clause of the constitution, but prohibiting notwithstanding such an intent, was an enactment within the state's police power. In the case of Vance *v.* Vandercook Co., 170 U. S. 438, hereafter more extensively referred to, the epitome of federal decision on this subject is carefully expressed. In Bowman *v.* Chicago & Northwestern Ry. Co., 125 U. S. 465, an Iowa statute forbidding the bringing into the state, by common carriers or otherwise, of any intoxicating liquors, was held to be unconstitutional as repugnant to said interstate commerce clause. This case was followed by that of Leisy *v.* Hardin, 135 U. S. 100, which held that the protection of that clause extended to delivery to, and sale by, the importer in original or unbroken packages, the police power of the state only attaching to liquors (in said case deemed articles of commerce just as other commodities of trade under said clause) when the articles became commingled with the general mass of property in the state. Soon after the rendition of this decision, what is known as the Wilson bill was, on August 8, 1890, enacted by congress. It provided that "all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police power, to the same extent and in the same manner as though such liquids and liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Within a few days after this law was passed a prosecution was begun in the state of Kansas under its prohibitory liquor law, against Charles A. Rahrer, for a sale of liquor, and upon conviction he sued out a writ of *habeas corpus* and the case is reported as *In re* Rahrer, 140 U. S. 545. The stipulated facts show that the law under which the conviction was obtained was passed prior to the act of congress, and that the sale was an original package of liquor shipped into the state prior to the act of congress becoming a law. The conviction was sustained, the court holding that the act of congress was constitutional and brought the former invalid law into force and effect. In the later case of Rhodes *v.* Iowa, 170 U. S. 412, 42 L. ed. 1088, the decision in S. *v.* Rhodes, 90 Iowa, 496, 58 N. W. R. 887, 24 L. R. A. 245, was reversed, the case turning upon the words in the act of congress "upon arrival in such state or territory." The reversing court held that these words included a delivery at destination to the consignee, and that all intermediate acts were within the shelter of the interstate commerce clause; the lower court being expressly reversed in holding that a removal from a station platform to the warehouse was unlawful because the state law forbade any

[1] Const. U. S., art. I, § 8.

ous liquors into the Indian country and contiguous territory.[1] And —

§ 990b. Interstate commerce.— Probably congress, under the power to regulate commerce between the states, can restrain liquor-selling on the vehicles which bear it. However this may be, it has been held that a steamboat, in transit between states, is not so far within the jurisdiction of an intermediate state as to render taxable by its laws the selling of

transportation "from one place to another." Again, the construction and effect of the Wilson bill came before the United States supreme court in cases arising upon the state dispensary law of South Carolina enacted in 1895. Donald *v.* Scott, 165 U. S. 68, 41 L. ed. 633. Without attempting to state the substance and effect of that law, which is set forth *in extenso* in the report of this case, the ruling of the court was that inasmuch as the dispensary law itself recognized the manufacture, sale and use of intoxicating liquors as lawful, and did not purport to forbid importation, manufacture, sale and use of such articles as detrimental to the welfare of the state or the health and morals of its citizens, it did not come within the scope of the Wilson bill, and not being an inspection law it was an unlawful interference with interstate commerce, as it discriminated against imported liquors, which were recognized by the state as lawful articles of commerce. In the subsequent case of Vance *v.* Vandercook Co., 170 U. S. 438, the scope and effect of the Donald-Scott case was a matter of dissent, the majority of the court holding that all that was decided was that the state law, so far as it forbade the sending of intoxicating liquor from one state to another for the use of the person to whom it was shipped, was repugnant to the interstate commerce clause of the constitution, and because of particular provisions in the state law amounting to an unjust discrimination against liquors, the products of other states, they were void. The law having been amended to exclude the discriminatory features pronounced unconstitutional and by permitting shipments to residents for their own use but under certain regulations and restrictions, the latter case sustained the law as a rightful enactment under the police power of the state, except that the regulations and restrictions in respect to shipments to residents for their own use were held void. The right of the state to forbid sale by the importer in any other manner than the dispensary law prescribed, viz., only to state officers, was expressly upheld, and in so ruling it also was held that the state law in forbidding sale by the importer *did* come "within the scope" of the Wilson bill, called the permissive act of congress. The cases cited in this note themselves refer to all the adjudications of the United States supreme court on this subject, citing them expressly and discussing their effect, or by stating the uniform doctrine held.]

[1] Crim. Law, I, § 154; U. S. *v.* Forty-three Gallons of Whiskey, 93 U. S. 188. See U. S. *v.* Carr, 2 Mont. 234; [Sarels *v.* U. S., 152 U. S. 370, 14 S. Ct. 720; Anheuser-Busch Brg. Ass'n *v.* Bond, 13 C. C. A. 665, 66 Fed. R. 653; Terr. *v.* Guyot, 9 Mont. 46, 22 Pac. R. 134; U. S. *v.* Cohn, 52 S. W. R. 38.]

liquor on board.[1] Nor can a vendor of liquors in a state be subjected to a higher tax on imported liquors, or those from another state, than for those of home manufacture.[2]

§ 991. National taxation.— The power of congress to derive a revenue from the business of the country gives it a jurisdiction to tax the selling of intoxicating liquors.[3] But the statutes which we once had expressly reserved to the states their former rights of restraint; and so they were held to furnish no protection to the violators of the state laws, leaving open the question how it would be in the absence of such a clause.[4] Still it has been deemed, and it would seem justly, that a tax on a business is neither a license nor an approval of it;[5] and it would be startling to say that congress could, if it chose, license, under the name of taxing, liquor-selling in the states in defiance of state laws.

§ 991*a*. Fourteenth amendment.— The fourteenth amendment of the national constitution, forbidding the states to "abridge the privileges or immunities of citizens of the United States," is not infringed by state laws against the selling of intoxicating liquor.[6]

[1] S. *v.* Frappart, 31 La. An. 340. "For the reason," said Spencer, J., "that a boat plying upon navigable waters between different states cannot be considered as doing or conducting a business at each and every point where she touches, so as to become subject to taxation at each of said points. Such a proposition would give the local authorities power not only to regulate but to destroy commerce between the states; which power, by the constitution, belongs exclusively to congress." Page 341.

[2] Tiernan *v.* Rinker, 102 U. S. 123; S. *v.* Marsh, 37 Ark. 356. But see Davis *v.* Dashiel, Phillips (N. C.), 114. See Reynolds *v.* Geary, 26 Conn. 179; *post*, § 1080; [Powell *v.* S., 69 Ala. 10; McCreary *v.* S., 73 Ala. 480.]

[3] U. S. *v.* Prussing, 2 Bis. 344.

[4] McGuire *v.* Com., 3 Wall. 387; License Tax Cases, 5 Wall. 462; Pervear *v.* Com., 5 Wall. 475; Com. *v.* Holbrook, 10 Allen, 200; Com. *v.* Keenan, 11 Allen, 262; S. *v.* Carney, 20 Iowa, 82; S. *v.* Stutz, 20 Iowa, 488; S. *v.* Baughman, 20 Iowa, 497; Com. *v.* O'Donnell, 8 Allen, 548; S. *v.* McCleary, 17 Iowa, 44; Block *v.* Jacksonville, 36 Ill. 301; Com. *v.* Thorniley, 6 Allen, 445; Com. *v.* Casey, 12 Allen, 214; [S. *v.* Lillard, 78 Mo. 136; S. *v.* Downs, 116 N. C. 1064, 21 S. E. R. 689; *Re* Jordan, 49 Fed. R. 238; Terr., Mabar *v.* O'Connor, 5 Dak. 397, 3 L. R. A. 355, 41 N. W. R. 746.]

[5] Youngblood *v.* Sexton, 32 Mich. 406, [20 Am. R. 654.]

[6] Bartemeyer *v.* Iowa, 18 Wall. 129; S. *v.* Stanton's Liquors, 38 Conn. 233. Compare *ante*, § 804; [S. *v.* Deschamp, 53 Ark. 490, 14 S. W. R. 653; Welch *v.* McKane, 55 Conn. 25, 10 Atl. R. 168; Butler *v.* S., 89 Ga. 821, 15 S. E. R. 763; Haggard *v.* Stehlin, 137 Ind. 43, 29 N. E. R. 1078, 22 L. R. A. 577; Shea *v.* Muncie, 148 Ind. 14, 46 N. E. R. 138; Daniells *v.* S., 150 Ind. 348, 50

§ 992. Under state constitutions.— Various statutes in the states, restraining the sale of intoxicating drinks, have been adjudged to violate the state constitution, because ordaining a procedure antagonistic to constitutional guarantees,[1] or because ineffectually enacted,[2] or for some other like reason.[3] But, aside from exceptions like these, the restraining and regulating enactments under consideration are uniformly held to be no infringement of our state constitutions as ordinarily drawn.[4] Even —

N. E. R. 74; Decie *v.* Brown, 167 Mass. 290, 45 N. E. R. 765; Woolcott *v.* Judge, etc., 112 Mich. 311; Sherlock *v.* Stuart, 96 Mich. 193, 55 N. W. R. 845; S. *v.* Shortell, 93 Mo. 123, 5 S. W. R. 691; S. *v.* Considine, 16 Wash. 358, 47 Pac. R. 755; S. *v.* Lindgrove, 1 Kan. Ap. 51, 41 Pac. R. 688; Crowley *v.* Christensen, 137 U. S. 86, 11 S. C. 13; Jacobs' Pharmacy *v.* Atlanta, 89 Fed. R. 244; Powell *v.* S., 69 Ala. 10; McCreary *v.* S., 73 Ala. 480; P. *v.* Bray, 105 Cal. 344, 38 Pac. R. 731; Swift *v.* P., 162 Ill. 534; Cairo *v.* Feuchter, 159 Ill. 155.]

[1] Fisher *v.* McGirr, 1 Gray, 1, [61 Am. D. 381;] P. *v.* Toynbee, 2 Park. Cr. 329, 2 Park. Cr. 490, 3 Kern. 378; P. *v.* Wynehamer, 2 Park. Cr. 377, 2 Park. Cr. 421, 3 Kern. 378; Greene *v.* James, 2 Curt. C. C. 187; S. *v.* Snow, 3 R. I. 64; Hibbard *v.* P., 4 Mich. 125. See P. *v.* Fisher, 2 Park. Cr. 402; *In re* Powers, 25 Vt. 261; Lincoln *v.* Smith, 27 Vt. 328; S. *v.* Prescott, 27 Vt. 194; S. *v.* Robinson, 19 Tex. 478; P. *v.* Lawton, 30 Mich. 386; Koerner *v.* Oberly, 56 Ind. 284, [26 Am. R. 34.] Of course, various objections of this sort have been overruled. Van Swartow *v.* Com., 24 Pa. St. 131; S. *v.* Cunningham, 25 Conn. 195; P. *v.* McCarthy, 45 How. Pr. 97.

[2] Parker *v.* Com., 6 Pa. St. 507, [47 Am. D. 480.] In the following cases the statute was sustained against objections of this sort: Parkinson *v.* S., 14 Md. 184, [74 Am. D. 522;] S. *v.* Thompson, 2 Kan. 432; O'Kane *v.* S., 69 Ind. 183; Albrecht *v.* S., 8 Tex. Ap. 216, [34 Am. R. 737.] See *ante*, § 36.

[3] Yazoo City *v.* S., 48 Miss. 440; Atkins *v.* Randolph, 31 Vt. 226.

[4] Lodano *v.* S., 25 Ala. 64; Bancroft *v.* Dumas, 21 Vt. 456; Pierce *v.* S., 13 N. H. 536, 571; S. *v.* Smith, 22 Vt. 74; S. *v.* Moore, 14 N. H. 451; Lunt's Case, 6 Greenl. 412; Austin *v.* S., 10 Mo. 591; Dorman *v.* S., 34 Ala. 216; Com. *v.* Kendall, 12 Cush. 414; Com. *v.* Burding, 12 Cush. 506; Our House *v.* S., 4 Greene (Iowa), 172; Zumhoff *v.* S., 4 Greene (Iowa), 526; Mason *v.* Lancaster, 4 Bush, 406; Falmouth *v.* Watson, 5 Bush, 660; Napier *v.* Hodges, 31 Tex. 287; S. *v.* Searcy, 20 Mo. 489; S. *v.* Gurney, 37 Me. 156, [58 Am. D. 782;] Jones *v.* P., 14 Ill. 196; S. *v.* Clark, 8 Fost. (N. H.) 176, [61 Am. D. 611]; Heisembrittle *v.* City Council, 2 McMul. 233; P. *v.* Hawley, 3 Mich. 330; Brown *v.* Maryland, 12 Wheat. 419; Bode *v.* S., 7 Gill, 326; Smith *v.* Adrian, 1 Mich. 495; S. *v.* Muse, 4 Dev. & Bat. 319; Miller *v.* S., 3 Ohio St. 475; City Council *v.* Ahrens, 4 Strob. 241; Com. *v.* Kimball, 24 Pick. 359, [35 Am. D. 326;] Fisher *v.* McGirr, 1 Gray, 1; Smith *v.* P., 1 Park. Cr. 583; P. *v.* Quant, 2 Park. Cr. 410; Langley *v.* Ergensinger, 3 Mich. 314; S. *v.* Snow, 3 R. I. 64; S. *v.* Peckham, 3 R. I. 289; Com. *v.* Clapp, 5 Gray, 97; Com. *v.* Hitchings, 5 Gray, 482; Com. *v.* Pomeroy, 5 Gray, 486, note; Keller *v.* S., 11 Md. 525, [69 Am. D. 226;] P. *v.* Gallagher, 4 Mich. 244; S. *v.* Brennan's Liquors, 25 Conn. 278; S. *v.*

§ 992a. After license.— A license, however formally and lawfully granted, will not protect sales made in violation of a subsequent statute. One legislature cannot bargain away the police power of the state so as to bind another;[1] nor is the license a contract, nor yet has the licensee any vested rights thereunder.[2]

Wheeler, 25 Conn. 290: Perdue *v.* Ellis, 18 Ga. 586; Bepley *v.* S., 4 Ind. 264, [58 Am. D. 628;] Germania *v.* S., 7 Md. 1; Gutzweller *v.* P., 14 Ill. 142; Fell *v.* S., 42 Md. 71, [20 Am. R. 83;] S. *v.* Hardy, 7 Neb. 377; S. *v.* Read, 12 R. I. 137; Reynolds *v.* Geary, 26 Conn. 179; Trammell *v.* County Judge, 37 Ark. 374; McKinney *v.* Salem, 77 Ind. 213; S. *v.* Winstrand, 37 Iowa, 110; Groesch *v.* S., 42 Ind. 547; Allen *v.* S., 52 Ind. 486 (the decisions in this state seem a little contradictory, as see Beebe *v.* S., 6 Ind. 501, [63 Am. D. 391;] O'Daily *v.* S., 9 Ind. 494; Crossinger *v.* S., 9 Ind. 557; S. *v.* Adamson, 14 Ind. 296; Thomasson *v.* S., 15 Ind. 449; Holmes *v.* Welch, 12 Ind. 555; Coulson *v.* Cass, 12 Ind. 558; Meshmeier *v.* S., 11 Ind. 482; Cassel *v.* Scott, 17 Ind. 514; Lauer *v.* S., 22 Ind. 461; Reams *v.* S., 23 Ind. 111); Block *v.* S., 66 Ala. 493; Harris *v.* S., 4 Tex. Ap. 131; Tonella *v.* S., 4 Tex. Ap. 325; Carr *v.* S., 5 Tex. Ap. 153; Kramer *v.* Marks, 64 Pa. St. 151; S. *v.* Ludington, 33 Wis. 107; Stanton *v.* Simpson, 48 Vt. 628; Rohrbacher *v.* Jackson, 51 Miss. 735; Myers *v.* P., 67 Ill. 503; Higgins *v.* P., 69 Ill. 11; S. *v.* Morgan, 40 Conn. 44; S. *v.* Joyner, 81 N. C. 534; S. *v.* Thomas, 47 Conn. 546; Pleuler *v.* S., 11 Neb. 547; Intoxicating Liquor Cases, 25 Kan. 751, [37 Am. R. 284;] Blackwell *v.* S., 36 Ark. 178; Boyd *v.* Bryant, 35 Ark, 69, [37 Am. R. 6;] Com. *v.* Ducey, 126 Mass. 269; Schwuchow *v.* Chicago, 68 Ill. 444; S. *v.* Allmond, 2 Houst. 612; *In re* Dougherty, 27 Vt. 525; S. *v.* Conlin, 27 Vt. 318; Lincoln *v.* Smith, 27 Vt. 328; Gill *v.* Parker, 31 Vt. 610; Bedore *v.* Newton, 54 N. H. 117. And see, for illustrative points, Washington *v.* S., 8 Eng. 752; Mabry *v.* Tarver, 1 Humph. 94; P. *v.* Jenkins, 1 Hill (N. Y.), 469; P. *v.* Roe, 1 Hill (N. Y.), 470; S. *v.* Bock, 9 Tex. 369. But see P. *v.* Toynbee, and P. *v.* Wynehamer, *supra*. [*Ex parte* Christenson, 85 Cal. 208, 24 Pac. R. 747; *Ex parte* Felchin, 96 Cal. 360, 31 Pac. R. 224; Foster *v.* Com'rs, 102 Cal. 483, 41 Am. St. R. 194, 37 Pac. R. 763; *Ex parte* Stephens, 114 Cal. 278, 46 Pac. R. 86: Baeumel *v.* S., 26 Fla. 71, 7 S. R. 371; Fresse *v.* S., 23 Fla. 267, 2 S. R. 1; Crabb *v.* S., 88 Ga. 584, 15 S. E. R. 455; Knight *v.* S., 88 Ga. 589, 15 S. E. R. 457; S. *v.* Gerhardt, 145 Ind. 473; Ritchie *v.* Zalesky, 98 Iowa, 589; S. *v.* Stricker, 58 Iowa, 529, 12 N. W. R. 483; Brown *v.* Hart, 97 Ky. 282; Stickrod *v.* Com., 86 Ky. 285, 5 S. W. R. 580; Saarles *v.* Com., 83 Ky. 427; McRae *v.* Roberts, 87 Md. 238; Keifer *v.* S., 87 Md. 562; Decie *v.* Brown, 167 Mass. 290; Lynch *v.* Murphy, 119 Mo. 163, 24 S. W. R. 774; Allentown *v.* Gross, 132 Pa. St. 319, 19 Atl. R. 269.]

[1] Beer Co. *v.* Massachusetts, 97 U. S. 25, 33; [S. *v.* Gerhardt, 145 Ind. 439, 33 L. R. A. 313; Kresser *v.* Lyman, 74 Fed. R. 765; Sharp *v.* Carthage, 48 Mo. Ap. 26; Kimberly *v.* Morris (Tex. Cr. R.), 31 S. W. R. 809; Voight *v.* Excise Com'rs, 57 N. J. L. 358, 37 L. R. A. 292.]

[2] Schwuchow *v.* Chicago, 68 Ill. 444; Pleuler *v.* S., 11 Neb. 547; Hedges *v.* Titus, 47 Ind. 145; McKinney *v.* Salem, 77 Ind. 213; Fell *v.* S., 42 Md. 71, [20 Am. R. 83;] Calder *v.* Kurby, 5 Gray, 597; Com. *v.* Brennan, 103 Mass. 70, 71; Robertson *v.* S., 12 Tex. Ap. 541; Reithmiller *v.* P., 44 Mich. 280; John-

§ 993. Confiscating liquor.—Misapprehensions regarding the constitutional right to confiscate liquors kept for unlawful sale have obscured a little some of the cases,[1] especially in New York.[2] One can hardly see how this right could be questioned where fines may be imposed; because the forfeiture is only a fine, levied on a specific article, instead of the offender's estate at large. The oldest English enactment against liquor-selling provides for this forfeiture;[3] so that the levying of the penalty on the specific article is one of the modes of fine known in that fountain of laws whence our jurisprudence is drawn. And it is believed that, at present, this right to inflict the forfeiture of the liquors as a punishment, and even to confiscate them in various circumstances wherein their owner has committed no criminal wrong, is universally conceded by our courts.[4] As to—

son *v.* S., 8 Lea, 469, [31 Am. R. 648.] And see *ante*, § 957; *post*, § 1001; Blann *v.* S., 39 Ala. 353, [84 Am. D. 788;] Emery *v.* Lowell, 127 Mass. 138; Ligonier *v.* Ackerman, 46 Ind. 552, [15 Am. R. 323;] Reg. *v.* Vine, Law R. 10 Q. B. 195; Lehritter *v.* S., 42 Ind. 482; Reed *v.* Beall, 42 Miss. 472; Coulson *v.* Harris, 43 Miss. 728, 738; [Powell *v.* S., 69 Ala. 10; Peyton *v.* Hot Springs Co., 53 Ark. 236, 29 Am. & E. Corp. Cas. 562; Heusen *v.* Reed (Cal.), 58 Pac. R. 536; Johnson *v.* P., 6 Colo. Ap. 163; La Croix *v.* Com'rs, etc., 49 Conn. 591; Denehy *v.* Chicago, 120 Ill. 627, 12 N. E. R. 227; P. *v.* Matthews, 53 Ill. Ap. 395; Martin *v.* P., 85 Ill. Ap. 66; Moore *v.* Indianapolis, 120 Ind. 483, 22 N. E. R. 424; S. *v.* Gerhardt, 145 Ind. 473, 44 N. E. R. 489, 33 L. R. A. 813; S., Kelley *v.* Bonnell, 119 Ind. 494, 21 N. E. R. 1101; McHenry *v.* Salem, 77 Ind. 213; Nelson *v.* S., 17 Ind. Ap. 403; S. *v.* Hudson, 78 Mo. 302; S. *v.* Hudson, 18 Mo. Ap. 61; Voight *v.* Newark Com'rs, 59 N. J. L. 358, 37 L. R. A. 292.]

[1] Fisher *v.* McGirr, 1 Gray, 1, [61 Am. D. 381;] S. *v.* Snow, 3 R. I. 64. But see P. *v.* Toynbee, 2 Park. Cr. 329, 2 Park. Cr. 490, 1 Kern. 378; P. *v.* Wynehamer, 2 Park. Cr. 377, 2 Park. Cr. 421, 3 Kern. 378; Miller *v.* S., 3 Ohio St. 475.

[2] P. *v.* Toynbee, and P. *v.* Wynehamer, *supra*.

[3] Stat. 12 Edw. 2, ch. 6, A. D. 1318, is as follows: "Also, to the common profit of the people, it is agreed that no officer in city or in borough, that by reason of his office ought to keep assizes of wines and victuals, so long as he is attendant to that office, shall not merchandise for wines nor victuals, neither in gross nor by retail. And if any do, and be thereof convict, the merchandise whereof he is convict shall be forfeit to the king, and the third part thereof shall be delivered to the party that sued the offender, as the king's gift." And then follows a direction concerning the court before which proceedings shall be had.

[4] Crim. Law, I, §§ 824, 833–835, 944; Gray *v.* Kimball, 42 Me. 299; Com. *v.* Certain Intoxicating Liquors, 107 Mass. 396; [S. *v.* O'Connor, 3 Kan. Ap. 596; S. *v.* Intoxicating Liquors, 85 Me. 304, 27 Atl. R. 178; Com. *v.* Intoxicating Liquors, 172 Mass. 311. In Michigan it is held that to punish a drug

§ 994. **Destroying.**— The destruction of the liquors, when required by statute, is equally permissible under our constitutions with the simple forfeiture.[1] Any owner of property can dispose of it as he will. The ownership of the liquors vests by forfeiture in the state, then the state destroys its own.[2]

§ 995. **Why?—Legislative control of person and property.** We have already seen something of the reasons on which the doctrines of this sub-title rest.[3] Both the volitions of men and the use of their property[4] are, and in the nature of things must be, under the control of the laws; the interests of individuals being in subjection to the higher interests of the state. The legislative body, restrained only by the written constitution, has the jurisdiction, from which there is no appeal, to determine what limitations of the use of private property the public good requires. What it adjudges to be right must be accepted as such judicially; what it ordains, must stand.[5] And,—

§ 996. **Manufacture.**— Within this doctrine, the legislature may forbid or regulate the distillation of grain. Such restraint does not violate the constitutional guaranty that no person "shall be deprived of life, liberty or property but by due course of law." "In every well-ordered state," said R. W. Walker, J.,

gist for violation of law as to selling liquor is constitutional, but forfeiting his business for a second offense is unconstitutional. Luton *v.* Judge, etc., 69 Mich. 610, 37 N. W. R. 701; Robinson *v.* Miner, 68 Mich. 549, 37 N. W. R. 21.]

[1] See Fisher *v.* McGirr, 1 Gray, 1, [61 Am. D. 381;] S. *v.* Brennan's Liquors, 25 Conn. 278; [S. *v.* Blair, 72 Iowa, 561, 34 N. W. R. 432. In Vermont it has been said that "Intoxicating liquor is an outlaw and has no rights the law is bound to respect. It is a public enemy that, when discovered, the law smites." S. *v.* Intoxicating Liquors, 55 Vt. 82.]

[2] And see Gray *v.* Kimball, 42 Me. 299; McCoy *v.* Zane, 65 Mo. 1. The common law has also precedents for this procedure. Thus, Pulton, speaking of the forfeiture in felony, says: "The felon's houses and lands shall be seized into the king's hands, where they shall remain by the space of a year and a day, and then the houses shall be thrown down to the ground, the trees shall be pulled up by the roots, the meadows shall be ploughed up, and all things which the felon did build or plant shall be cast down, digged up, and supplanted; which punishment was ordained in spite of offenders, and to show to others how much the law doth detest murderers, committers of burglary, robbery and other felonies, and as much as may be to terrify and discourage others to attempt or practice the like." Pulton de Pace (ed. of 1615), 220*b*.

[3] *Ante*, § 989; Crim. Law, I, § 493. And see *ante*, §§ 798, 856.

[4] Com. *v.* Tewksbury, 11 Met. 55.

[5] Jones *v.* P., 14 Ill. 196, 197; Austin *v.* S., 10 Mo. 591, 593; License Cases, 5 How. (U. S.) 504; [S. *v.* Gray, 61 Conn. 39, 20 Atl. R. 675; Powers *v.* Com., 90 Ky. 167, 13 S. W. R. 450.]

"property is held subject to the tacit condition that it shall not be so used as to injure the equal rights of others, or the interests of the community."[1]

§ 997. Municipal by-laws.— Under limitations explained in another connection,[2] municipal corporations may be constitutionally empowered by statute, and they frequently are, to restrict, regulate or entirely prohibit the sale of intoxicating liquor in their respective localities.[3] By-laws of this sort, being in restraint of trade,[4] cannot validly extend beyond the terms of the statutory power.[5] For example, under the authority to

[1] Ingram *v.* S., 39 Ala. 247, 249, [84 Am. D. 782.] To the like effect: S. *v.* P., 9 Colo. 459, 13 Pac. R. 630; Hoffman *v.* Lovell, 47 Vt. 493. See Scanlan *v.* Childs, 33 Wis. 663; Westinghausen *v.* P., 44 Mich. 265; [Pearson *v.* Distillery Co., 73 Iowa, 348, 34 N. W. R. 1; Kauffman *v.* Dostal, 73 Iowa, 691, 36 N. W. R. 643; City of Indianapolis *v.* Bieler, 138 Ind. 30, 36 N. E. R. 857; Stickrod *v.* Com., 86 Ky. 285, 5 S. W. R. 580.]

[2] *Ante*, §§ 18–26.

[3] Gunnarssohn *v.* Sterling, 92 Ill. 569; Com. *v.* Fredericks, 119 Mass. 199; Kettering *v.* Jacksonville, 50 Ill. 39; S. *v.* Bott, 31 La. An. 663, [33 Am. R. 224;] Carthage *v.* Buckner, 4 Bradw. 317; West *v.* Columbus, 20 Kan. 633; S. *v.* Welch, 36 Conn. 215; Rochester *v.* Upman, 19 Minn. 106; Kansas *v.* Flanders, 71 Mo. 281; Falmouth *v.* Watson, 5 Bush, 660; Mason *v.* Lancaster, 4 Bush, 406; Cuthbert *v.* Conly, 32 Ga. 211; Bloomington *v.* Strehle, 47 Ill. 72; Megowan *v.* Com., 2 Met. (Ky.) 3; Decker *v.* McGowan, 59 Ga. 805; S. *v.* Andrews, 11 Neb. 523; Licks *v.* S., 42 Miss. 316; Burckholter *v.* McConnellsville, 20 Ohio St. 308; Jackson *v.* Boyd, 53 Iowa, 536; Roberson *v.* Lambertville, 9 Vroom, 69; Salina *v.* Seitz, 16 Kan. 143; Newlan *v.* Aurora, 14 Ill. 364; Newlan *v.* Aurora, 17 Ill. 379; Baldwin *v.* Murphy, 82 Ill. 485; Bennett *v.* P., 30 Ill. 389; Sweet *v.* Wabash, 41 Ind. 7; [Mayor, etc. *v.* Shattuck, 19 Colo. 104, 34 Pac. R. 947; Keilkopf *v.* Denver, 19 Colo. 325, 35 Pac. R. 535; Rogers *v.* P., 8 Colo. 175, 6 Pac. R. 157; Cunningham *v.* P., 1 Colo. Ap. 155, 27 Pac. R. 949; Menaugh *v.* Orlando (Fla.), 29 S. R. 34; Hood *v.* Von Glahn, 88 Ga. 405, 14 S. E. R. 564; Chambers *v.* Barnesville, 89 Ga. 739, 15 S. E. R. 634; Brown *v.* Social Circle, 105 Ga. 834, 32 S. E. R. 141; East St. Louis *v.* Trustees, etc., 101 Ill. 126; Denehy *v.* Chicago, 120 Ill. 627, 12 N. E. R. 227; Swift *v.* Klein, 176 Ill. 137; S. *v.* Harris, 50 Minn. 128, 52 N. W. R. 387; P. *v.* Wade, 101 Mich. 89, 59 N. W. R. 438; City *v.* McHugh, 122 Mo. 649, 27 S. W. R. 523; S. *v.* Harper, 42 La. An. 312, 7 S. R. 446; Decker *v.* Sargeant, 125 Ind. 404, 25 N. E. R. 458; Davis *v.* Fasig, 128 Ind. 271, 27 N. E. R. 726; S. *v.* Austin, 114 N. C. 855, 25 L. R. A. 283, 19 S. E. R. 919; Bennett *v.* Pulaski (Tenn.), 52 S. W. R. 913; Miller *v.* Ammon, 145 U. S. 421.]

[4] *Ante*, § 20; [Metcalf *v.* S., 76 Ga. 308; Whitney *v.* Township, etc., 71 Mich. 234.]

[5] Sullivan *v.* Oneida, 61 Ill. 242; Mount Pleasant *v.* Vansice, 43 Mich. 361, [38 Am. R. 193;] Salt Lake City *v.* Wagner, 2 Utah, 400; Kinmundy *v.* Mahan, 72 Ill. 462; Pekin *v.* Smelzel, 21 Ill. 464, 469, [74 Am. D. 105;] Tuck *v.* Waldron, 31 Ark. 462; Harbaugh *v.* Monmouth, 74 Ill. 367; [*Ex parte* Russellville, 95 Ala. 19; Johnson *v.* P., 6 Colo. App. 163; Hart *v.*

prohibit tippling-houses or dram-shops, the by-law cannot forbid all sales of intoxicating drinks, for whatever purposes, except mechanical and medicinal;[1] and the power to regulate cannot be exercised by entire suppression.[2] But an ordinance is good which goes only a part way, not covering the entire ground authorized.[3] And the authority to vend may be made conditional where the statute permits it to be absolute.[4] The ordinance can provide only for the locality of the municipality; as, it will be ill if it forbids the sale of beer within three miles of the corporate limits.[5] But the provisions are so diverse that, instead of discussing them further, we shall do best simply to refer to some of the adjudications.[6]

S., 88 Ga. 635, 15 S. E. R. 684; Smith *v.* Warrion, 99 Ala. 481; Bagwell *v.* Lawrenceville, 94 Ga. 654, 21 S. E. R. 903; Cunningham *v.* Guffin (Ga.), 33 S. E. R. 664; Strauss *v.* Waycross, 97 Ga. 475; Tatum *v.* S., 79 Ga. 308, 3 S. E. R. 907; Kiel *v.* Chicago, 176 Ill. 137; P. *v.* Swift, 60 Ill. Ap. 395; Martins *v.* P., 85 Ill. Ap. 66; Vinson *v.* Monticello, 118 Ind. 103, 19 N. E. R. 734; Cantul *v.* Sainer, 59 Iowa, 26, 12 N. W. R. 753; Clinton *v.* Gussendorf, 80 Iowa, 117, 45 N. W. R. 407; Champer *v.* Greencastle, 138 Ind. 339, 24 L. R. A. 768; *In re* Jackson, 55 Kan. 694, 41 Pac. R. 956; Brown *v.* Lutz, 36 Neb. 527, 54 N. W. R. 860; Winants *v.* Bayonne, 15 Vr. (N. J. L.) 114; Schleister *v.* Stokes (N. J. L.), 43 Atl. R. 571; Portland *v.* Schmidt, 13 Oreg. 17, 6 Pac. R. 221; *Ex parte* Sikes, 102 Ala. 173, 24 L. R. A. 774, 15 S. R. 522; Champer *v.* City, etc., 138 Ind. 339, 35 N. E. R. 14, 24 L. R. A. 768; S., Noble *v.* Cheyenne (Wyo.), 40 L. R. A. 710.]

[1] Strauss *v.* Pontiac, 40 Ill. 301.

[2] Tuck *v.* Waldron, 31 Ark. 462; [*Ex parte* Reynolds, 87 Ala. 138, 6 S. R. 335; *Ex parte* Sikes, 102 Ala. 173, 15 S. R. 522.]

[3] Schwuchow *v.* Chicago, 68 Ill. 444; Piqua *v.* Zimmerlin, 35 Ohio St. 507.

[4] Schwuchow *v.* Chicago, *supra;* Baldwin *v.* Smith, 82 Ill. 162; Hurber *v.* Baugh, 43 Iowa, 514; Ottumwa *v.* Schaub, 52 Iowa, 515. Compare Crim. Law, I, § 914.

[5] Strauss *v.* Pontiac, *supra.*

[6] Camp *v.* S., 27 Ala. 53; Byers *v.* Olney, 16 Ill. 35; Goddard *v.* Jacksonville, 15 Ill. 588; S. *v.* Clark, 8 Fost. (N. H.) 176, [61 Am. D. 611;] Heisenbrittle *v.* City Council, 2 McMul. 233; S. *v.* Columbia, 6 Rich. 404; Aberdeen *v.* Saunderson, 8 Sm. & M. 663; Bogart *v.* New Albany, Smith (Ind.), 38; Clintonville *v.* Keeting, 4 Denio, 341; City Council *v.* Ahrens, 4 Strob. 241; Morris *v.* Rome, 10 Ga. 532; S. *v.* Hogan, 10 Fost. (N. H.) 268; Markle *v.* Akron, 14 Ohio, 586; Louisville *v.* Kean, 18 B. Monr. 9; S. *v.* Neeper, 3 Greene (Iowa), 337; Harris *v.* Livingston, 28 Ala. 577; St. Paul *v.* Troyer, 3 Minn. 291; Chastain *v.* Calhoun, 29 Ga. 333; Gardner *v.* S., 20 Ill. 430; Pekin *v.* Smelzel, 21 Ill. 464; Megowan *v.* Com., 2 Met. (Ky.) 3; Savannah *v.* Hussey, 21 Ga. 80; Brooklyn *v.* Toynbee, 31 Barb. 282; Thompson *v.* Mt. Vernon, 11 Ohio St. 688; Com. *v.* Locke, 114 Mass. 288; Dewar *v.* P., 40 Mich. 401, [29 Am. R. 545;] S. *v.* Brady, 41 Conn. 588; S. *v.* Pfeifer, 26 Minn. 175; S. *v.* Fleckenstein, 26 Minn. 177; Mount Pleasant *v.* Vansice, 43 Mich. 361, [38 Am. R. 193;] Douglasville *v.* Johns, 62 Ga. 423; Hetzer *v.* P., 4 Colo. 45; Glentz *v.* S., 38 Wis. 549; Winona *v.* Whipple, 24 Minn. 61; Kitson *v.* Ann.

Local statutes,— enacted by the legislature,[1] are sometimes made to govern this question in particular localities instead of municipal by-laws.[2] This sort of statute may also, and it often does, render unlawful the sale of liquors within a specified distance of particular places, the protection whereof is deemed specially desirable.[3]

§ 998. Constitutional regulations.— In a few of the states the experiment has been tried of more or less regulating this subject by a special provision in the constitution.[4]

Arbor, 26 Mich. 335; *Ex parte* Hurd, 393, 47 N. W. R. 37; S. *v.* Wingfield, 49 Cal. 557; *Ex parte* Schmitker, 6 115 Mo. 428; S. *v.* Graves, 121 N. C. Neb. 108; Meyer *v.* S., 13 Vroom, 145; 632, 28 S. E. R. 403; Eilenbecker *v.* Gilham *v.* Wells, 64 Ga. 192; Osborne Court, 134 U. S. 31.]
v. Mobile, 44 Ala. 493; Kniper *v.* [4] Langley *v.* Ergensinger, 3 Mich.
Louisville, 7 Bush, 599; S. *v.* King, 37 314; Prohibitory Amendment Cases,
Iowa, 462. 24 Kan. 700; [Mugler *v.* Kansas, 123

[1] *Ante*, §§ 36, 42*b*, 104, 112*b*, 126; U. S. 623; Boran *v.* S., 38 Tex. Cr. R. 414,
Crim. Law, I, § 1068. 40 S. W. R. 796; Shields *v.* S., 38 Tex.

[2] S. *v.* Joiner, 81 N. C. 534; Dorman Cr. R. 252, 42 S. W. R. 398. The con-
v. S., 34 Ala. 216; Hudgins *v.* S., 46 stitution of Ohio contains a provision
Ala. 208; Indianapolis *v.* Fairchild, in reference to liquor traffic which
1 Ind. 315, Smith (Ind.), 122; Cheva- makes the decisions, generally speak-
lier *v.* Com., 8 B. Monr. 379; Hill *v.* ing, stand in a class to themselves.
Decatur, 22 Ga. 203; Ambrose *v.* S., The provision is as follows: "No
6 Ind. 351; McRae *v.* Wessell, 6 Ire. license to traffic in intoxicating liq-
153; McCuen *v.* S., 19 Ark. 630; Levy uors shall hereafter be granted in this
v. S., 6 Ind. 281. See Parker *v.* Com., state, but the general assembly may
6 Pa. St. 507, [47 Am. D. 480;] Rauch by law provide against the evils re-
v. Com., 78 Pa. St. 490; S. *v.* Strauss, sulting therefrom;" in the light of
49 Md. 288; [Com. *v.* King, 86 Ky. which all of the following cases
436, 6 S. W. R. 124; S. *v.* Moore, 107 should be read: S. *v.* Sinks, 42 Ohio
Mo. 78, 16 S. W. R. 937; S. *v.* Dugan, St. 345, 9 N. E. R. 672; Adler *v.* Whit-
110 Mo. 138, 19 S. W. R. 195; S. *v.* beck, 44 Ohio St. 539; Gordon *v.* S.,
Searcy, 111 Mo. 236, 20 S. W. R. 186; 46 Ohio St. 607, 23 N. E. R. 63; Van
S. *v.* Wingfield, 115 Mo. 428, 22 S. W. Wert *v.* Brown, 47 Ohio St. 477, 25
R. 363, Gordon *v.* S., 46 Ohio St. 607, N. E. R. 59; S. *v.* Rouch, 47 Ohio St.
23 N. E. R. 63; S. *v.* Snow (N. C.), 23 478, 25 N. E. R. 59; Senior *v.* Rateman,
S. E. R. 322; Sparks *v.* S. (Tex. Cr. R.), 44 Ohio St. 661, 11 N. E. R. 321. The
45 S. W. R. 493; Savage *v.* Com., 84 dispensary laws also call for special
Va. 619, 5 S. E. R. 565.] mention, and particularly as to South

[3] Block *v.* S., 66 Ala. 493; Boyd *v.* Carolina, in which state legislation
Bryant, 35 Ark. 69, [37 Am. R. 6;] was enacted in 1895; and upon the
Blackwell *v.* S., 36 Ark. 178; Barnes law in some respects being declared
v. S., 49 Ala. 342; Wilson *v.* S., 35 Ark. by the United States supreme court
414; Harney *v.* S., 8 Lea, 113; S. *v.* unconstitutional, it was amended,
Hampton, 77 N. C. 526; De Bois *v.* and as amended upheld. In the note
S., 34 Ark. 381; Manis *v.* S., 3 Heisk. to section 990, *supra*, the cases both
315; [Feek *v.* Bloomingdale, 82 Mich. state and federal are cited, and the

III. The License.

§ 999. Discretionary or not.—In the absence of special terms in the statute, and as our enactments on this subject are commonly framed, the license may be granted or withheld by the licensing power at its discretion.[1] And from its decision

act of congress of 1890, known as the Wilson bill, and its relation to this and other state legislation, is referred to. In this connection the case of S., George *v.* City Council, etc. (S. C.), 26 L. R. A. 345, is cited as containing a very full discussion along the line indicated, and the briefs and case itself abound in citations of authority. Questions relating to pleadings, exceptive provisions as to druggists and physicians and the place of sale, have arisen under prohibition and local-option legislation, and, for convenience in grouping, the cases deciding these questions are here cited, being classified as above; and to these are added a fourth class, upon statutory construction. The cases relating to pleading are: Cost *v.* S., 96 Ala. 60, 11 S. R. 435; Chew *v.* S., 43 Ark. 153; Mazzia *v.* S., 51 Ark. 177, 10 S. W. R. 257; Baird *v.* S., 52 Ark. 326, 12 S. W. R. 566; Stringer *v.* S., 32 Fla. 238, 13 S. R. 450; Carson *v.* S., 37 Fla. 331; Butler *v.* S., 25 Fla. 347, 6 S. R. 433; Cook *v.* S., 25 Fla. 698, 6 S. R. 451; Com. *v.* Howe (Ky.), 32 S. W. R. 132; Com. *v.* Shelton (Ky.), 35 S. W. R. 128; S. *v.* Harper, 42 La. An. 312, 7 S. W. R. 446; S. *v.* Langdon, 31 Minn. 316, 17 N. W. R. 859; S. *v.* Emberton, 45 Mo. Ap. 56; Lowery *v.* S. (Tex. Cr. Ap.), 34 S. W. R. 956; Webster *v.* Com., 89 Va. 154, 15 S. E. R. 513; Fortner *v.* Duncan, 91 Ky. 55, 11 L. R. A. 188, 15 S. W. R. 55. Those relating to druggists and physicians are: Jones *v.* S., 68 Ala. 539; Flower *v.* S., 39 Ark. 209; P. *v.* Murphy, 93 Mich. 41, 52 N. W. R. 1042: Bishopp *v.* Lane, 94 Mich. 461, 53 N. W. R. 1093. Those relating to place of sale are: Pilgreen *v.* S., 71 Ala. 368; Dubois *v.* S., 87 Ala. 101, 6 S. R. 381; Newman *v.* S., 88 Ala. 115, 6 S. R. 762; Brooks *v.* S., 105 Ala. 33; Berger *v.* S., 50 Ark. 20, 6 S. W. R. 15; Smith *v.* S., 55 Ark. 259, 18 S. W. R. 287; S. *v.* Houts, 36 Mo. Ap. 265; Northcott *v.* S. (Tex. Cr. Ap.), 34 S. W. R. 946; S. *v.* Flannegan, 38 W. Va. 52, 17 S. E. R. 792, 22 L. R. A. 430; Gipps Brewg. Co. *v.* De France, 91 Iowa, 108, 28 L. R. A. 386. And those relating to construction of these statutes are: Ashurst *v.* S., 79 Ala. 276; Prestwood *v.* S., 88 Ala. 235, 7 S. R. 259; Love *v.* Porter, 93 Ala. 384, 9 S. R. 585; Long *v.* S., 103 Ala. 55, 15 S. R. 565; Menaugh *v.* Orlando (Fla.), 27 S. R. 34; Feek *v.* Bloomingdale, 82 Mich. 393, 47 N. W. R. 37, 10 L. R. A. 69; P. *v.* Ackerman, 80 Mich. 588, 45 N. W. R. 367; P. *v.* Rice, 103 Mich. 350, 61 N. W. R. 540; P. *v.* Wade, 101 Mich. 89, 59 N. W. R. 438; P. *v.* Barnes, 114 Mich. 213; Crabb *v.* S., 88 Ga. 584, 15 S. E. R. 455; Southern Exp. Co. *v.* S. (Ga.), 33 S. E. R. 641; Com. *v.* Currier (Mass.), 42 N. E. R. 96; Warrenburg *v.* McHugh, 122 Mo. 649, 27 S. W. R. 523; Rathbone *v.* S. (Tex. Cr. Ap.), 31 S. W. R. 189; Van Arsdale *v.* S. (Tex. Cr. Ap.), 34 S. W. R. 935; Keaton *v.* S., 36 Tex. Cr. Ap. 259, 33 S. W. R. 522; Pike *v.* S. (Tex. Cr. Ap.), 51 S. W. R. 17; Snearly *v.* S. (Tex. Cr. Ap.), 52 S. W. R. 547.

[1] *Ex parte* Yeager, 11 Grat. 625; Leigh *v.* Westervelt, 2 Duer, 618; Reg. *v.* Bristol, 28 Eng. L. & Eq. 291, 24 Law J. (N. S.) M. C. 43, 1 Jur. (N. S.) 373; P. *v.* Norton, 7 Barb. 477; Attorney-General *v.* Guildford, 5 Ire. 315; Reg. *v.* Harris, 2 Ld. Raym. 1303; Rex *v.* Austin, 8 Mod. 309; Louisville

there is no appeal;[1] though, by force of common-law principles, ministerial officers corruptly refusing or granting licenses may be indicted therefor,[2] as in other cases of corruption.[3] Yet there are states wherein, by reason of special language in the statute, the officer must act whenever the grounds of action are furnished to him;[4] and states in which an appeal lies from the decision of those to whom the application is originally made.[5] Of course,—

§ 999a. Qualifications.— If the statute requires specified qualifications in the licensee, the applicant must show that he possesses them.[6] In principle, and as a deduction from such

v. Kean, 18 B. Monr. 9; Raleigh *v.* Kane, 2 Jones (N. C.), 288; S. *v.* Holt County Court, 39 Mo. 521; Austin *v.* S., 10 Mo. 591; *Ex parte* Whittington, 34 Ark. 394; *In re* Mundy, 50 How. Pr. 359; [Smith's Appeal, 65 Conn. 111, 31 Atl. R. 529; S. *v.* Gray, 61 Conn. 39, 22 Atl. R. 675; Perkins *v.* Ledbetter, 68 Miss. 327, 8 S. R. 507; Sherlock *v.* Stuart, 96 Mich. 193, 55 N. W. R. 845, 21 L. R. A. 580; S. *v.* Excise Board, 16 N. Y. Supp. 798; P. *v.* Waters, 23 N. Y. Supp. 691; P. *v.* Bennett, 23 N. Y. Supp. 695; P. *v.* Freeman, 23 N. Y. Supp. 913; Watkins *v.* Excise Com'rs, 24 N. Y. Supp. 547; P., Ryan *v.* Com'rs, etc., 28 N. Y. Supp. 481; *Re* Thomas, 169 Pa. St. 111, 32 Atl. R. 100; Kelminski's License, 164 Pa. St. 231, 30 Atl. R. 301; *Re* Fitzpatrick, 148 Pa. St. 52, 24 Atl. R. 910.]

[1] Coulterville *v.* Gillen, 72 Ill. 599; Van Baalen *v.* P., 40 Mich. 258; Toole's Appeal, 90 Pa. St. 376; French *v.* Noel, 22 Grat. 454. And see S. *v.* Hardy, 7 Neb. 377; Pierce *v.* Com., 10 Bush, 6.

[2] P. *v.* Norton, 7 Barb. 477; Rex *v.* Holland, 1 T. R. 692. And see Attorney-General *v.* Justices, 5 Ire. 315.

[3] Crim. Law, I, § 459 *et seq.*; II, § 971 *et seq.*

[4] S. *v.* The Justices, 15 Ga. 408; Dougherty *v.* Com., 14 B. Monr. 239; Miller *v.* Wade, 58 Ind. 91. See P. *v.* Perry, 13 Barb. 206; Sights *v.* Yarnalls, 12 Grat. 292; Reg. *v.* Sylvester, 2 B. & S. 322; Goodwin *v.* Smith, 72 Ind. 113, [37 Am. R. 144;] *Ex parte* Laboyteaux, 65 Ind. 545; Grummon *v.* Holmes, 76 Ind. 585; Leader *v.* Yell, 16 C. B. (N. S.) 584; Reg. *v.* Bakewell, 7 Ellis & B. 848; Reg. *v.* Vine, Law R. 10 Q. B. 195, 13 Cox, C. C. 43; Kelly *v.* New York, 54 How. Pr. 327; [Russell *v.* S., 77 Ala. 89; Henry *v.* Barton (Cal.), 40 Pac. R. 798; U. S. *v.* Com'rs D. C., 6 Mackey, 409; S., Norman *v.* D'Alenberte, 30 Fla. 545, 11 S. R. 905; *Ex parte* Theisen, 30 Fla. 529, 11 S. R. 901; Roberts *v.* S., 26 Fla. 360, 7 S. R. 861; S. *v.* Reynolds, 18 Neb. 431, 25 N. W. R. 610; Pelton *v.* Drummond, 21 Neb. 492, 32 N. W. R. 593; Pisar *v.* S., 56 Neb. 455, 76 N. W. R. 869; P. *v.* Cregier, 138 Ill. 401, 28 N. E. R. 812; Hillsbro *v.* Smith, 110 N. C. 417, 14 S. E. R. 972; Braconier *v.* Packard, 136 Mass. 50; Perry *v.* Salt Lake City, 7 Utah, 143, 11 L. R. A. 446, 25 Pac. R. 739; S. *v.* Gerhardt, 145 Ind. 439, 33 L. R. A. 313.]

[5] S. *v.* Tippecanoe, 45 Ind. 501; Keiser *v.* Lines, 57 Ind. 431; *Ex parte* Dunn, 14 Ind. 122; Drapert *v.* S., 14 Ind. 123; Miller *v.* Wade, *supra;* Murphy *v.* Monroe, 78 Ind. 483; Molihan *v.* S., 30 Ind. 266; Young *v.* S., 34 Ind. 46; Reg. *v.* Du Rutzen, 1 Q. B. D. 55; Reg. *v.* Sykes, 1 Q. B. D. 52; *Ex parte* Manghan, 1 Q. B. D. 49; [McCreary *v.* Rhodes, 63 Mo. 308.]

[6] Goodwin *v.* Smith, 72 Ind. 113,

authority as we have,[1] the issuing of the license is an adjudication that the qualifications are possessed, the requisite notice has been given, and the like; rendering the license a protection to the seller so long as it is unrevoked, unless the statute provides otherwise.[2]

§ 1000. The license — ought to be in due form, yet not every departure from what would be strictly appropriate will render it void.[3] A certificate that one is licensed is not a license;[4] nor will a license by parol suffice where the statute requires it to be in writing.[5] Nor yet will any license, issued without authority of law, avail the party.[6] Doubtless the essential formalities differ with the varying terms of statutes. And there are, it seems, states wherein the mere order or vote of the licensing board constitutes a license, and the issuing of the paper which is termed the license is a mere non-essential form.[7] Doubtless an omission of the licensing board to make the proper record will not impair the validity of a license.[8]

Bond.— Some of the statutes require the licensee to give bond to conduct his business according to law[9] or pay the dam-

[87 Am. R. 144;] Leader *v.* Yell, 16 C. B. (N. S.) 584; McWilliams *v.* Phillips, 51 Miss. 196. And see *Ex parte* Laboyteaux, 65 Ind. 545; Reg. *v.* Du Rutzen, 1 Q. B. D. 55; Reg. *v.* Vine, Law R. 10 Q. B. 195; 13 Cox, C. C. 43; Grummon *v.* Holmes, 76 Ind. 585; Miller *v.* Wade, 58 Ind. 91; O'Rourke *v.* P., 5 Thomp. & C. 496, 3 Hun, 225; [Smith's Appeal, 65 Conn. 111, 31 Atl. R. 529; Botthelder *v.* Erb, 18 Vr. (N. J.) 92.]

[1] Stevens *v.* Emson, 1 Ex. D. 100; Hornaday *v.* S., 43 Ind. 306; Martel *v.* East St. Louis, 94 Ill. 67; S. *v.* Brandon, 28 Ark. 410. And see Leader *v.* Yell, 16 C. B. (N. S.) 584.

[2] Reg. *v.* Vine, Law R. 10 Q. B. 195; [S. *v.* Evans, 83 Mo. 319; Sherlock *v.* Stuart, 96 Mich. 193, 21 L. R. A. 580.] See S. *v.* Fisher, 33 Wis. 154, 159; S. *v.* Ludington, 33 Wis. 107; Spake *v.* P., 89 Ill. 617.

[3] *Ante*, § 255; S. *v.* Shaw, 32 Me. 570; Pope *v.* S., 2 Swan (Tenn.), 611; Murphy *v.* Nolan, 126 Mass. 542; Com. *v.* Matthews, 129 Mass. 485; [Com. *v.* Cauley, 150 Mass. 272, 25 N. E. R. 909.]

[4] Com. *v.* Spring, 19 Pick. 306.

[5] Lawrence *v.* Gracy, 11 Johns. 179; S. *v.* Moore, 14 N. H. 451.

[6] Com. *v.* Mueller, 81 Pa. St. 127; Spake *v.* P., 89 Ill. 617; [Handy *v.* P., 29 Ill. App. 99.]

[7] Houser *v.* S., 18 Ind. 106; S. *v.* White, 23 Ark. 275. But see Schlict *v.* S., 31 Ind. 246. And compare Wiles *v.* S., 33 Ind. 206; S. *v.* Wilcox, 66 Ind. 557; Vannoy *v.* S., 64 Ind. 447. And see Brown *v.* S., 27 Tex. 335; 1 Bishop, Mar., Div. & S., § 483; Wright *v.* Lanckton, 19 Pick. 288.

[8] Foster *v.* Dow, 29 Me. 442.

[9] Providence *v.* Bligh, 10 R. I. 208; S. *v.* Ferguson, 72 Mo. 297; Whalin *v.* Macomb, 76 Ill. 49; Tripp *v.* Flanigan, 10 R. I. 128; S. *v.* Church, 4 W. Va. 745; Tripp *v.* Norton, 10 R. I. 125; Lightner *v.* Com., 31 Pa. St. 341; [Quintard *v.* Knodeller, 53 Conn. 485, 2 Atl.

ages to those whom he may injure;[1] even rendering the license without it void.[2] So also —

Payment — for the license is required by the statute in varying terms.[3]

§ 1001. Prior sales.— The licensing and pardoning powers being distinct, a license cannot ordinarily so relate back as to legalize an illegal sale already made.[4] Probably not even will it protect a sale made on the day[5] of its issue, at an earlier hour.[6] But where the licensing body is the representative of a municipal corporation to which is to be paid the penalty for illegal selling,— as, where it is the city council, and the penalty consists of money payable to the city,— an ante-dated license is deemed to be a release also of penalties already incurred.[7]

Subsequent legislation.— The licensee is bound by any subsequent legislation on the subject; to which, therefore, he must conform.[8]

Unduly granted—Informalities.—While, as just said, a license granted without authority of law will not protect the holder,[9] one merely informal may.[10] But,—

R. 752; Schullher *v.* S., 68 Miss. 227, 8 S. R. 328; Lyman *v.* Bricker, 26 Misc. 394, 50 N. Y. Supp. 767.]

[1] S. *v.* Ludington, 33 Wis. 107.

[2] S. *v.* Fisher, 33 Wis. 154.

[3] Spake *v.* P., 89 Ill. 617; S. *v.* Lincoln, 6 Neb. 12; Powers *v.* Decatur, 54 Ala. 214; Thomson *v.* Norris, 62 Ga. 538; New *v.* S., 34 Tex. 100; Vannoy *v.* S., 64 Ind. 447. And see O'Harra *v.* Cox, 42 Miss. 496; [Wicker *v.* Siesel, 80 Ga. 724, 6 S. E. R. 817; City of Craig *v.* Smith, 31 Mo. App. 286; Zielke *v.* S., 42 Neb. 750, 60 N. W. R. 1010; Fry *v.* Kaesner, 48 Neb. 133, 66 N. W. R. 112; *Re* Umholz, 191 Pa. St. 177, 43 Atl. R. 175.]

[4] S. *v.* Hughes, 24 Mo. 147; Edwards *v.* S., 22 Ark. 253; S. *v.* Pate, 67 Mo. 488; Wiles *v.* S., 33 Ind. 206; Bolduc *v.* Randell, 107 Mass. 121.

[5] *Ante*, §§ 27, 29; [Hanks *v.* P., 89 Ill. App. 223.]

[6] Campbell *v.* Strangeways, 3 C. P. D. 105.

[7] Charleston *v.* Corleis, 2 Bailey, 186. And see Vannoy *v.* S., 64 Ind. 447. A later South Carolina case holds that a license by the city council of Charleston, after suit commenced for a penalty, is no release of it. But there was a special provision in the ordinance making this so. And Whitner, J., said: "We think the cause presented is precisely as though this part of the ordinance had been incorporated in the license." Charleston *v.* Schmidt, 11 Rich. 343, 346.

[8] S. *v.* Fairfield, 37 Me. 517; Hirn *v.* S., 1 Ohio St. 15; S. *v.* Holmes, 38 N. H. 225. See Foster *v.* Dow, 29 Me. 442; Hannibal *v.* Guyott, 18 Mo. 515; S. *v.* Andrews, 26 Mo. 171; S. *v.* Andrews, 28 Mo. 14, 19. And see *ante*, § 992*a*.

[9] S. *v.* Moore, 1 Jones (N. C.), 276; House *v.* S., 41 Miss. 737; Thompson *v.* Harvey, 4 H. & N. 254. And see *Ex parte* Cox, 19 Ark. 688.

[10] Com. *v.* Graves, 18 B. Monr. 33; Goff *v.* Fowler, 3 Pick. 300. But see

§ 1002. Illegal stipulations — (Agent to sell).— Where the statute authorized town agencies for the sale of intoxicating liquor for lawful purposes, adding "that no agent shall have any interest in such liquor, or in the profits of the sales thereof," one appointed with the understanding that he should own it and have the profits for his compensation, was held not to be protected; because the transaction was contrary to the statute, and because there can be no agent whose duty it is to do business on his own account.[1]

Other points — appear in cases cited in the note.[2]

§ 1003. Effect of license.— The licensee can sell only in the place, to the persons, in the quantities, within the time, and according to the manner pointed out in the license and in the law under which it is given.[3] For other sales the license furnishes no protection.[4] But what he does within its scope, and the law under which it was granted, is lawful.[5] Specially as to —

Crutz *v.* S., 4 Ind. 385. And see Nathan *v.* Bloomington, 46 Ill. 347.

[1] S. *v.* Putnam, 38 Me. 296.

[2] Com. *v.* Matthews, 129 Mass. 485; Com. *v.* Ducey, 126 Mass. 269; Sights *v.* Yarnells, 12 Grat. 292; Aulanier *v.* Governor, 1 Tex. 658; Hannibal *v.* Guyott, 18 Mo. 515; S. *v.* Estabrook, 6 Ala. 658; Com. *v.* Luck, 2 B. Monr. 296; Woods *v.* Pratt, 5 Blackf. 377; S. *v.* Wynne, 1 Hawks, 451; S. *v.* Kennedy, 1 Ala. 31; Com. *v.* Voorhies, 12 B. Monr. 361: Parsley *v.* Hutchings, 2 Jones (N. C.), 159; Redpath *v.* Nottingham, 5 Blackf. 267; McGowen *v.* Deyo, 8 Barb. 340; Orvis *v.* Thompson, 1 Johns. 500; Furman *v.* Knapp, 19 Johns. 248; Floyd *v.* Com'rs, 14 Ga. 354, [58 Am. D. 559;] Com. *v.* Kamp, 14 B. Monr. 385; S. *v.* Gerhardt, 3 Jones (N. C.), 178; S. *v.* Cloud, 6 Ala. 628.

[3] Adams *v.* Hackett, 7 Fost. (N. H.) 289, [59 Am. D. 376;] Com. *v.* Markoe, 17 Pick. 465; Benson *v.* Moore, 15 Wend. 260; S. *v.* Fredericks, 16 Mo. 382; Lambert *v.* S., 8 Mo. 492; Disbrow *v.* Saunders, 1 Denio, 149; Page *v.* S., 11 Ala. 849; Com. *v.* Hall, 8 Grat. 588; S. *v.* Prettyman, 3 Harring. (Del.) 570; S. *v.* Woodward, 34 Me. 293; S. *v.* Ambs, 20 Mo. 214; Independence *v.* Noland, 21 Mo. 394; Curd *v.* Com., 14 B. Monr. 386. See Mabry *v.* Bullock, 7 Dana, 337; [Com. *v.* Rogers, 135 Mass. 536; Com. *v.* Kane, 143 Mass. 92, 8 N. E. R. 880; Com. *v.* Luddy, 143 Mass. 568, 10 N. E. R. 448; Rich Hill *v.* Coleman, 63 Mo. App. 615.]

[4] S. *v.* Perkins, 6 Fost. (N. H.) 9; Com. *v.* Thayer, 8 Met. 523; Com. *v.* Jordan, 18 Pick. 228; S. *v.* Keen, 34 Me. 500; S. *v.* Putnam, 38 Me. 296; S. *v.* Parks, 29 Vt. 70; S. *v.* Heise, 7 Rich. 518; S. *v.* Holmes, 28 La. An. 765, [26 Am. R. 110;] Nicrosi *v.* S., 52 Ala. 336; S. *v.* Cahen, 35 Md. 236; S. *v.* Fisher, 35 Vt. 584. And see Reg. *v.* Knapp, 2 Ellis & B. 447, 22 Eng. L. & Eq. 157; U. S. *v.* Whitmell, 3 Murph. 137; Parker *v.* S., 27 Ind. 393; [S. *v.* Copp, 34 Kan. 522, 9 Pac. R. 283.]

[5] Huffstater *v.* P., 5 Hun, 28; Reg. *v.* Lancashire, 7 Ellis & B. 839; Harper *v.* S., 3 Lea, 211.

The place.— Obviously no license can authorize sales beyond the jurisdiction of the licensing body.[1] Moreover it is common, and perhaps by most of the statutes required, for the license to specify the particular locality or building within which alone the sales may be made.[2] A license for a specified building has been held to extend to reasonable enlargements, if the jury are of opinion that the premises remain substantially the same as before.[3]

§ 1003a. Revoking.— Under statutes, the license may be revoked or annulled for cause, by proceedings conforming to the statutory requirements.[4] And we have statutes providing for a judgment of forfeiture of it on a conviction for its violation.[5]

§ 1004. Ownership of liquor.— One may sell, under a license to himself, the liquor of another.[6] Also —

By agent.— The selling may be either by the licensee in person, or by his agent, and the latter will be protected by the license.[7] It is even held that the licensee may carry on the business by agent.[8] But —

Assignee.— The license is so far a personal trust that it cannot be validly assigned. In the hands of the assignee it is void.[9] Hence,—

[1] Phillips *v.* Tecumseh, 5 Nev. 312. And see Brown *v.* Nicholson, 5 C. B. (N. S.) 468; S. *v.* Dobson, 65 N. C. 346; Haug *v.* Gillett, 14 Kan. 140; [Hanlon *v.* S., 51 Ark. 186, 10 S. W. R. 265.]

[2] Murphy *v.* Monroe, 73 Ind. 483; Sanders *v.* Elberton, 50 Ga. 178; S. *v.* Walker, 16 Me. 241; S. *v.* Prettyman, 3 Harring. (Del.) 570. And see Johnson *v.* S., 3 Lea, 469, [31 Am. R. 648;] Taylor *v.* Pickett, 52 Iowa, 467; [Com. *v.* Merriam, 136 Mass. 433; Goforth *v.* S., 60 Mo. 756.]

[3] Reg. *v.* Raffles, 1 Q. B. D. 207; [Popworth *v.* Goodnow, 104 Ga. 653, 30 S. E. R. 872; Adams *v.* Frajiacomo, 70 Miss. 799, 14 S. R. 21.]

[4] Com. *v.* Hamer, 128 Mass. 76; Gaertner *v.* Fond du Lac, 34 Wis. 497; P. *v.* Brooklyn, 59 N. Y. 92; P. *v.* Wright, 5 Thomp. & C. 518, 3 Hun, 306; Hogan *v.* Guigon, 29 Grat. 705; Com. *v.* Moylan, 119 Mass. 109; Plummer *v.* Com., 1 Bush, 26; [S., Cox *v.* Hanlon, 24 Neb. 608, 39 N. W. R. 780; Kelly's License, 3 Del. Ch.]

[5] S. *v.* Plunket, 1 Ire. 115; Lightner *v.* Com., 81 Pa. St. 341, [Martin *v.* S., 23 Neb. 371, 36 N. W. R. 554; Martin *v.* S., 27 Neb. 325, 43 N. W. R. 108; Sprayberry *v.* Atlanta, 87 Ga. 120, 13 S. E. R. 197.]

[6] Lane *v.* S., 37 Ark. 272. And see *post*, § 1024.

[7] *Post*, § 1024; Runyon *v.* S., 52 Ind. 320.

[8] Thompson *v.* S., 37 Ala. 151; S. *v.* McNeeley, Winst., i, 234; Runyon *v.* S., *supra*. One who forfeits his license by removing out of the state cannot thus carry on the business. And the forfeited license will not protect the selling agent. Krant *v.* S., 47 Ind. 519.

[9] Alger *v.* Weston, 14 Johns. 231; Lewis *v.* U. S., Morris, 199; Com. *v.* Bryan, 9 Dana, 310; Godfrey *v.* S., 5 Blackf. 151; S. *v.* Lydick, 11 Neb. 366;

Partnership.— Though a joint license may be granted to two or more persons or a firm, and all may sell under it, or one may sell after the others have retired from business,[1] yet a license to one member of a firm, or to one person who afterward takes in a partner, will not authorize the partner to make sales.[2] For, by the unwritten law, a partner is the agent of the firm, but not of an individual other partner.[3] Still there are some Kentucky cases which seem to go far toward the doctrine that one partner may sell under a license to another.[4] And there is a case tending to the further opinion that any licensee can protect any other person in selling, if he has a general superintendence of the business, though the latter conducts it on his own account.[5] But the former must control it himself.[6]

§ 1005. Conviction not a license.— A conviction for selling without a license does not authorize further unlicensed sales.[7]

§ 1006. License refused.— A refusal of a license, by the licensing power, however wrongful, will not entitle the applicant to sell without license.[8] So —

Impossible.— It is no defense to the vendor without license that there was no officer to whom application for it could be made, or that the obtaining of it was otherwise impossible.[9]

Keiser *v.* S., 58 Ind. 379; [Porter *v.* Johnson, 96 Ga. 145; Pierce *v.* Pierce, 17 Ind. Ap. 107; Heath *v.* S., 105 Ind. 342, 4 N. E. R. 901; P. *v.* Sykes, 96 Mich. 452, 56 N. W. R. 12; *Re* Grimm's Estate, 181 Pa. St. 233, 37 Atl. R. 403; *Re* Lyman, 26 Misc. 394, 56 N. Y. Supp. 1020.]

[1] S. *v.* Gerhardt, 3 Jones (N. C.), 178; U. S. *v.* Glab, 1 McCrary, 166; Shaw *v.* S., 56 Ind. 188; Long *v.* S., 27 Ala. 32, 36; [S., Reider *v.* County Court, 45 Mo. Ap. 387; Com. *v.* James (Ky.), 32 S. W. R. 219.]

[2] Shaw *v.* S., *supra;* Long *v.* S., *supra;* Keiser *v.* S., 58 Ind. 379.

[3] Bishop, Con., §§ 1144, 1145.

[4] Barnes *v.* Com., 2 Dana, 388; Gray *v.* Com., 9 Dana, 300, [35 Am. D. 136.]

See S. *v.* Davis, 23 Me. 403; Com. *v.* Hall, 8 Grat. 588.

[5] Duncan *v.* Com., 3 B. Monr. 281, [38 Am. D. 152.]

[6] Com. *v.* Branamon, 8 B. Monr. 374.

[7] S. *v.* McBride, 4 McCord, 332.

[8] Kadgihn *v.* Bloomington, 58 Ill. 229; S. *v.* Cron, 23 Minn. 140; S. *v.* Myers, 63 Mo. 324; Hodgman *v.* P., 4 Denio, 235; City Council *v.* Hollenback, 3 Strob. 355; Indianapolis *v.* Fairchild, 1 Ind. 315; S. *v.* Downer, 21 Wis. 274; S. *v.* Jamison, 23 Mo. 330; Com. *v.* Blackington, 24 Pick. 352; Garner *v.* S., 8 Blackf. 568; New York *v.* Mason, 4 E. D. Smith, 142; [Dudley *v.* S., 91 Ind. 312.]

[9] Lord *v.* Jones, 24 Me. 439, [41 Am. D. 391;] Erb *v.* S., 35 Ark. 631; Reese *v.* Atlanta, 63 Ga. 344.

IV. Expositions of Statutes and Doctrines.

§ 1006a. Statutory name of liquor.—The statutes have various terms to designate the liquor the selling whereof they regulate or forbid. And —

Court or jury — ("*Malt liquor*"—"*Pop*"—"*Lager beer*"—"*Whiskey*").— The meanings of the several terms, and whether or not the admitted or proven facts of a case are within them, are for the court,[1] while the jury determine what facts the evidence establishes.[2] Yet, on this issue, there are facts so familiarly known and certain,[3] or so completely a part of the language itself,[4] that the court will take judicial cognizance of them; hence they need not be proved to the jury.[5] For example, it is judicially known that lager beer is a malt liquor,[6] but probably not that "pop" is.[7] And whiskey is judicially known to be intoxicating,[8] but malt liquors are not so known.[9]

§ 1007. "Intoxicating liquor."— This term denotes any liquor which, by reason of its containing alcohol, whether only created by fermentation, or afterward extracted by distilling and then mixed with other ingredients or left pure, is, in such quantities as may be practically drank, capable of producing intoxication.[10] Except as to what is judicially known, within

[1] *Ante*, § 116; Crim. Pro., I, §§ 989*a*, 989*b*.

[2] *Ante*, § 907; Crim. Pro., *ut sup.*

[3] Rex *v.* Luffe, 8 East, 193, 202; Boullemet *v.* S., 28 Ala. 83; Hart *v.* S., 55 Ind. 599; Lumpkin *v.* Murrell, 46 Tex. 51; Dixon *v.* Niccolls, 39 Ill. 372, [89 Am. D. 312;] Humphrey *v.* Burnside, 4 Bush, 215; Ross *v.* Boswell, 60 Ind. 235.

[4] Clementi *v.* Golding, 2 Camp. 25, 30, 32; Lampton *v.* Haggard, 3 T. B. Monr. 149; Jones *v.* Overstreet, 4 T. B. Monr. 547; Bailey *v.* Kalamazoo, 40 Mich. 251.

[5] That a fact whereof the court takes judicial cognizance need not be proved is a proposition substantially axiomatic. We may say that the jury, having the same means of knowledge as the court (S. *v.* Packer, 80 N. C. 439; Feldman *v.* Morrison, 1 Bradw. 460; Eagan *v.* S., 53 Ind. 162), will take the same cognizance of the fact; or, that the court, knowing the fact, will instruct them therein. The result of the two forms of the proposition is identical.

[6] Watson *v.* S., 55 Ala. 158; Adler *v.* S., 55 Ala. 16; S. *v.* Goyette, 11 R. I. 592. But see S. *v.* Starr, 67 Me. 242.

[7] Godfreidson *v.* P., 88 Ill. 284.

[8] Schlicht *v.* S., 56 Ind. 173; Eagan *v.* S., 53 Ind. 162; Feldman *v.* Morrison, 1 Bradw. 460.

[9] Shaw *v.* S., 56 Ind. 188; Godfreidson *v.* P., *supra;* Rau *v.* P., 63 N. Y. 277; Haines *v.* Hanrahan, 105 Mass. 480; Com. *v.* White, 15 Gray, 407. See P. *v.* Hawley, 3 Mich. 330; Markle *v.* Akron, 14 Ohio, 586, 591.

[10] S. *v.* Kelley, 47 Vt. 294; Com. *v.* Blos, 116 Mass. 56; P. *v.* Hawley, 3 Mich. 330; Markle *v.* Akron, 14 Ohio, 586, 591; Foster *v.* S., 36 Ark. 258; Tompkins *v.* Taylor, 21 N. Y. 173;

the explanations of the last section, the question whether a particular liquor is intoxicating or not is for the jury, who decide it, like any other fact, on evidence presented.[1] Some of the statutes have attempted to remove practical difficulties by specifying what liquors shall be deemed intoxicating.[2]

"*Beer*."— Some of the New York judges considered the word "beer" alone to imply that it be intoxicating.[3]

§ 1008. "Strong liquor."— A statute of New York made punishable the unlicensed retailing of "any *strong* or spirituous liquors or wines;" and the majority of the court held that strong beer is "strong liquor" within the inhibition, because capable of producing intoxication.[4] There are other cases inclining also to this opinion; and agreeing with it that small beer which cannot intoxicate is not strong liquor.[5]

§ 1009. "Spirituous liquor"— is composed wholly or in part of alcohol extracted by distillation.[6] It need not be rectified;[7] that is, it is within the term though it has passed through the still only once.[8] Fermented liquors are not included.[9] But —

Lathrope *v.* S., 50 Ind. 555; S. *v.* Laffer, 38 Iowa, 422; Com. *v.* Peckham, 2 Gray, 514: Com. *v.* Herrick, 6 Cush. 465. See King *v.* S., 58 Miss. 737, [38 Am. R. 344;] Smith *v.* S., 19 Conn. 493; Bridges *v.* S., 37 Ark. 224; [S. *v.* Hutchinson, 72 Iowa, 561, 34 N. W. R. 421; Hartel *v.* P., 78 Ill. Ap. 109; Petteway *v.* S., 36 Tex. Cr. R. 11, 35 S. W. R. 646.]

[1] Josephdaffer *v.* S., 32 Ind. 402; Eisenman *v.* S., 49 Ind. 520; Rau *v.* P., 63 N. Y. 277; Klare *v.* S., 43 Ind. 483; Haines *v.* Hanrahan, 105 Mass. 480; Lathrope *v.* S., 50 Ind. 555; S. *v.* Lowry, 74 N. C. 121; Com. *v.* White, 15 Gray, 407; S. *v.* Biddle, 54 N. H. 379; Plunkett *v.* S., 69 Ind. 68; S. *v.* Wall, 34 Me. 165; S. *v.* Miller, 58 Iowa, 84; S. *v.* Peterson, 41 Vt. 504; S. *v.* Packer, 80 N. C. 439; [Knowles *v.* S., 80 Ala. 9; Bell *v.* S., 91 Ga. 227, 18 S. E. R. 288; S. *v.* Shaeffer, 44 Kan. 90.]

[2] Jackson *v.* S., 19 Ind. 312; S. *v.* Lemp, 16 Mo. 389; S. *v.* Wittmar, 12 Mo. 407; Com. *v.* Giles, 1 Gray, 466; Com. *v.* Timothy, 8 Gray, 480; Johnston *v.* S., 23 Ohio St. 556; Com. *v.* Chappel, 116 Mass. 7; Guptill *v.* Richardson, 62 Me. 257; Plunkett *v.* S., 69 Ind. 68; S. *v.* Volmer, 6 Kan. 371; Intoxicating Liquor Cases, 25 Kan. 751, [37 Am. R. 284;] S. *v.* Starr, 67 Me. 242; Com. *v.* Shea, 14 Gray, 386; S. *v.* McNamara, 69 Me. 133.

[3] P. *v.* Wheelock, 3 Park. Cr. 9; [Tinker *v.* S., 90 Ala. 647, 8 S. R. 855; Hansberg *v.* P., 120 Ill. 21, 8 N. E. R. 857; Mullen *v.* S., 96 Ind. 304; Welsh *v.* S., 126 Ind. 71, 25 N. E. R. 888; Netso *v.* S., 24 Fla. 368, 5 S. R. 8.]

[4] Tompkins *v.* Taylor, 21 N. Y. 173, 178.

[5] Nevin *v.* Ladue, 3 Denio, 43; s. c., 3 Denio, 437; P. *v.* Crilley, 20 Barb. 246.

[6] Caswell *v.* S., 2 Humph. 403; S. *v.* Moore, 5 Blackf. 118; Walker *v.* Prescott, 44 N. H. 511. See Smith *v.* S., 19 Conn. 493.

[7] *Ante*, § 278.

[8] S. *v.* Summery, Winst. ii, 108. And see Boyd *v.* U. S., 14 Blatch. 317.

[9] S. *v.* Adams, 51 N. H. 568; Fritz *v.*

Peppermint cordial.— Where the statutory words were, "any wine, rum, brandy, gin, whiskey, or any *spirituous liquor*, . . . or any punch or other mixed liquor," peppermint cordial, made of whiskey sweetened and scented, was by the majority of the court held to be spirituous liquor.[1]

§ 1010. "Vinous liquor"— ("Cider").— Vinous liquor is liquor made from the juice of the grape.[2] Cider is not within the term.[3]

Liquor.— Under a statute forbidding the "keeper of an inn, tavern or ordinary, or retailer of liquors by the small measure," to sell "on a credit *liquors* to a greater amount than $10," champagne wine was held to be a liquor.[4]

§ 1011. Other terms.— There are other words, either explained in the earlier parts of this volume, or needing no explanation; as, "*distiller*,"[5] "*distillery*,"[6] "*manufacturer*,"[7] "*merchant*,"[8] "*plantation*,"[9] "*refreshment saloon*,"[10] *saloon*,"[11] "*ordinary*,"[12] "*premises*,"[13] "*furnishing*,"[14] "*public house*,"[15] "*place of public resort*,"[16] "*town*,"[17] "*dwelling-house*,"[18] "*store*," "*shop*,"[19] "*liquor shop*."[20]

S., 1 Bax. 15, overruling S. *v.* Sharrer, 2 Coldw. 323.

[1] S. *v.* Bennet, 3 Harring. (Del.) 565. See *post*, § 1020. See, as to an analogous question, Smith *v.* S., 19 Conn. 493; [Royall *v.* S., 78 Ala. 410; Wall *v.* S., 78 Ala. 417; Musick *v.* S., 51 Ark. 165, 10 S. W. R. 225; Rabe *v.* S., 39 Ark. 204.]

[2] Adler *v.* S., 55 Ala. 16, 24; [Reyfelt *v.* S., 73 Miss. 415, 18 S. R. 925.]

[3] Feldman *v.* Morrison, 1 Bradw. 460.

[4] Kizer *v.* Randleman, 5 Jones (N. C.), 428.

[5] *Ante*, § 273. And see *ante*, § 1009; Johnson *v.* S., 44 Ala. 414.

[6] Atlantic Dock Co. *v.* Libby, 45 N. Y. 499.

[7] Com. *v.* Bralley, 3 Gray, 456.

[8] Com. *v.* McGeorge, 9 B. Monr. 3; Cole *v.* Com., 8 Dana, 31; Anderson *v.* Com., 9 Bush, 569; *post*, § 1090.

[9] *Ante*, § 300; Sanderlin *v.* S., 2 Humph. 315.

[10] S. *v.* Hogan, 10 Fost. (N. H.) 268. And see Howes *v.* Board of Inland Revenue, 1 Ex. D. 385.

[11] Kitson *v.* Ann Arbor, 26 Mich. 325; S. *v.* Mansker, 36 Tex. 364; O'Brien *v.* S., 10 Tex. Ap. 544; S. *v.* Barr, 39 Conn. 40. And see Haines *v.* Smith, 7 Tex. Ap. 30.

[12] Burner *v.* Com., 13 Grat. 778.

[13] *Ante*, § 291, note; Downman *v.* S., 14 Ala. 242; Swan *v.* S., 11 Ala. 594; Easterling *v.* S., 30 Ala. 46.

[14] S. *v.* Freeman, 27 Vt. 520; S. *v.* Jones, 39 Vt. 370; Com. *v.* Davis, 12 Bush, 240.

[15] *Ante*, §§ 297–299; Brown *v.* S., 27 Ala. 47.

[16] Bandalow *v.* P., 90 Ill. 218. And see *ante*, §§ 291, 298.

[17] *Ante*, § 299*a*; S. *v.* Glennon, 3 R. I. 276.

[18] *Ante*, §§ 277–290; Com. *v.* Estabrook, 10 Pick. 293.

[19] *Ante*, §§ 294, 295; Barth *v.* S., 18 Conn. 432.

[20] Wooster *v.* S., 6 Bax. 533, S. *v.* Powell, 3 Lea, 164.

§ 1012. Giving away.— Some of the statutes make punishable the giving away of the liquor,[1] equally with the selling. Under the rule of interpretation that an act, to be within a penal prohibition, must be within its spirit[2] as well as its letter, the court will not hold it to be a crime, where the purpose of the provision was evidently to prevent evasions of another against selling,[3] merely to treat in hospitality a person calling at one's house.[4] But where it is to prevent the corruption of elections, on election day, the contrary conclusion seems to follow.[5] In some of the statutes the word "give" is held to comprehend a sale.[6]

§ 1013. "Sell."— To sell is to transfer the ownership for a valuable consideration.[7] A gift is not a sale,[8] nor is the administering of the liquor by a physician as a medicine.[9] Nor yet is a mere agreement to sell;[10] there must be a delivery of the liquor,[11] or such a constructive delivery as will cause the title to pass.[12] But payment need not be made; for a sale on credit is equally within the prohibition as one for cash, though the law would not enforce the payment.[13] So also it is a sale

[1] Albrecht *v.* P., 78 Ill. 510; Bloomington *v.* Strehle, 47 Ill. 72; Williams *v.* S., 48 Ind. 306; Dahmer *v.* S., 56 Miss. 787; Parkinson *v.* S., 14 Md. 184, [74 Am. D. 522.]

[2] *Ante*, §§ 226, 230, 231 *et seq.*; [Amos *v.* S., 73 Ala. 493; S. *v.* Standish, 37 Iowa, 643.]

[3] Williams *v.* S., *supra;* Dahmer *v.* S., *supra;* [S. *v.* Ball, 27 Neb. 601, 43 N. W. R. 398.]

[4] Albrecht *v.* P., *supra;* [Reynolds *v.* S., 73 Ala. 3; Powers *v.* Com., 90 Ky. 167; P. *v.* Hicks, 79 Mich. 457, 44 N. W. R. 931; Com. *v.* Heckler, 168 Pa. St. 575, 32 Atl. R. 52; S. *v.* Camp, 64 Vt. 295, 24 Atl. R. 1114.]

[5] Searfoss *v.* S., 42 Md. 403.

[6] Com. *v.* Davis, 12 Bush, 240. Compare with Dahmer *v.* S., and Parkinson *v.* S., *supra;* [Ritchie *v.* Zalesky, 98 Iowa, 89, 67 N. W. R. 399; S. *v.* Danforth, 62 Vt. 188, 19 Atl. R. 229.]

[7] Parkinson *v.* S., 14 Md. 184, [74 Am. D. 522;] Stevenson *v.* S., 65 Ind. 409; Lumpkin *v.* Wilson, 5 Heisk. 555; Madison Avenue Baptist Church *v.* Baptist Church, 46 N. Y. 131; [McGruder *v.* S., 83 Ga. 616, 10 S. E. R. 281; Paschal *v.* S., 84 Ga. 326, 10 S. E. R. 821; Com. *v.* Abrams, 150 Mass. 393, 23 N. E. R. 53; Ludwig *v.* S. (Tex. Cr. R.), 51 S. W. R. 390.]

[8] Parkinson *v.* S., *supra;* Allen *v.* S., 14 Tex. 633; [Wlecke *v.* S., 14 Ill. Ap. 447; Siegel *v.* S., 106 Ill. 89; Harvey *v.* S., 80 Ind. 142; Kurtz *v.* S., 79 Ind. 488.]

[9] Schaffner *v.* S., 8 Ohio St. 642. And see *post*, § 1019.

[10] Banchor *v.* Warren, 33 N. H. 182; Riley *v.* S., 43 Miss. 397.

[11] Pulse *v.* S., 5 Humph. 108.

[12] Bishop, Con., §§ 1309, 1323; Dobson *v.* S., 57 Ind. 69; Com. *v.* Greenfield, 121 Mass. 40. See Tegler *v.* Shipman, 33 Iowa, 194, [11 Am. R. 118;] S. *v.* Comings, 28 Vt. 508; Stallard *v.* Marks, 3 Q. B. D. 412.

[13] Emerson *v.* Noble, 33 Me. 380; Com. *v.* Burns, 8 Gray, 482; Com. *v.* Rumrill, 1 Gray, 388, 390; Riley *v.* S.,

where the liquor is delivered in discharge of a prior obligation.[1] And,—

Quantity and where drank.— To complete the offense some of the statutes require less than a specified quantity to be sold,[2] or the sale to be by retail,[3] or for drinking on the premises, or the like;[4] others do not.[5] Now,—

Evasions.— It not being punishable under a statute to violate its spirit where the letter is not broken,[6] if, from whatever motive, parties so shape a transaction that it does not constitute a sale, or a sale of the forbidden quantity, and it is not meant to be such, they escape the statutory penalty.[7] But no mere evasion of the law, where a sale is the thing intended by the parties,— it being for the jury to say whether or not such was their intent, where *prima facie* the transaction was not a sale,[8]— will avail them.[9] Numerous have been the devices of offenders to escape this doctrine, and almost all have been unsuccessful; as,

supra; Ihrig *v.* S., 40 Ind. 422; S. *v.* Thomas, 18 W. Va. 848; [Perkins *v.* S., 92 Ala. 60, 90 S. R. 536; Billingsley *v.* S., 96 Ala. 114, 11 S. R. 408; P. *v.* Bradley, 58 Hun, 601.]

[1] Mason *v.* Lothrop, 7 Gray, 354; Beecher *v.* S., 32 Ind. 480; S. *v.* Poteet, 86 N. C. 612.

[2] Scott *v.* S., 25 Tex. Sup. 168; Noecker *v.* P., 91 Ill. 468; Weireter *v.* S., 69 Ind. 269; Sappington *v.* Carter, 67 Ill. 482; [Olmstead *v.* S., 90 Ala. 631, 8 S. R. 668; Bach *v.* S. (Ark.), 33 S. W. R. 357; Beiser *v.* S., 79 Ga. 326, 4 S. E. R. 257.]

[3] Tripp *v.* Hennessy, 10 R. I. 129; Bryant *v.* S., 46 Ala. 302; Lemons *v.* S., 50 Ala. 130; Harris *v.* S., 50 Ala. 127; Lillensteine *v.* S., 46 Ala. 498; Luling *v.* Labranche, 30 La. An. 972; Martin *v.* S., 59 Ala. 34; Forwood *v.* S., 49 Md. 531.

[4] O'Connor *v.* S., 45 Ind. 347; Bandalow *v.* P., 90 Ill. 218; Powell *v.* S., 63 Ala. 177; Bath *v.* White, 3 C. P. D. 175; S. *v.* White, 7 Bax. 158; [Ritchie *v.* Zalesky, 98 Iowa, 589, 67 N. W. R. 399; Com. *v.* Wheeler, 79 Ky. 284.]

[5] Allen *v.* S., 5 Wis. 329; S. *v.* Corll, 73 Ind. 535.

[6] *Ante*, § 1012, and places referred to.

[7] Dobson *v.* S., 57 Ind. 69; Young *v.* S., 58 Ala. 358; Scott *v.* S., 25 Tex. Supp. 168; S. *v.* Kirkham, 1 Ire. 384; [Skinner *v.* S., 97 Ga. 690; Hogg *v.* P., 15 Ill. Ap. 288; S. *v.* Hutchins, 74 Iowa, 20; Hood *v.* S., 35 Tex. Cr. R. 585, 34 S. W. R. 935; Way *v.* S., 36 Tex. Cr. R. 40, 35 S. W. R. 377.]

[8] Com. *v.* Smith, 102 Mass. 144, 147; Rickart *v.* P., 79 Ill. 85; Kober *v.* S., 10 Ohio St. 444. Handing the liquor to a person who asks for it is not the only method by which a sale may be made. Kimball *v.* P., 20 Ill. 348. And see S. *v.* Hopkins, 4 Jones (N. C.), 305; S. *v.* Wright, 4 Jones (N. C.), 308; [Roberson *v.* S., 99 Ala. 189, 13 S. R. 532; Marcus *v.* S., 89 Ala. 23, 8 S. R. 155; Blackwell *v.* S., 42 Ark. 275; Winn *v.* S., 43 Ark. 153; Lauer *v.* D. C., 11 Wash. Ap. 453; Hardison *v.* S., 95 Ga. 337, 22 S. E. R. 681; Roberson *v.* S., 100 Ala. 37, 14 S. R. 554.]

[9] Id.; S. *v.* Redden, 5 Harring. (Del.) 505; [P. *v.* Andrews, 115 N. Y. 427, 22 N. E. R. 358.]

selling something else and giving the liquor,[1] contracting for the larger permissible quantity and delivering it in the smaller forbidden quantities at different times,[2] permitting the customer to help himself and drop a piece of money into a hole in the table,[3] the "social club" device,[4] and other similar ones.[5] The

[1] Com. *v.* Thayer, 8 Met. 525; Archer *v.* S., 45 Md. 33. And see New Gloucester *v.* Bridgham, 28 Me. 60. Thus, "an ingenious but worthless woman set up a stall to give away liquor, and sell cigars at a price which would compensate for the liquor; in that case it was left for the jury to say whether it was in the contemplation of the parties by the purchase of cigars to pay for the liquor; and the jury convicted the defendant of a violation of this law." Observation in S. *v.* Redden, *supra;* [Com. *v.* Hogan, 140 Mass. 289, 3 N. E. R. 207; *In re* Kinzee, 59 N. Y. S. 682; *In re* Lyman, 59 N. Y. S. 968, 28 Misc. 385.]

[2] Murphy *v.* S., 1 Ind. 366, Smith (Ind.), 261; S. *v.* Kirkham, 1 Ire. 384; Thomas *v.* S., 37 Miss. 353; [Hunter *v.* S., 60 Ark. 312, 30 S. W. R. 42, 40 Cent. L. J. 495; Richardson *v.* Com., 76 Va. 1007.]

[3] S. *v.* McMinn, 33 N. C. 668.

[4] S. *v.* Mercer, 32 Iowa, 405; Marmont *v.* S., 48 Ind. 21. [A list of club cases is here appended, from which it will be seen that some of the courts hold, either upon principle or construction of the statutes in particular jurisdictions, that it is wholly illegal for a club to distribute intoxicating liquors among its members, whether a profit is made therefrom or not, and whether the use of liquor is a mere incident or the main purpose of the club, and that others make the legality of the distribution turn upon the question of the *bona fides* of the club as a social body with such distribution as a mere incident, or whether there were sales for profit, or the organization was a device or scheme to evade the statute. The cases, as here cited, are divided into those holding that the distribution was illegal and those holding the contrary. The following cases are of the former class: Mohrman *v.* S., 105 Ga. 709, 32 S. E. R. 143, 43 L. R. A. 378; S. *v.* Horacek, 41 Kan. 87, 41 S. W. R. 612, 3 L. R. A. 687; Kentucky Club *v.* Louisville, 92 Ky. 309; S. *v.* Boston Club, 45 La. An. 585, 20 L. R. A. 185; S. *v.* Easton, etc. Club, 73 Md. 97, 10 L. R. A. 64; Com. *v.* Baker, 152 Mass. 337; Com. *v.* Jacobs, 152 Mass. 276; P. *v.* Soule, 74 Mich. 250, 2 L. R. A. 494; S. *v.* Essex Club, 53 N. J. L. 99; Nogales Club *v.* S., 59 Miss. 218; S. *v.* Bacon, 44 Mo. Ap. 86; P. *v.* Andrews, 115 N. Y. 427, 6 L. R. A. 128; Com. *v.* Tierney, 148 Pa. St. 552; P. *v.* Bradley (N. Y.), 58 Hun, 601; S. *v.* Neis, 108 N. C. 787, 29 S. E. R. 453, 12 L. R. A. 412; Finn *v.* S., 38 Tex. Cr. R. 75, 41 S. W. R. 1102; Kranek *v.* S., 38 Tex. Cr. R. 44, 41 S. W. R. 612; Com. *v.* Shumate, 48 W. Va. 90, 29 S. E. R. 1001; Boldt *v.* S., 72 Wis. 7. And the following belong to the latter class: S., Bell *v.* St. Louis Club, 125 Mo. 308, 28 S. W. R. 573, 29 L. R. A. 185; P. *v.* Adelphia Club, 149 N. Y. 5, 43 N. E. R. 931, 31 L. R. A. 510; Barden *v.* Montana Club, 10 Mont. 330, 11 L. R. A. 593; Klein *v.* Livingston, 177 Pa. St. 224, 34 L. R. A. 94; S. *v.* McMaster, 35 S. C. 1; S. *v.* Austin Club, 89 Tex. 20, 33 S. W. R. 113, 30 L. R. A. 500; Hood *v.* S., 35 Tex. Cr. R. 585, 34 S. W. R. 935; Way *v.* S., 36 Tex. Cr. R. 40, 35 S. W. R. 377; Piedmont Club *v.* Com., 87 Va. 540.]

[5] Rickart *v.* P., 79 Ill. 85; S. *v.* White, 7 Bax. 158; S. *v.* Bell, 2 Jones (N. C.), 337. And see S. *v.* Simmons,

principle is that a sale is, not an executory, but an executed, contract; and, when the possession of the liquor has passed from the one person to the other, the transaction, whatever its form was, or however defective in form, becomes what the parties meant.[1] Again,—

Name of liquor.— If a drink of a particular name is adulterated or mixed with other ingredients, known or unknown, and sold under another name, still a sale of the mixture is a sale of the drink.[2]

§ 1014. "Barter" and "exchange," distinguished from "sale." — In other departments of the law a distinction is sometimes made between a "barter" or "exchange" of goods and a "sale" of them.[3] If goods are delivered at a fixed price, to be paid for in other goods, the transaction is as completely a sale as though the payment were to be in money.[4] But where one thing is simply given for another, and no determinate value is set upon either, the transaction is a barter and not a sale, and it does not alter the case that a money difference is paid.[5] Still we have other authority for saying that whenever, for any valuable consideration, though only in unappraised goods, the ownership of a thing passes from one person to another, there is a sale.[6] Some have applied the former doctrine to the criminal statutes now under discussion and held

66 N. C. 622; Bath *v.* White, 3 C. P. D. 175, 180; Weireter *v.* S., 69 Ind. 269; [S. *v.* Neis, 106 N. C. 787, 13 S. E. R. 225.]

[1] Bishop, Con., §§ 380, 386, 391, 401, 404; Huthmacher *v.* Harris, 38 Pa. St. 491, [80 Am. D. 502;] Whitcher *v.* Shattuck, 3 Allen, 319; Dunham *v.* Chatham, 21 Tex. 231, [73 Am. D. 228;] Weatherby *v.* Banham, 5 Car. & P. 228.

[2] Com. *v.* Bathrick, 6 Cush. 247; S. *v.* Stanton, 37 Conn. 421, 423. See Russell *v.* Sloan, 33 Vt. 656.

[3] Vail *v.* Strong, 10 Vt. 457; [Coker *v.* S., 91 Ala. 92, 8 S. R. 874; Robinson *v.* S., 59 Ark. 341, 27 S. W. R. 233; Gillan *v.* S., 47 Ark. 555, 2 S. W. R. 185.]

[4] Picard *v.* McCormick, 11 Mich. 68; Keiler *v.* Tutt, 31 Mo. 301; Loomis *v.* Wainwright, 21 Vt. 520. Still we have some authority for saying that it is a barter and not a sale where goods are exchanged at agreed prices. Guerreiro *v.* Peile, 3 B. & Ald. 616. And see Toml. Law Dict., "Barter."

[5] Gunter *v.* Leckey, 30 Ala. 591; Mitchell *v.* Gile, 12 N. H. 390; Woodford *v.* Patterson, 32 Barb. 630; Lumpkin *v.* Wilson, 5 Heisk. 555. See Wittkowsky *v.* Wasson, 71 N. C. 451.

[6] Foster *v.* Pettibone, 3 Seld. 433; Madison Avenue Baptist Church *v.* Baptist Church, 46 N. Y. 131, 139, 140. See Schermerhorn *v.* Talman, 4 Kern. 93, 117. "In exchanging, both parties are buyers and *sellers*." Anonymous, 3 Salk. 157.

that a barter of the liquor is not a sale of it.[1] On the other hand, under the statutory words "shall, directly or indirectly, on any pretense or by any device, sell, or in consideration of the purchase of any other property give to any person any spirituous or intoxicating liquor," the offense was held to be committed where a distiller exchanged intoxicating liquor for grain. "The intention of the legislature," said the learned judge, "was manifestly to cover every case of the transfer of intoxicating liquors for value, in whatever form the consideration for such transfer might be given or paid."[2]

§ 1015. "Mortgage" as "sale."— With some exceptions and qualifications,[3] a mortgage is a sale, though upon condition. Therefore the mortgage of an apothecary's stock, consisting in part of intoxicating liquors, was adjudged to be a sale of the liquors within the prohibitory laws; and, as such, invalid.[4]

§ 1016. "Offer to sell."— A sale is not necessarily an offer to sell.[5]

Single sale — (*One day*).— Under many of the principal statutes, a single instance of selling constitutes the offense;[6] and a person may commit any number of offenses in a single day; or as to one purchaser.[7] Thus,—

[1] Stevenson *v.* S., 65 Ind. 409. See Schlicht *v.* S., 56 Ind. 173.

[2] Com. *v.* Clark, 14 Gray, 367, 372, opinion by Bigelow, J. And see Howard *v.* Harris, 8 Allen, 297; [Com. *v.* Abrams, 150 Mass. 393, 23 N. E. R. 53.]

[3] Krider *v.* Western College, 31 Iowa, 547; P. *v.* Cox, 45 Cal. 342.

[4] Hay *v.* Parker, 55 Me. 355.

[5] "It [the offer to sell] is not to be inferred from the mere fact of a sale, because the seller may have merely accepted an offer of a third person to purchase an article which he had no previous thought of selling, or wish to sell; and it is absurd to talk of an acceptance as an offer. They are as essentially distinct as a question and an answer." Williams *v.* Tappan, 3 Fost. (N. H.) 385, 394.

"Expose for sale."— The mere having of liquors visible at the bar, without any affirmative act of offering them, has been held not to be within a statute against exposing them for sale on Sunday. Houtsch *v.* Jersey City, 5 Dutcher, 316; [Herron *v.* S., 51 Ark. 133, 10 S. W. R. 25.]

[6] Com. *v.* Porter, 4 Gray, 426; S. *v.* Grames, 68 Me. 418; Weireter *v.* S., 69 Ind. 269; Woody *v.* S., 32 Ga. 595; S. *v.* Small, 31 Mo. 197; [Dansey *v.* S., 23 Fla. 316, 2 S. R. 692; Frese *v.* S., 23 Fla. 267, 2 S. R. 1; P. *v.* Kropp, 52 Mich. 582, 18 N. W. R. 368; Springfield *v.* Ford, 40 Mo. Ap. 586. Single illegal sale not sufficient to convict druggist of keeping with intent to sell unlawfully. Maynard *v.* Eaton, 108 Mich. 201, 65 N. W. R. 760.]

[7] S. *v.* Small, 31 Mo. 197; Weireter *v.* S., *supra;* Brooke *v.* Milliken, 3 T. R. 509.

"*Retail*,"— in the statute, is satisfied by a single instance of selling,[1] though it may equally consist of more sales than one.[2] So —

"*Deal in selling*."— The words "deal in selling" are held to be satisfied by a single sale.[3] But —

"*Dealer*"— implies a plurality of instances.[4] And —

"*Business or employment*" — same.[5]

§ 1017. "**Presume to be seller.**" — The words "presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time," are held to require only a single sale.[6] But —

Quantity.— This statute is not violated where several kinds of liquor are included in the one sale, the quantity of each kind being less than the twenty-eight gallons, yet all being more. "It is," said Shaw, C. J., "a wholesale dealing with a customer who buys to sell again."[7]

§ 1018. "**Common seller.**" — The English statute of 5 and 6 Edw. 6, ch. 25, § 4, followed by some later enactments, made punishable those who should without license "use commonly selling of" specified drinks. Whence we have derived the expression "common seller," which some of our statutes forbid any one to be without license. And our courts have interpreted it to require proof of three specific acts of sale, to which

[1] S. *v.* Cassety, 1 Rich. 90; S. *v.* Mooty, 3 Hill (S. C.), 187; Lawson *v.* S., 55 Ala. 118; Martin *v.* S., 59 Ala. 34. In Markle *v.* Akron, 14 Ohio, 586, the court were of opinion that the word "retail" does not necessarily imply a consideration given; but, *query*.

[2] S. *v.* Anderson, 3 Rich. 172; Lillensteine *v.* S., 46 Ala. 498.

"**Wholesale.**"— As to the distinction between "wholesale" and "retail," see Gorsuth *v.* Butterfield, 2 Wis. 237; Harris *v.* Livingston, 28 Ala. 577; Koopman *v.* S., 61 Ala. 70; Espy *v.* S., 47 Ala. 533; Browne *v.* Hilton, 23 Pick. 319.

[3] *Ante*, § 210; S. *v.* Paddock, 24 Vt. 312; S. *v.* Glasgow, Dudley (S. C.), 40; S. *v.* Bugbee, 22 Vt. 32; S. *v.* Chandler, 15 Vt. 425.

[4] *Ante*, § 210; Overall *v.* Bezeau, 37 Mich. 506. A clerk in a dealer's saloon is not a dealer. Archer *v.* S., 10 Tex. Ap. 482. See also Barton *v.* Morris, 10 Phila. 360. [*Contra*, Jordon *v.* S., 22 Fla. 528.]

[5] Moore *v.* S., 16 Ala. 411; Harris *v.* S., 50 Ala. 127; Lemons *v.* S., 50 Ala. 130; Martin *v.* S., 59 Ala. 34; U. S. *v.* Jackson, 1 Hughes, C. C. 531; Lawson *v.* S., 55 Ala. 118.

[6] Com. *v.* Dean, 21 Pick. 334; R. S. of Mass., ch. 47, § 3.

[7] Browne *v.* Hilton, 23 Pick. 319. And see Com. *v.* Buck, 12 Met. 524; [Olmstead *v.* S., 90 Ala. 634, 8 S. R. 668; Bach *v.* S., 61 Ark. 326.]

perhaps must be added other evidence.[1] They need not be to three distinct persons;[2] even if all are to one, the effect is the same.[3] They may be all in one day,[4] or evening,[5] or on different days.[6] They do not constitute, but rather evidence,[7] the offense. There may be other proofs, and even those of the three sales may be circumstantial,[8] while yet the jury must in some way be made satisfied that they occurred.[9] Plainly, aside from a statutory interpretation which has sometimes prevailed in at least one of the states,[10] three sales may take place under circumstances which do not make the seller a common seller. Hence, and for other reasons, the defendant's surroundings and fittings up, and numberless other like facts, may be shown against him.[11]

§ 1019. Medical use — (Exceptive provisions). — Some of the statutes, in varying terms, provide for the selling of liquors for medical use, or except from their penalties sales made for such use.[12] And this accords alike with their general policy and with the opinions of all classes of people; for, though intoxicating liquor is not a "drug,"[13] all deem it a valuable medicine. Where these statutory provisions and limitations prevail,

[1] Com. *v.* Tubbs, 1 Cush. 2; Com. *v.* Odlin, 23 Pick. 275; S. *v.* Day, 37 Me. 244. See S. *v.* O'Conner, 49 Me. 594.

[2] Com. *v.* Tubbs, *supra;* S. *v.* Will, 6 R. I. 207.

[3] Com. *v.* Odlin, 23 Pick. 275, 278.

[4] Com. *v.* Perley, 2 Cush. 559.

[5] Com. *v.* Rumrill, 1 Gray, 388.

[6] S. *v.* Day, 37 Me. 244.

[7] S. *v.* Maher, 35 Me. 225; S. *v.* Coombs, 32 Me. 539. See *post,* § 1027.

[8] S. *v.* Hynes, 66 Me. 114, 115.

[9] Com. *v.* Tubbs, 1 Cush. 2. Yet Shaw, C. J., once said: "No statute and no rule of common law has precisely determined what shall constitute a person a common seller." Com. *v.* Odlin, 23 Pick. 275, 278; [Abel *v.* S., 90 Ala. 631, 8 S. R. 760.]

[10] Declaring three acts of sale sufficient to constitute a a common seller. Com. *v.* Kirk, 7 Gray, 496; Com. *v.* Barker, 14 Gray, 412; Com. *v.* Hogan, 97 Mass. 120. See Com. *v.* Mahony, 14 Gray, 46; Com. *v.* Boyden, 14 Gray, 101. Evidence of three transactions with delivery, sales, and purchase distinct from one another, although at a single visit of the purchasers, and in pursuance of a preconcerted plan to obtain evidence against the liquor-seller, is competent proof of three sales. Com. *v.* Graves, 97 Mass. 114.

[11] Com. *v.* Tubbs, *supra;* Com. *v.* Madden, 1 Gray, 486; Com. *v.* Harvey, 1 Gray, 487; Com. *v.* Norton, 16 Gray, 30; Com. *v.* Maloney, 16 Gray, 20; Com. *v.* Whalen, 16 Gray, 23; Com. *v.* Collins, 16 Gray, 29.

[12] Haynie *v.* S., 32 Miss. 400; Henwood *v.* S., 41 Miss. 579; S. *v.* Mitchell, 28 Mo. 562; S. *v.* Wells, 28 Mo. 565; Harper *v.* S., 3 Lea, 211; Boone *v.* S., 10 Tex. Ap. 418, [38 Am. R. 641;] Mills *v.* Perkins, 120 Mass. 41; Bain *v.* S., 61 Ala. 75; [Carl *v.* S., 87 Ala. 17, 6 S. R. 118.]

[13] Gault *v.* S., 34 Ga. 533.

they must, in reason, and it is believed on authority, be accepted as the measure of the right to make such sales, so that no further right can be superinduced by interpretation.[1] But,—

§ 1020. No exceptive provision.— Where the statute has no exceptive provision, it is the better opinion that interpretation should except the *bona fide* sale, proceeding on due caution and inquiry, for medical use;[2] though the books contain much in dissent from this.[3] In principle, this doctrine rests on a very firm foundation. It being an established rule in the interpretation of penal statutes that one to violate them must infringe their spirit equally with their letter,[4] everybody knows the purpose of these enactments to be the suppression of tippling,— or, at least, the sale for drink,— not the depriving of the sick of a needed medicine. Hence it is plain that the interpretation which is given to other criminal statutes will, if applied to these, except the *bona fide* and cautious sale for medical use. Again,—

Medicine distinguished from drink.— Things are distinguishable by the uses to which they are put. A piece of hickory wood two and a half feet long is one thing or another according as its purposed use is for fuel, for an axe handle, or for a deadly weapon with which to commit a murder. So is alcohol

[1] Harper *v.* S., *supra;* S. *v.* Wool, 86 N. C. 708; Newman *v.* S., 7 Lea, 617; [Flower *v.* S., 39 Ark. 209; Battle *v.* S., 51 Ark. 97; Telford *v.* S., 109 Ind. 359, 10 N. E. R. 107; S. *v.* Benadone, 79 Iowa, 90, 44 N. W. R. 218; S. *v.* Field, 89 Iowa, 34, 56 N. W. R. 276; S. *v.* McConnell, 90 Iowa, 197, 57 N. W. R. 707; S. *v.* Tanner, 50 Kan. 365, 31 Pac. R. 1096; Covington *v.* Com., 78 Ky. 83; Com. *v.* Day, 95 Ky. 120, 23 S. W. R. 952; Com. *v.* Frost, 155 Mass. 273, 34 N. E. R. 334; S. *v.* McAdoo, 80 Mo. 216; S. *v.* Hendrix, 98 Mo. 1020, 11 S. W. R. 728; S. *v.* Marchand, 25 Mo. Ap. 657; S. *v.* Baker, 36 Mo. Ap. 58; S. *v.* Mixdorf, 46 Mo. Ap. 494; S. *v.* Bevans, 52 Mo. Ap. 130; Nichols *v.* S., 37 Tex. Cr. R. 546, 40 S. W. R. 268; Miller *v.* S., 37 Tex. Cr. R. 35, 38 S. W. R. 772; S. *v.* Tetrick, 34 W. Va. 137, 11 S. E. R. 1002.]

[2] *Ante*, § 238; Donnell *v.* S., 2 Ind. 658; S. *v.* Adamson, 14 Ind. 296; Thomasson *v.* S., 15 Ind. 449; Elrod *v.* S., 72 Ind. 292; Hooper *v.* S., 56 Ind. 153; Ball *v.* S., 50 Ind. 595; Jakes *v.* S., 42 Ind. 473; Nixon *v.* S., 76 Ind. 524; Anderson *v.* Com., 9 Bush, 569; Miles *v.* S., 5 W. Va. 524; S *v.* Wray, 72 N. C. 253.

[3] *Ante*, § 238; S. *v.* Brown, 31 Me. 522; Com. *v.* Sloan, 4 Cush. 52; Com. *v.* Kimball, 24 Pick. 366; S. *v.* Chandler, 15 Vt. 425; Gault *v.* S., 34 Ga. 533; Wright *v.* P., 101 Ill. 126; Phillips *v.* S., 2 Yerg. 458; Brown *v.* S., 9 Neb. 189. See P. *v.* Safford, 5 Denio, 112; [Thomason *v.* S., 70 Ala. 20; Brinson *v.* S., 89 Ala. 105, 8 S. R. 527; Chapman *v.* S., 100 Ga. 311; S. *v.* Field, 89 Iowa, 34, 56 N. W. R. 276.]

[4] *Ante*, §§ 226, 230, 231 *et seq.*, 1012, 1013.

one thing when employed in tippling and another when administered for medicine to the sick. And it accords with all rules of interpretation to apply these statutes, as they were meant by the makers,[1] only to the tippling alcohol. Therefore, in the words of Gamble, J., "if a physician, upon his professional judgment that a sick person needs brandy, administers it as a medicine, in good faith, and charges for it, he is not to be punished; because such liquor properly used is a valuable medicine. But if he sells it to a man who is well, or sells it to a man who is not well, without exercising his professional judgment, and determining that it is necessary for the sick person, he is indictable."[2] Within this distinction, if, acting honestly and carefully, he is deceived by the sick man, who perverts what was given for medicine to a different use, he is excused by reason of the mistake of fact;[3] but it is otherwise where he is not deceived.[4] *A fortiori*, therefore, if the forbidden liquor is so mixed with other ingredients as to become a medicine in distinction from an intoxicating drink, the selling of it is not within these statutes.[5] Hence it is no offense to keep the liquor with the intent thus to mix it.[6] But the Maine court held that a physician cannot sell the unmixed liquor and the other ingredients separately, though the purchaser compounds them in his presence,[7] — a conclusion in which perhaps not all courts will concur.

§ 1021. Selling to particular classes — (Minors — Drunkards — Negroes — Slaves). — There are in some of the states statutes, in varying terms, forbidding the sale of intoxicating liquors to specified classes of persons; as, "minors,"[8] "drunk-

[1] *Ante*, §§ 70, 75, 76.

[2] S. *v.* Larrimore, 19 Mo. 391. See also Com. *v.* Kimball, 24 Pick. 366, 369; S. *v.* Hall, 39 Me. 107; Struble *v.* Nodwift, 11 Ind. 64; *ante*, § 1013; [Cousens *v.* S., 69 Ala. 235; Davis *v.* S., 93 Ga. 45, 18 S. E. R. 998; Tomlinson *v.* Terr. (N. Mex.), 36 Pac. R. 950.]

[3] Leppert *v.* S., 7 Ind. 300; Taylor *v.* Pickett, 52 Iowa, 467; S. *v.* Mitchell, 28 Mo. 562; [Stovall *v.* S., 37 Tex. Cr. R. 337, 39 S. W. R. 934.]

[4] McGuire *v.* S., 37 Miss. 369.

[5] King *v.* S., 58 Miss. 737, [38 Am. R. 344;] Prather *v.* S., 12 Tex. Ap. 401; Intoxicating Liquor Cases, 25 Kan. 751, [37 Am. R. 284;] S. *v.* Bennet, 3 Harring. (Del.) 565; Russell *v.* Sloan, 33 Vt. 656. See Byars *v.* Mt. Vernon, 77 Ill. 467. [But to pretendedly make and sell as medicine what is intended to be used as a beverage is punishable. U. S. *v.* White, 42 Fed. R. 138.]

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

[7] S. *v.* Hall, 39 Me. 107. And see S. *v.* Chandler, 15 Vt. 425.

[8] S. *v.* Fairfield, 37 Me. 517; Ihrig *v.* S., 40 Ind. 422; Com. *v.* Davis, 12 Bush, 240; Newman *v.* S., 63 Ga. 536; Werneke *v.* S., 50 Ind. 22; Weed *v.*

ards,"[1] "negroes,"[2] and formerly "slaves."[3] To deliver liquor to a minor for the use of the parent is not to sell it to the minor.[4] Some of the statutes permit the sale with the parent's consent; under which the consent must be in the statutory form.[5] Or, if the statute does not contain the exception, the

S., 55 Ala. 13; Edgar *v.* S., 37 Ark. 219; S. *v.* Cain, 9 W. Va. 559; S. *v.* Gilmore, 9 W. Va. 641; Ihinger *v.* S., 53 Ind. 251; Hill *v.* S., 62 Ala. 168; Adler *v.* S., 55 Ala. 16; Com. *v.* Jessup, 63 Pa. St. 34; Payne *v.* S., 74 Ind. 203; Reich *v.* S., 63 Ga. 616; Redmond *v.* S., 36 Ark. 58, [38 Am. R. 24;] S. *v.* Munson, 25 Ohio St. 381; Farmer *v.* P., 77 Ill. 322; McCutcheon *v.* P., 69 Ill. 601; Faulks *v.* P., 39 Mich. 200, [33 Am. R. 374;] Robinius *v.* S., 67 Ind. 94; Robinius *v.* S., 63 Ind. 235; Moore *v.* S., 65 Ind. 382; Bain *v.* S., 61 Ala. 75; S. *v.* Hartfiel, 24 Wis. 60; Goetz *v.* S., 41 Ind. 162; Ward *v.* S., 48 Ind. 289; Marshall *v.* S., 49 Ala. 21; Jamison *v.* Burton, 43 Iowa, 282; S. *v.* Richter, 23 Minn. 81; Perry *v.* Edwards, 44 N. Y. 223; Fitzenrider *v.* S., 30 Ind. 238; Baer *v.* Com., 10 Bush, 8; Johnson *v.* S., 74 Ind. 197; Hale *v.* S., 36 Ark. 150; Johnson *v.* P., 83 Ill. 431; [Liles *v.* S., 88 Ala. 139, 7 S. R. 196; Neely *v.* S., 60 Ark. 66, 27 L. R. A. 449, 28 S. W. R. 800; Siciluff *v.* S., 52 Ark. 56, 11 S. W. R. 964; P. *v.* Garrett, 68 Mich. 487; P. *v.* Neumann, 85 Mich. 98, 48 N. W. R. 290; Faber *v.* S., 3 Ind. Ap. 568. Removal of civil disabilities does not avoid it, being a sale in violation of law. Coker *v.* S., 91 Ala. 92.]

[1] Barnes *v.* S., 19 Conn. 398; Miller *v.* S., 3 Ohio St. 475; Smith *v.* S., 19 Conn. 493; Zeizer *v.* S., 47 Ind. 129; Hill *v.* S.; 62 Ala. 168; S. *v.* Gutekunst, 24 Kan. 252; Walton *v.* S., 62 Ala. 197; S. *v.* Mahoney, 23 Minn. 181; Atkins *v.* S., 60 Ala. 45; Williams *v.* S., 48 Ind. 306; Humpeler *v.* P., 92 Ill. 400; Dudley *v.* Sautbine, 49 Iowa, 650, [31 Am. R. 165;] Murphy *v.* P., 90 Ill. 59; Crabtree *v* S., 30 Ohio St. 382; P. *v.* Hislop, 77 N. Y. 331; Adams *v.* S., 25 Ohio St. 584; Elam *v.* S., 25 Ala. 53; Smith *v.* S., 55 Ala. 1; Mapes *v.* P., 69 Ill. 523; Deveny *v.* S., 47 Ind. 208; Allen *v.* S., 52 Ind. 486; Ruell *v.* S., 72 Ind. 523; Tatum *v.* S., 68 Ala. 147; S. *v.* Heck, 23 Minn. 549.

[2] S. *v.* Sonnerkalb, 2 Nott & McC. 280.

[3] Bond *v.* S., 13 Sm. & M. 265; Com. *v.* Hatton, 15 B. Monr. 537; S. *v.* Bradshaw, 2 Swan (Tenn.), 627; Powell *v.* State, 27 Ala. 51; Boltze *v.* S., 24 Ala. 89; Johnson *v.* Com., 12 Grat. 714; S. *v.* McNair, 1 Jones (N. C.), 180; Rawlings *v.* S., 2 Md. 201; Lindsay *v.* S., 19 Ala. 560; Brown *v.* S., 2 Head, 180; S. *v.* Weaks, 7 Humph. 522; Jolly *v.* S., 8 Sm. & M. 145; Page *v.* Luther, 6 Jones (N. C.), 413; Shuttleworth *v.* S., 35 Ala. 415; Reinhart *v.* S., 29 Ga. 522; S. *v.* Harrington, 12 Rich. 293. [It is no defense to an indictment founded on a statute prohibiting sale to an Indian to show he had abandoned the tribal relation and had adopted the habits of civilization. P. *v.* Bray, 105 Cal. 344, 38 Pac. R. 731, 27 L. R. A. 158; S. *v.* Wise, 70 Minn. 343, 72 N. W. R. 843.]

[4] Com. *v.* Lattinville, 120 Mass. 385. But see Ross *v.* P., 17 Hun, 591. [O'Connell *v.* O'Leary, 145 Mass. 311; Waldstein *v.* S., 29 Tex. Ap. 82; S. *v.* McMahon, 53 Cal. 485. But sale to minor for use of adult is violation. Sumner *v.* S., 4 Ind. Ap. 403. And to deliver to minor in pursuance of sale to adult is neither gift nor sale to minor. Ward *v.* S., 45 Ark. 351, and Wallace *v.* S., 54 Ark. 642, 16 S. W. R. 571.]

[5] Adler *v.* S., 55 Ala. 16; S. *v.* Coenan, 48 Iowa, 567; Ridling *v.* S., 56 Ga. 601; Com. *v.* Davis, 12 Bush, 240;

authority of the parent will be no excuse to the seller.[1] What is a drunkard we have already seen.[2] One, to be such, need not always be drunk.[3] Now,—

§ 1022. Mistake of fact — (Vendee's age — Habits — Intoxicating quality of liquor).— Under these statutes the question of the effect of a mistake of fact, discussed or adverted to in several other connections, has often arisen. It is not proposed to repeat the former discussions; they are referred to in a note,[4] and the reader is requested to examine them. The result, derivable both from the places referred to and from the decisions under the present head, is that one whom the law permits to sell intoxicating liquor, and whose purpose and endeavor it is to conform to the law in all things, and to do no wrong of any sort, is legally, the same as he is morally, justified in acting, like other people in respect of other things, on what upon careful investigation and inquiry appear to be the facts; so that, if believing the appearances he does what would be legally and morally right were the real facts so, he is not punishable though he was deceived and they were different. Thus, if one authorized to sell liquor to adults and forbidden to sell it to minors is, without his fault or carelessness, led to believe

[Blahut *v.* S., 54 Ark. 538, 16 S. W. R. 582; Mascowitz *v.* S., 49 Ark. 109, 4 S. W. R. 657; Mogler *v.* S., 47 Ark. 351, 14 S. W. R. 473; Gill *v.* S., 86 Ga. 751, 13 S. E. R. 86; Dixon *v.* S., 86 Ga. 754, 13 S. E. R. 87; Snider *v.* S., 81 Ga. 753, 7 S. E. R. 631; Blair *v.* S., 81 Ga. 629, 7 S. E. R. 855; Connolly *v.* P., 42 Ill. Ap. 36; S. *v.* Bender, 35 Mo. Ap. 532. No defense that minor had neither parent nor guardian. Hachenbach *v.* S. (Tex. Cr. R.), 29 S. W. R. 470.]

[1] S. *v.* Clottu, 33 Ind. 409; [Geraghty *v.* S., 110 Ind. 103.]

[2] *Ante*, §§ 970, 972; [S. *v.* Valure, 91 Iowa, 402, 64 N. W. R. 280; S. *v.* Moulton, 52 Kan. 69, 34 Pac. R. 412; Com. *v.* Saverey, 145 Mass. 212, 13 N. E. R. 611; Com. *v.* O'Kean, 152 Mass. 584, 26 N. E. R. 97; Com. *v.* Daley, 148 Mass. 160, 19 N. E. R. 209; Gilmore *v.* S., 37 Tex. Cr. R. 178, 39 S. W. R. 105.]

[3] Murphy *v.* P., 90 Ill. 59.

[4] Crim. Law, I, §§ 301–310; *ante*, §§ 490, 596*a*, 596*b*, 631*a*–632*a*, 663–665, 729, 819; [Jones *v.* S., 100 Ala. 88, 14 S. R. 772; S. *v.* Norton, 42 Mo. Ap. 64; S. *v.* Keith, 46 Mo. Ap. 525; S. *v.* O'Connor, 65 Mo. Ap. 324; Schurzer *v.* S. (Tex. Cr. R.), 25 S. W. R. 23; S. *v.* Wakefield (Tex. Cr. R.), 28 S. W. R. 470; Reynolds *v.* S., 32 Tex. Cr. R. 36; S. *v.* Wallace, 91 Iowa, 656, 16 S. W. R. 571. The following cases decide that it is a violation to deliver to a minor on his representation that he has been sent by adult: Neely *v.* S., 60 Ark. 66, 27 L. R. A. 503, 28 S. W. R. 800; Com. *v.* Joslin, 158 Mass. 482, 21 L. R. A. 449, 33 N. E. R. 653; Yukel *v.* S., 30 Tex. Ap. 391; and the following hold the contrary: S. *v.* McClain, 49 Mo. Ap. 398; Dixon *v.* S., 89 Ga. 785; Wallace *v.* S., 54 Ark. 542, 16 S. W. R. 571.]

an applicant to be an adult, while truly he is a minor, he is not punishable though he makes the sale,[1]— a proposition which some deny.[2] And the same doctrine applies under the statutes

[1] Crim. Law, I, § 302; Reich *v.* S., 63 Ga. 616; Marshall *v.* S., 49 Ala. 21; Ward *v.* S., 48 Ind. 289; Farbach *v.* S., 24 Ind. 77; Rineman *v.* S., 24 Ind. 80, 85; Brown *v.* S., 24 Ind. 113; Goetz *v.* S., 41 Ind. 162; Williams *v.* S., 48 Ind. 306; Robinius *v.* S., 67 Ind. 94; Faulks *v.* P., 39 Mich. 200, 202, [33 Am. R. 374], the court observing: "It cannot be assumed that the legislature would attempt such a wrong as to punish as criminal an act which involved no criminal intent. There can be no crime where there is no criminal mind. This principle is as old as the criminal law, and underlies the whole of it." Adler *v.* S., 55 Ala. 16; [Freiberg *v.* S., 94 Ala. 91, 10 S. R. 703; Harkey *v.* S., 89 Ga. 478, 15 S. E. R. 552; Hunter *v.* S., 101 Ind. 241; Kreamer *v.* S., 106 Ind. 192, 6 N. E. R. 341; Mulreed *v.* S., 107 Ind. 62, 7 N. E. R. 884; Ross *v.* S., 116 Ind. 495, 19 N. E. R. 451; P. *v.* Welch, 71 Mich. 548, 1 L. R. A. 385.]

[2] It is difficult to say what cases there are in denial of the better doctrine. A just examination of the decisions will disclose but very few. One difficulty is that judges and writers on the law have alike, in various instances, discussed this question in a condition of mind so dense with fog as to render it impossible to determine what is really meant; and another difficulty is that, in some correctly decided cases, where the facts did not require the drawing of exact lines, observations have fallen from the court leading ill-instructed writers to believe them adverse, while they are not. Such a writer, with strong leanings against the true doctrine, would set down S. *v.* Hartfiel, 24 Wis. 60, as adverse. The head-note is: "The sale of intoxicating liquors to a minor is an offense under section 1, chapter 128, Laws of 1867, though the vendor does not know that the purchaser is a minor." But there is nothing here of the sort. The statute is silent as to the seller's knowledge; and, of course, such knowledge is, as the head-note says, no element in the offense. Looking into the case, we find the following observation from the learned judge: "The authorities cited are to the effect that, where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact, or state of things contemplated by the statute, will not excuse its violation." Page 61. Nothing of this is in the slightest degree adverse to the doctrine of my text. All admit that a man has no right to act while his mind is in a state of "ignorance." He should first inform himself; and, if he will not, he must take the consequences. One who throws down from a loft, into the street, what will kill any man it hits, while "ignorant" whether or not there are men there, is properly adjudged guilty of a criminal homicide if a man is killed. And by all opinions the same doctrine applies to a sale of liquor to a minor in "ignorance" of his age. But it is a very different question whether or not it is a defense for the seller that he took pains to remove his "ignorance," and was duly, yet mistakenly, informed, therefore believed, that the buyer had attained majority. All concede that this sort of mistake would be a perfect defense in the case of homicide. Is the selling of a glass of whiskey to a youth an offense so much greater than murdering him that it should be dealt with less leniently? I shall not further ex-

permitting sales generally but not to habitual drunkards.[1] It applies, likewise, to the question of the intoxicating quality of the liquors sold; but there are cases in denial of this.[2] Where the statute is silent as to the defendant's intent or knowledge, the indictment need not allege or the government's evidence show that he knew the fact; his being misled concerning it is matter for him to set up in defense and prove.[3] Quite different are the law and procedure where the statute has the word "knowingly" or the like; knowledge is then an element in the crime, the indictment must allege it, and the evidence against the defendant affirmatively establish its existence.[4]

§ 1023. Opinion as to rightfulness — Intent. — When, not mistaking the fact, one intentionally makes the sale or does the other thing forbidden by these statutes, he commits the

amine the cases in detail, but perhaps some would deem the following to tend more or less toward the erroneous doctrine: Redmond *v.* S., 36 Ark. 58, [38 Am. R. 24;] Edgar *v.* S., 37 Ark. 219; S. *v.* Cain, 9 W. Va. 559; S. *v.* Gilmore, 9 W. Va. 641; Farmer *v.* P., 77 Ill. 322; McCutcheon *v.* P., 69 Ill. 601; Humpeler *v.* P., 92 Ill. 400; Ulrich *v.* Com., 6 Bush, 400. And see, as perhaps having some bearing on this question, on the one side or the other, Stanley *v.* S., 26 Ala. 26; Smith *v.* S., 24 Tex. 547; Dickins *v.* S., 30 Ga. 383; Miller *v.* S., 5 Ohio St. 275; Emery *v.* Kempton, 2 Gray, 257; Com. *v.* Goodman, 97 Mass. 117; [Robinson *v.* S., 38 Ark. 601; Waller *v.* S., 38 Ark. 656; S. *v.* Kinkead, 57 Cal. 103; Wright *v.* P., 101 Ill. 126; Flynn *v.* City, 12 Ill. App. 200; Holmes *v.* S., 88 Ind. 145; S. *v.* Thompson, 74 Iowa, 119, 37 N. W. R. 104; S. *v.* Ward, 75 Iowa, 637, 36 N. W. R. 765; S. *v.* Lindoen, 87 Iowa, 701, 54 N. W. R. 1075; S. *v.* Field, 89 Iowa, 34, 56 N. W. R. 276; Fielding *v.* La Grange, 104 Iowa, 530, 73 N. W. R. 1038; S. *v.* Moulton, 52 Kan. 69, 34 Pac. R. 412; Carroll *v.* S., 63 Md. 551, 3 Atl. R. 29; Patterson *v.* S., 83 Md. 194; Com. *v.* Stevens, 155 Mass. 291, 29 N. E. R. 508; Com. *v.* Joslin, 158 Mass. 482, 21 L. R. A. 489, 33 N. E. R. 653; Com. *v.* Gould, 158 Mass. 499, 33 N. E. R. 656; S. *v.* Bruder, 35 Mo. Ap. 475; *Re* Carlson's License, 127 Pa. St. 330, 18 Atl. R. 8.]

[1] Crabtree *v.* S., 30 Ohio St. 382; [Com. *v.* Julius, 143 Mass. 132, 8 N. E. R. 898; McDonald *v.* Casey, 84 Mich. 505, 47 N. W. R. 1104; Com. *v.* Zelt (Pa.), 7 W. N. C. 131; S. *v.* Farr, 34 W. Va. 84, 11 S. E. R. 737.]

[2] Crim. Law, I, § 303*a*, note, par. 20; Com. *v.* Boynton, 2 Allen, 160; Com. *v.* Hallett, 103 Mass. 452.

[3] *Ante*, §§ 675, 729; S. *v.* Kalb, 14 Ind. 403; Goetz *v.* S., 41 Ind. 162; Ward *v.* S., 48 Ind. 289; Marshall *v.* S., 49 Ala. 21; Mapes *v.* P., 69 Ill. 523; Jamison *v.* Burton, 43 Iowa, 282; Bain *v.* S., 61 Ala. 75; S. *v.* Heck, 23 Minn. 549; Werneke *v.* S., 50 Ind. 22.

[4] Crim. Pro., I, §§ 522, 523; *ante*, §§ 732, 733; Felton *v.* U. S., 96 U. S. 699; Perry *v.* Edwards, 44 N. Y. 223; Atkins *v.* S., 60 Ala. 45. And see Elam *v.* S., 25 Ala. 53. [Sales by servant under mistaken belief that parties are hotel guests has been held to be no defense. Com. *v.* Green, 163 Mass. 103, 39 N. E. R. 775.]

offense; it being no excuse for him that he deems what he does to be right.[1]

§ 1024. Principal and agent.— The ordinary doctrines regarding the criminal responsibilities of principal and of agent[2] find frequent illustrations in the present class of cases. However men combine, each one is criminally responsible for what he personally does, whether instigated to it or not, for the whole of what he assists others in doing, and for all that others do through his procurement. It is immaterial, therefore, that the liquor which one sells on his own motion is another's,[3] or that he sells another's liquor as the agent or servant of the owner,[4] or that he procures another to sell his liquor as his servant or agent.[5] In all these cases he is liable for the whole offense as seller, and it makes no difference that others are

[1] S. *v.* Presnell, 12 Ire. 103. See also S. *v.* Cassety, 1 Rich. 90; Gilbert *v.* Hendricks, 2 Brev. 161. And see Crim. Law, I, §§ 344, 345; [U. S. *v.* White, 42 Fed. R. 138; Com. *v.* O'Kean, 152 Mass. 584, 26 N. E. R. 97; P. *v.* Bacon, 117 Mich. 187; S. *v.* Chastain, 19 Oreg. 176, 23 Pac. R. 962; Petteway *v.* S., 36 Tex. Cr. R. 97, 35 S. W. R. 646; Pike *v.* S. (Tex. Cr. R.), 51 S. W. R. 395. If one sells, believing the sale is unlawful, and it turns out to be lawful, there is no violation. Com. *v.* Green, 163 Mass. 103, 39 N. E. R. 775.]

[2] Crim. Law, I, §§ 355, 626–643, 656–658, 685–689, 892; [Liles *v.* S., 86 Ala. 139, 7 S. R. 196; P. *v.* Longwell (Mich.), 79 N. W. R. 484; Com. *v.* Joslin, 158 Mass. 432, 33 N. E. R. 653; U. S. *v.* White, 42 Fed. R. 138; S. *v.* Denoon, 31 W. Va. 122; S. *v.* Kinnebrew, 80 Ga. 232.]

[3] S. *v.* Wadsworth, 30 Conn. 55; Com. *v.* Williams, 4 Allen, 587; S. *v.* Finan, 10 Iowa, 19; *ante*, § 1004; [Cagle *v.* S., 87 Ala. 38, 6 S. R. 300; Whiller *v.* S., 11 Lea (Tenn.), 18; P. *v.* Andrews, 115 N. Y. 427, 22 N. E. R. 358.]

[4] Crim. Law, I, §§ 355, 657, 658; Schmidt *v.* S., 14 Mo. 137; Hays *v.* S., 13 Mo. 246; S. *v.* Bryant, 14 Mo. 340; S. *v.* Bugbee, 22 Vt. 32; Com. *v.* Hadley, 11 Met. 66; Roberts *v.* O'Conner, 33 Me. 496; S. *v.* Caswell, 2 Humph. 399; S. *v.* Dow, 21 Vt. 484; French *v.* P., 3 Park. Cr. 114; S. *v.* Matthis, 1 Hill (S. C.), 37; S. *v.* Wiggin, 20 N. H. 449; Winter *v.* S., 30 Ala. 22; Reg. *v.* Howard, 45 U. C. Q. B. 346; Com. *v.* Eggleston, 128 Mass. 498; Tardiff *v.* S., 28 Tex. 169; S. *v.* Stucker, 33 Iowa, 395; S. *v.* Mercer, 32 Iowa, 405; Johnson *v.* P., 33 Ill. 431; S. *v.* Canton, 43 Mo. 48; Walton *v.* S., 62 Ala. 197; [S. *v.* Sullivan, 33 Me. 417, 22 Atl. R. 381; P. *v.* De Groot, 111 Mich. 245; S. *v.* McGinnis, 30 Minn. 48, 14 N. W. R. 256; S. *v.* Kreichbaum, 81 Iowa, 633, 47 N. W. R. 872; Jenks *v.* S., 29 Tex. Ap. 421.]

[5] Crim. Law, I, §§ 564, 628–633, 673, 677; Com. *v.* Park, 1 Gray, 553; Thompson *v.* S., 5 Humph. 138; Com. *v.* Major, 6 Dana, 293; Com. *v.* Nichols, 10 Met. 259, [43 Am. D. 432;] Schmidt *v.* S., 14 Mo. 137; S. *v.* Brown 31 Me. 520; S. *v.* Stewart, 31 Me. 515; S. *v.* Dow, 21 Vt. 484; S. *v.* Caswell, 2 Humph. 399; Forrester *v.* S., 63 Ga. 349; McCutcheon *v.* P., 69 Ill. 601; Stevens *v.* P., 67 Ill. 587; Mullinix *v.* P., 76 Ill. 211.

equally liable also for the same sales. Even the sale, by one partner, of the firm's liquors, may, under some circumstances, be deemed the act of each member of the firm, though not specially authorized by the others.[1] Yet, in all cases, if the person sought to be charged really did not give authority, direct or indirect, or participate in the profits, or suffer his will to concur in the transaction, he cannot be holden.[2] A license to the principal protects also the agent.[3]

§ 1025. Husband and wife.—The principles which determine the respective liabilities of husband and wife in these cases are explained in other connections.[4] If she sells in his absence, as his authorized agent, she is punishable personally,[5] and he is so likewise for the same sales.[6] For sales by her in his presence, actual or constructive, the liability is his,[7] and *prima facie* it does not attach to her, who is presumed to act from his coercion.[8] But where she sells in his absence, without his consent, expressed or implied, she alone is criminally liable,[9] — a doctrine in a measure qualified by another; namely,

[1] Smith *v.* Adrian, 1 Mich. 495; S. *v.* Neal, 7 Fost. (N. H.) 131; Whitton *v.* S., 37 Miss. 379; Gathings *v.* S., 44 Miss. 343. And see Blahut *v.* S., 34 Ark. 447; Com. *v.* Cook, 12 Allen, 542. But see Acree *v.* Com., 13 Bush, 353; [P. *v.* Whipple, 108 Mich. 587.]

[2] Crim. Law, I, §§ 218–221, 628–634; Barnes *v.* S., 19 Conn. 398; Com. *v.* Nichols, 10 Met. 259; S. *v.* Borgman, 2 Nott & McC. 34, note; S. *v.* Bohles, 1 Rice, 145, 147; Lauer *v.* S., 14 Ind. 131; Wreidt *v.* S., 48 Ind. 579; Gaiocchio *v.* S., 9 Tex. Ap. 387; Hanson *v.* S., 43 Ind. 550; O'Leary *v.* S., 44 Ind. 91; Goods *v.* S., 3 Greene (Iowa), 566; Lathrope *v.* S., 51 Ind. 192. See Mullins *v.* Collins, Law R. 9 Q. B. 292; Riley *v.* S., 43 Miss. 397; Noecker *v.* P., 91 Ill. 494; [Minders *v.* Silverstein, 36 La. An. 912; Com. *v.* Rooks, 150 Mass. 159, 22 N. E. R. 436; Com. *v.* Stevens, 153 Mass. 421, 26 N. E. R. R. 992; Butler *v.* Augusta, 100 Ga. 370, 28 S. E. R. 164; Banks *v.* Sullivan, 78 Ill. Ap. 298. Mere absence of proprietor and violation of instructions by clerk has been held not to be complete defense. S. *v.* Kittrelle, 110 N. C. 560.]

[3] *Ante*, § 1004; Perkins *v.* S., 20 Ind. 116.

[4] Crim. Law, I, §§ 356–366, 391*a*.

[5] S. *v.* Haines, 35 N. H. 207; Geuing *v.* S., 1 McCord, 573; Rex *v.* Crofts, 7 Mod. 397, 2 Stra. 1120; [Com. *v.* Hyland, 155 Mass. 7, 28 N. E. R. 1055.]

[6] S. *v.* Roberts, 55 N. H. 483; Com. *v.* Reynolds, 114 Mass. 306; Com. *v.* Kennedy, 119 Mass. 211; Com. *v.* Hamor, 8 Grat. 698; Com. *v.* Tryon, 99 Mass. 442; S. *v.* Colby, 55 N. H. 72.

[7] Hensly *v.* S., 52 Ala. 10.

[8] Com. *v.* Munsey, 112 Mass. 287; [Com. *v.* Flaherty, 140 Mass. 452, 5 N. E. R. 258; Com. *v.* Daley, 148 Mass. 11, 18 N. E. R. 579. It has been held that if she acts as his agent in re-receiving money for whisky she may be convicted. Smith *v.* Com. (Ky.), 48 S. W. R. 1081.]

[9] Pennybaker *v.* S., 2 Blackf. 484; Com. *v.* Murphy, 2 Gray, 510; S. *v.* Collins, 1 McCord, 355; S. *v.* Baker,

that he is required to use all his legitimate marital powers to restrain her from crime, neglecting which he may be held criminally for sales made by her, in his absence, even against his remonstrance.[1] The recent statutes enlarging the property rights of married women do not affect these questions.[2] Though, for example, the wife separately owns the liquors, the business,[3] and the house,[4] and he makes the sales,[5] or she makes them in her presence and by his direction,[6] he is indictable.

§ 1026. Punishment.— The question of the punishment, and particularly whether that for a joint sale should be made by the sentence several or joint, will be found sufficiently elucidated in "Criminal Law."[7] There are, on this question, some points special to particular states.[8]

§ 1027. Electing offense to prosecute.—An offender's conduct will often be found to have violated more than one of the provisions of these statutes. Then, as in other criminal cases, he may be proceeded against for any crime which can be carved out of it, at the election of the prosecuting power.[9] But,—

71 Mo. 475; [Com. *v.* Roberts, 132 Mass. 267; S. *v.* Baker, 71 Mo. Ap. 475.]

[1] Crim. Law, I, § 891*a*; S. *v.* McDaniel, 1 Houst. Crim. 506; Com. *v.* Barry, 115 Mass. 146; [Com. *v.* Welsh, 165 Mass. 62.]

[2] Com. *v.* Gannon, 97 Mass. 547; Com. *v.* Welch, 97 Mass. 593; Com. *v.* Carroll, 124 Mass. 30; [S. *v.* Rozum (N. Dak.), 80 N. W. R. 477; S. *v.* Ekange (N. Dak.), 80 N. W. R. 482.]

[3] Com. *v.* Barry, 115 Mass. 146.

[4] Com. *v.* Kennedy, 119 Mass. 211; Com. *v.* Pratt, 126 Mass. 462.

[5] Orange *v.* Dougherty, 55 Barb. 332; [Faircloth *v.* S., 73 Ga. 426.]

[6] Mulvey *v.* S., 43 Ala. 316, [94 Am. D. 684.]

[7] Crim. Law, I, §§ 940, 957. And see Lincolnton *v.* McCarter, Busbee, 429; Black *v.* McGilvery, 38 Me. 287; Tuttle *v.* Com., 2 Gray, 505; Estes *v.* S., 2 Humph. 496; Ingersoll *v.* Skinner, 1 Denio, 540; Washburn *v.* McInroy, 7 Johns. 134; P. *v.* Brown, 16 Wend. 561; Barth *v.* S., 18 Conn. 432; Com. *v.* Harris, 7 Grat. 600; Tracy *v.* Perry, 5 N. H. 504; Harris *v.* Com., 23 Pick. 280; S. *v.* Shaw, 23 Iowa, 316; Hall *v.* McKechnie, 22 Barb. 244; Bates *v.* Enright, 42 Me. 105; Com. *v.* Fontain, 127 Mass. 452.

[8] Taunton *v.* Sproat, 2 Gray, 428; Crosby *v.* Snow, 16 Me. 121; Miller *v.* S., 3 Ohio St. 475; Johnson *v.* P., Breese, 276; Mertz's Case, 8 Watts & S. 374; Morris *v.* P., 2 Thomp. & C. 219; Marxhausen *v.* Com., 29 Grat. 853; S. *v.* Little, 42 Iowa, 51; S. *v.* McGrew, 11 Iowa, 112; Reg. *v.* Dale, Dears. 37, 6 Cox, C. C. 93; P. *v.* Bartow, 27 Mich. 68.

[9] Crim. Law, I, § 791; Miller *v.* S., 3 Ohio St. 475. And see Henry *v.* Com., 9 B. Monr. 361; Frasier *v.* S., 6 Mo. 195; [Com. *v.* O'Hanlan, 155 Mass. 198, 29 N. E. R. 518; Com. *v.* Galligan, id. 54, 28 N. E. R. 1121. But where two like violations are shown no election compelled. S. *v.* Heinze, 45 Mo. Ap. 403.]

Former jeopardy.—Whether, in a particular instance, after a jeopardy for one of the crimes he can be pursued for another, it may be difficult to decide, partly because of inherent obscurities in this class of questions, and partly because the adjudications have not been entirely harmonious, or all absolutely just.[1] As this is not the place for the elucidation of the principles involved, we shall here only look at some adjudged points. Thus,—

Common seller and single sales.—Whether, where it is punishable to be a common seller, and likewise to make specific sales, the three instances[2] relied on to establish the former offense may be also prosecuted as separate sales, we saw in another connection.[3] Again,—

Nuisance and specific sales, etc.—It appears to be settled that one may be convicted both of keeping a tippling-shop or other like liquor nuisance, and of specific sales shown in evidence of it,[4] or of being a common seller.[5] Also —

Nuisance and keeping liquors.—Maintaining a liquor nuisance and keeping liquor with the intent to sell it have been held to be separate offenses in respect of this question.[6] So —

Keeping for sale and selling — have been adjudged distinct offenses, as thus viewed.[7]

Specific sales.—A prosecution for one specific sale will not bar an indictment for another,[8] yet it will for the same sale.[9]

[1] Crim. Law, I, §§ 1012, 1048–1069. [Sale to minor and sale without license are distinct offenses though in one transaction. Ruhle *v.* S., 51 Ark. 170, 10 S. W. R. 262; Blair *v.* S., 61 Ga. 629, 7 S. E. R. 855; S. *v.* Gapen, 17 Ind. App. 524. And selling on Sunday,—prosecution for is no bar to prosecution for selling without license on other days within the statutory period. Arrington *v.* Com., 87 Va. 96, 12 S. E. R. 224. Selling to two Indians in one transaction is one offense. P. *v.* Faust, 113 Cal. 172.]

[2] *Ante*, § 1018.

[3] Crim. Law, I, §§ 1054, 1065; S. *v.* Coombs, 32 Me. 529; S. *v.* Maher, 35 Me. 225; S. *v.* Johnson, 3 R. I. 94. See Wilson *v.* Com., 12 B. Monr. 2; P. *v.* Safford, 5 Denio, 112.

[4] Crim. Law, I, § 1065; S. *v.* Williams, 1 Vroom, 102; S. *v.* Lincoln, 50 Vt. 644; Com. *v.* Hogan, 97 Mass. 122.

[5] S. *v.* Inness, 53 Me. 536; Com. *v.* O'Donnell, 8 Allen, 546.

[6] Com. *v.* McShane, 110 Mass. 502.

[7] S. *v.* Head, 3 R. I. 135.

[8] S. *v.* Ainsworth, 11 Vt. 91; S. *v.* Cassety, 1 Rich. 90. For other points, see P. *v.* Stevens, 13 Wend. 341; Miller *v.* S., 3 Ohio St. 475; S. *v.* Brown, 49 Vt. 437; S. *v.* Shafer, 20 Kan. 226.

[9] S. *v.* Brown, *supra;* Brinkman *v.* S., 57 Ind. 76.

Principal and agent.— The conviction of the principal for a sale made by his agent is no defense to the agent afterward indicted for the same sale.[1]

§ 1028. Felony or misdemeanor.— In Vermont[2] and New York[3] this offense is a misdemeanor, and probably none of our statutes elevate it to a higher degree.

§ 1029. Abetting.— One in this misdemeanor, as in others, may incur the guilt by assisting another therein.[4] It has been even held that to make change for persons selling is to commit the offense.[5] But, for reasons explained in "Criminal Law," the purchaser of the liquor is not indictable as abetting the seller.[6]

§ 1030. Civil consequences.— Courts will not assist parties in violating a statute.[7] Therefore all executory contracts for the purchase and sale of liquors contrary to a statutory inhibition or provision rendering it penal, and all promises, even promissory notes, to pay for liquors thus unlawfully sold or for services rendered in the selling are void.[8] But any independ-

[1] S. *v.* Finan, 10 Iowa, 19.

[2] S. *v.* Comings, 28 Vt. 508.

[3] Hill *v.* P., 20 N. Y. 363.

[4] *Ante*, §§ 1024, 1025; Walton *v.* S., 92 Ala. 197; S. *v.* Munson, 25 Ohio St. 381; White *v.* S., 11 Tex. App. 476; S. *v.* Summey, 1 Winst. ii. 108; [Foster *v.* S., 45 Ark. 361; Phillips *v.* S., 95 Ga. 478, 20 S. E. R. 270.]

[5] Johnson *v.* P., 83 Ill. 431. [Merely setting out the glasses at request of seller is not. S. *v.* Keith, 46 Mo. App. 525; Wiley *v.* S., 74 Miss. 727, 21 S. R. 797.]

[6] Crim. Law, I, §§ 657, 658, 761; Com. *v.* Willard, 22 Pick. 476; Hill *v.* Spear, 50 N. H. 253, [9 Am. R. 205;] Com. *v.* Williams, 4 Allen, 587; Harney *v.* S., 8 Lea, 113; [S. *v.* Crow, 53 Kan. 669, 37 Pac. R. 172; S. *v.* Baden, 37 Minn. 212, 34 N. W. R. 24; S. *v.* Cullins, 53 Kan. 100, 36 Pac. R. 56; Sears *v.* S. (Tex. Cr. R.), 34 S. W. R. 124.]

[7] Bishop, Con., §§ 547, 548; Holt *v.* Green, 73 Pa. St. 198, [13 Am. R. 737;] Fowler *v.* Scully, 72 Pa. St. 456, [13 Am. R. 699.]

[8] Bishop, Con., § 548; Briggs *v.* Campbell, 25 Vt. 704; Vannoy *v.* Patton, 5 B. Monr. 248; Smith *v.* Joyce, 12 Barb. 21; Turck *v.* Richmond, 13 Barb. 533; Bancroft *v.* Dumas, 21 Vt. 456; Chase *v.* Burkholder, 18 Pa. St. 48; Adams *v.* Hackett, 7 Fost. (N. H.) 289, [59 Am. D. 376;] Lewis *v.* Welch, 14 N. H. 294; Rindskoff *v.* Curran, 34 Iowa, 325; Melchoir *v.* McCarty, 31 Wis. 252, [11 Am. R. 605;] Timson *v.* Moulton, 3 Cush. 269; Roop *v.* Delahaye, 2 Colo. 307; Niles *v.* Rhodes, 7 Mich. 374; Alexander *v.* O'Donnell, 12 Kan. 608; Webber *v.* Howe, 36 Mich. 150, [24 Am. R. 590.] And see Mabry *v.* Bullock, 7 Dana, 337; New Gloucester *v.* Bridgham, 28 Me. 60; Foster *v.* Thurston, 11 Cush. 322; Solomon *v.* Dreschler, 4 Minn. 278; Mansfield *v.* Stoneham, 15 Gray, 149; Butler *v.* Northumberland, 50 N. H. 33; Niles *v.* Fries, 35 Iowa, 41; Dolan *v.* Buzzell, 41 Me. 473; [Wassenbocher *v.* Boulier, 84 Me. 165, 24 Atl. R. 808; Knowlton *v.* Doherty, 87 Me. 518, 33 Atl. R. 18; Wildemuth *v.* Cole, 77

ent, lawful contract may be enforced, though made at the same time;[1] while yet, if the lawful and unlawful are so blended as to constitute one indivisible contract, all will be void.[2] Some nice questions arise where the transaction is partly in a state wherein it is lawful, and partly in one where it is unlawful; but a mere reference to some of the authorities will suffice under this head.[3] When the contract has become fully executed on both sides,[4] neither money paid on it[5] nor the liquors[6] can be recovered back. After a sale on credit has been made, the repeal of the forbidding statute will not so operate retrospectively as to enable the vendor to recover the price.[7] Now,—

§ 1031. Special provisions.— Some of the statutes have special provisions confirming or modifying the common-law doctrines thus laid down. They are not uniform in our states. The reader may consult the cases cited in the note; of which some are only illustrative, having proceeded on enactments which did not contain the express provisions.[8]

Mich. 483, 43 N. W. R. 889. Lien for freight in favor of railroads transporting liquors to be sold illegally will be defeated where the officers of the railroads knew the purpose. S. *v.* Creeden, 78 Iowa, 556, 43 N. W. R. 673.]

[1] Chase *v.* Burkholder, 18 Pa. St. 48. And see Buck *v.* Albee, 27 Vt. 190.

[2] Bishop, Con., § 487; Ladd *v.* Dillingham, 34 Me. 316; Bliss *v.* Brainard, 41 N. H. 256.

[3] Hill *v.* Spear, 50 N. H. 253, [9 Am. R. 205;] Converse *v.* Foster, 32 Vt. 828; Carter *v.* Clark, 28 Conn. 512; Backman *v.* Mussey, 31 Vt. 547; Harrison *v.* Nichols, 31 Vt. 709; Gaylord *v.* Soragen, 32 Vt. 110, [76 Am. D. 154;] Finch *v.* Mansfield, 97 Mass. 89; Second National Bank *v.* Curren, 36 Iowa, 555; Garfield *v.* Paris, 96 U. S. 557; Boothby *v.* Plaisted, 51 N. H. 436, [12 Am. R. 140;] Schlesinger *v.* Stratton, 9 R. I. 578; Erwin *v.* Stafford, 45 Vt. 390; Abberger *v.* Marrin, 102 Mass. 70; Ely *v.* Webster, 102 Mass. 304; Brockway *v.* Maloney, 102 Mass. 308; Dolan *v.* Green, 110 Mass. 322.

[4] Bishop, Con., § 589 and note.

[5] Mudgett *v.* Morton, 60 Me. 260.

[6] Marienthal *v.* Shafer, 6 Iowa, 223.

[7] Hathaway *v.* Moran, 44 Me. 67; Webber *v.* Howe, 36 Mich. 150.

[8] Carlton *v.* Bailey, 7 Fost. (N. H.) 230; Breck *v.* Adams, 3 Gray, 569; Sullivan *v.* Park, 33 Me. 438; Towle *v.* Blake, 38 Me. 528; Cochrane *v.* Clough, 38 Me. 25; Emerson *v.* Noble, 32 Me. 380; Webber *v.* Williams, 36 Me. 512; Territt *v.* Bartlett, 21 Vt. 184; Gassett *v.* Godfrey, 6 Fost. (N. H.) 415; Orcutt *v.* Nelson, 1 Gray, 536; Fisher *v.* McGirr, 1 Gray, 1, [61 Am. D. 381;] Lord *v.* Chadbourne, 42 Me. 429, [66 Am. D. 290;] Gray *v.* Kimball, 42 Me. 299; Dearborn *v.* Hoit, 41 Me. 120; Dunbar *v.* Mulry, 8 Gray, 163; Barnard *v.* Field, 46 Me. 526; Foxcroft *v.* Crooker, 40 Me. 308; Charlton *v.* Donnell, 100 Mass. 229; Aiken *v.* Blaisdell, 41 Vt. 655; Smith *v.* Hickman, 68 Ill. 314; McGunn *v.* Hanlin, 29 Mich. 476; Becker *v.* Betten, 39 Iowa, 668; Street *v.* Sanborn, 47 Vt. 702; Abberger *v.* Marrin, 103 Mass. 70; Ely *v.* Webster, 102 Mass. 304; Brockway *v.* Maloney, 102 Mass.

§ 1031a. Civil-damage laws.—In some of the states there are statutes, in varying terms, giving to wives and others injured by the purchasers of intoxicating drinks in consequence of their using them, or deprived thereby of their services or support, a civil suit against the sellers for the damages. It is not within the scope of this work to discuss these statutes, but a reference to some of the cases may be serviceable.[1]

§ 1032. Questions special to particular states—have been less considered in the foregoing elucidations than those of a more general nature. It is not proposed to enter into them more minutely, but to refer in the note to various cases involving them, some of which have been already cited and others have not.[2]

308; Dolan *v.* Green, 110 Mass. 322; Carlin *v.* Heller, 34 Iowa, 256; Thayer *v.* Partridge, 47 Vt. 423; Hamilton *v.* Goding, 55 Me. 419; Lindsey *v.* Stone, 123 Mass. 332; Cottle *v.* Cleaves, 70 Me. 256; Donahoe *v.* Coleman, 46 Conn. 319; [S. *v.* Davis, 44 Kan. 60, 24 Pac. R. 73; Pottenger *v.* S., 54 Kan. 312, 38 Pac. R. 278; Connolly *v.* Scorr, 72 Iowa, 223, 33 N. W. R. 641.]

[1] Bates *v.* Davis, 76 Ill. 222; Brannan *v.* Adams, 76 Ill. 331; Hackett *v.* Smelsley, 77 Ill. 109; Horn *v.* Smith, 77 Ill. 381; McEvoy *v.* Humphrey, 77 Ill. 388; Martin *v.* West, 7 Ind. 657; Schafer *v.* S., 49 Ind. 460; Barnaby *v.* Wood, 50 Ind. 405; English *v.* Beard, 51 Ind. 489; Welch *v.* Jugenheimer, 56 Iowa, 11, [41 Am. R. 77;] Kreiter *v.* Nichols, 28 Mich. 496; Ganssly *v.* Perkins, 30 Mich. 492; Bodge *v.* Hughes, 53 N. H. 614; Bedore *v.* Newton, 54 N. H. 117; Kilburn *v.* Coe, 48 How. Pr. 144; Hayes *v.* Phelan, 4 Hun, 733; Dubois *v.* Miller, 5 Hun, 332; Jackson *v.* Brookins, 5 Hun, 530; Duroy *v.* Blinn, 11 Ohio St. 331; Schneider *v.* Hosier, 21 Ohio St. 98; Mulford *v.* Clewell, 21 Ohio St. 191; Granger *v.* Knipper, 2 Cin. 480; Stanton *v.* Simpson, 48 Vt. 628; Peterson *v.* Knoble, 35 Wis. 80; Church *v.* Higham, 44 Iowa, 482.

[2] *Alabama.*—Smith *v.* S., 22 Ala. 54; Lodano *v.* S., 25 Ala. 64; Holt *v.* School Commissioners, 29 Ala. 451; Mulvey *v.* S., 43 Ala. 316, [94 Am. D. 684; [Campbell *v.* S., 46 Ala. 116; Lillensteine *v.* S., 46 Ala. 498; Nicrosi *v.* S., 52 Ala. 336; Ulmer *v.* S., 61 Ala. 208.

Arkansas.—Ramsey *v.* S., 6 Eng. 35.

Connecticut.—Hine *v.* Belden, 27 Conn. 384; S. *v.* Wolfarth, 42 Conn. 155; S. *v.* Cady, 47 Conn. 44.

[*Georgia.*—Belding *v.* Johnson, 86 Ga. 177, 11 L. R. A. 53.]

Illinois.—Sullivan *v.* P., 15 Ill. 233; Bennett *v.* P., 16 Ill. 160; Zarresseller *v.* P., 17 Ill. 101; President, etc. *v.* Holland, 19 Ill. 271; Myers *v.* P., 67 Ill. 503; Ferguson *v.* P., 73 Ill. 559; Mullinix *v.* P., 76 Ill. 211; Gunnarssohn *v.* Sterling, 92 Ill. 559; Flora *v.* Lee, 5 Bradw. 629; [Cruse *v.* Alden, 127 Ill. 231, 3 L. R. A. 327; Lloyd *v.* Kelly, 48 Ill. Ap. 554.]

Indiana.—S. *v.* Turner, 5 Blackf. 253; Cable *v.* S., 8 Blackf. 531; Place *v.* S., 8 Blackf. 319; Sloan *v.* S., 8 Blackf. 361; Cheezem *v.* S., 2 Ind. 149; King *v.* S., 2 Ind. 523; Thompson *v.* Bassett, 5 Ind. 535; Hanning *v.* S., 6 Ind. 432; Brosee *v.* S., 5 Ind. 75; Howard *v.* S., 5 Ind. 183; Rust *v.* S., 4 Ind. 528; Cassett *v.* S., 9 Ind. 87; S.

The decisions — on the subject of this chapter are in some respects a little inharmonious; but, on the whole, they are less in conflict than those which relate to the procedure, to be treated of in the next chapter.

v. O'Conner, 4 Ind. 299; Rosenbaum *v.* S., 4 Ind. 599; Leyner *v.* S., 8 Ind. 490; Hanson *v.* S., 43 Ind. 550; Zeller *v.* S., 46 Ind. 304; Layton *v.* S., 49 Ind. 229; S. *v.* Woulfe, 58 Ind. 17; McLaughlin *v.* S., 66 Ind. 193; S. *v.* Mulhisen, 69 Ind. 145; S. *v.* Christman, 67 Ind. 328; Douglass *v.* S., 72 Ind. 385; Elliott *v.* S., 73 Ind. 10; Payne *v.* S., 74 Ind. 203; [Haggard *v.* Stehlin, 137 Ind. 37, 35 N. E. R. 997, 22 L. R. A. 577.]

Iowa.— Rogers *v.* Alexander, 2 Greene (Iowa), 443; S. *v.* Koehler, 6 Iowa, 398; S. *v.* Shawbeck, 7 Iowa, 322; S. *v.* Smouse, 50 Iowa, 43; [Gustafson *v.* Wind, 62 Iowa, 281; Flint *v.* Gauer, 66 Iowa, 296; Applegate *v.* Winebramer, 67 Iowa, 235; Myers *v.* Kirb, 68 Iowa, 124; Huff *v.* Aultman, 69 Iowa, 71. See also note with citation of Iowa and other cases in S. *v.* Creeden, 7 L. R. A. 295.]

Kansas.— S. *v.* Pittman, 10 Kan. 593.

Kentucky.— Lawson *v.* Com., 14 B. Monr. 225.

Maine.— Foster *v.* Haines, 13 Me. 307; S. *v.* Davis, 23 Me. 403; New Gloucester *v.* Bridgham, 28 Me. 60; S. *v.* Gurney, 33 Me. 527; S. *v.* Robinson, 33 Me. 564; Parsons *v.* Bridgham, 34 Me. 240: S. *v.* Tibbetts, 36 Me. 553; Black *v.* McGilvery, 38 Me. 287; Androscoggin R. R. Co. *v.* Richards, 41 Me. 233; S. *v.* Elder, 54 Me. 381; Guptill *v.* Richardson, 62 Me. 257; S. *v.* Nowlan, 64 Me. 531.

Maryland.— Brown *v.* Maryland, 12 Wheat. 419; Bode *v.* S., 7 Gill, 326; Keller *v.* S., 11 Md. 525, [69 Am. D. 226;] Downs *v.* S., 19 Md. 571; Cearfoss *v.* S., 42 Md. 403; S. *v.* Popp, 45 Md. 432.

Massachusetts.— Com. *v.* Odlin, 23 Pick. 275; Harris *v.* Com., 23 Pick. 280: Com. *v.* Herrick, 6 Cush. 465; Com. *v.* Bralley, 3 Gray, 456; Com. *v.* Newell, 5 Gray, 76; Com. *v.* Certain Intoxicating Liquors, 13 Allen, 561; Com. *v.* Doe, 108 Mass. 418; Com. *v.* Kevill, 108 Mass. 422; Com. *v.* Locke, 114 Mass. 288; Com. *v.* Costello, 118 Mass. 454; [Sackett *v.* Buder, 152 Mass. 397, 9 L. R. A. 391; Finnegan *v.* Lucy, 157 Mass. 439.]

Michigan.— P. *v.* Hart, 1 Mich. 467; Smith *v.* Adrian, 1 Mich. 495; P. *v.* Bartow, 27 Mich. 68; *In re* Buddington, 29 Mich. 472; [Garrison *v.* Stelle, 46 Mich. 98; Brockway *v.* Patterson, 72 Mich. 122, 1 L. R. A. 708; McDonald *v.* Casey, 84 Mich. 505; Peacock *v.* Oaks, 83 Mich. 578; Doty *v.* Postal, 87 Mich. 143; Gullickson *v.* Gjorna, 89 Mich. 8; Radley *v.* Snider, 99 Mich. 431, 58 N. W. R. 366; Fletcher *v.* Fosler (Mich.), 10 L. R. A. 80; Eddy *v.* Courtright, 93 Mich. 264; Dennison *v.* Van Wormer, 107 Mich. 461; Matthews *v.* Gorman, 110 Mich. 559; Weiser *v.* Welch, 112 Mich. 135; Wood *v.* Lutz, 116 Mich. 275, 74 N. W. R. 462; Jewell *v.* Welch, 117 Mich. 65.]

Minnesota.— S. *v.* Hanley, 25 Minn. 429; S. *v.* Kobe, 26 Minn. 148.

Mississippi.— Brittain *v.* Bethany, 31 Miss. 331; Pons *v.* S., 49 Miss. 1; Blakely *v.* S., 57 Miss. 680.

Missouri.— Bledsoe *v.* S., 10 Mo. 388; S. *v.* Huffschmidt, 47 Mo. 73; S. *v.* Stewart, 47 Mo. 382; S. *v.* Edwards, 60 Mo. 490; S. *v.* Jaeger, 63 Mo. 403; [Draper *v.* Fitzgerald, 30 Mo. Ap. 518; Bochman *v.* Brown, 57 Mo. Ap. 68.]

[*Nebraska.*— McCloy *v.* Worrell, 18 Neb. 44; Jones *v.* Bates, 26 Neb. 693, 4 L. R. A. 495; Bloedel *v.* Zimmerman, 41 Neb. 695, 60 N. W. R. 6; Grau *v.* Houston (Neb.), 64 N. W. R. 245;

Dolan *v.* McLaughlin (Neb.), 64 N. W. R. 1076; Fitzgerald *v.* Donoho (Neb.), 67 N. W. R. 880; Klimont *v.* Corcoran, 51 Neb. 142, 70 N. W. R. 910.]

New Hampshire.— S. *v.* Fletcher, 5 N. H. 257; S. *v.* Perkins, 6 Fost. (N. H.) 9; S. *v.* Rundlett, 33 N. H. 70; Pierce *v.* Hillsborough, 54 N. H. 433; S. *v.* Tufts, 56 N. H. 137; Piece *v.* Hillsborough, 57 N. H. 324; [Fortier *v.* Moore, 67 N. H. 460, 36 Atl. R. 369.]

New Jersey.— S. *v.* Passaic, 13 Vroom, 87.

New York.— Blasdell *v.* Hewit, 3 Caines, 137; Griffith *v.* Wells, 3 Denio, 226; P. *v.* Townsey, 5 Denio, 70; Wright *v.* Smith, 13 Barb. 414; Andrews *v.* Harrington, 19 Barb. 343; Cattaraugas *v.* Willey, 2 Lans. 427; Wynehamer *v.* P., 2 Park. Cr. 377; s. c. *nom.* Wynhamer *v.* P., 20 Barb. 567; P. *v.* Quant, 2 Park. Cr. 410; Van Zant *v.* P., 2 Park. Cr. 168; P. *v.* Page, 3 Park. Cr. 600; Foote *v.* P., 56 N. Y. 321; Rau *v.* P., 63 N. Y. 277; P. *v.* Smith, 69 N. Y. 175; P. *v.* Hislop, 77 N. Y. 331; [Goodwin *v.* Young, 34 Hun, 252; Ford *v.* Ames, 36 Hun, 571; Sharpley *v.* Brown, 43 Hun, 374; Campbell *v.* Schlesinger, 48 Hun, 428; McCarty *v.* Wells, 51 Hun, 171; Rouse *v.* Steamboat Co., 59 Hun, 80; Bacon *v.* Jacobs, 63 Hun, 51; Hall *v.* Germain, 131 N. Y. 536; Dudley *v.* Parker, 132 N. Y. 386; Quinlan *v.* Welch, 141 N. Y. 158, 36 N. E. R. 12; Du Puy *v.* Cook, 35 N. Y. S. 632; Snyder *v.* Launt, 37 N. Y. S. 408, 25 Civ. Proc. R. 141.]

North Carolina.— S. *v.* Plunket, 1 Ire. 115; Lincolnton *v.* McCarter, Busbee, 429; S. *v.* Hix, 3 Dev. 116; S. *v.* Smitherman, 1 Ire. 14.

Ohio.— Hirn *v.* S., 1 Ohio St. 15; Miller *v.* S., 3 Ohio St. 475.

Pennsylvania.— Com. *v.* Saal, 10 Phila. 496; Specht *v.* Com., 24 Pa. St. 103; Van Swartow *v.* Com., 24 Pa. St. 131; Com. *v.* Jessup, 63 Pa. St. 34; [Bradford *v.* Boley, 167 Pa. St. 506, 31 Atl. R. 751; Rommel *v.* Schambacher, 120 Pa. St. 579; Veon *v.* Creaton, 138 Pa. St. 48, 9 L. R. A. 814.]

Rhode Island.— Hanley *v.* Powers, 11 R. I. 82; S. *v.* Read, 12 R. I. 135; S. *v.* Carver, 12 R. I. 285; S. *v.* Collins, 12 R. I. 478.

South Carolina.— S. *v.* Mooty, 3 Hill (S. C.), 187; S. *v.* Evans, 3 Hill (S. C.), 190; S. *v.* Chamblyss, Cheves, 220, [34 Am. D. 593;] Commissioners *v.* Dennis, Cheves, 229.

[*South Dakota.*— Sandidge *v.* Widmann (S. D.), 80 N. W. R. 164.]

Tennessee.— Dyer *v.* S., Meigs, 237; Campbell *v.* S., 3 Humph. 9; S. *v.* Eskridge, 1 Swan (Tenn.), 413; Levi *v.* S., 4 Bax. 289; Brady *v.* S., 7 Bax. 87; S. *v.* Staley, 3 Lea, 565; [Riden *v.* Grimm, 97 Tenn. 220, 36 S. W. R. 1097, 35 L. R. A. 589.]

Texas.— Manning *v.* S., 36 Tex. 670; Countz *v.* S., 41 Tex. 50; Halfin *v.* S., 5 Tex. Ap. 212; [Edgett *v.* Fuin (Tex. Civ. Ap.), 36 S. W. R. 830; Peavy *v.* Goss, 90 Tex. 89, 37 S. W. R. 317.]

Vermont.— S. *v.* Conlin, 27 Vt. 318; Street *v.* Hall, 29 Vt. 165; S. *v.* Peterson, 41 Vt. 504; *In re* Pierce, 46 Vt. 374; Morrill *v.* Thurston, 46 Vt. 732; S. *v.* Preston, 48 Vt. 12; S. *v.* Benjamin, 49 Vt. 101; [Testearn *v.* Bacon, 65 Vt. 516, 27 Atl. R. 198; McQuade *v.* Hatch, 65 Vt. 482.]

Virginia.— Clemmons *v.* Com., 6 Rand. 681; Com. *v.* Scott, 10 Grat. 749; Thon *v.* Com., 31 Grat. 887.

[*Washington.*— Delfel *v.* Hanson, 2 Wash. 194.]

West Virginia.— S. *v.* Cain, 8 W. Va. 720.

Wisconsin.— Williams *v.* Troop, 17 Wis. 463; S. *v.* Miller, 23 Wis. 634; S. *v.* Gumber, 37 Wis. 298.

CHAPTER LVI.

SELLING INTOXICATING LIQUOR — THE PROCEDURE.

§ 1032. Introduction.
1033*a*–1045. The indictment.
1045*a*–1053. The evidence.

§ 1033. How chapter divided. — We shall consider, I. The indictment; II. The evidence.

I. The Indictment.

§ 1033a. In general of indictment. — The statutes, the modifications of the offense created by them, and the views special to the tribunal, relating to this subject, so differ in our several states, and in the same state at different times, that the providing of forms for general use becomes too complicated to be profitably carried far. Often indictments very loosely drawn — perhaps inadequately, as tested by the rules of pleading which control other cases — have been sustained for this offense. Yet there is no just reason why specially loose allegations should be permitted. The subject has no intrinsic difficulties; nor, if the very strictest rules were enforced, would the indictment, under any of these statutes, require to be long. Still, by the practice as we find it,—

Adherence to canons of pleading and statutes. — The pleader, in these cases, while not held to the strictest rules, is compelled to follow the statutes in substance, and conform in substance to the canons of good pleading.[1] For example,—

[1] Mulvey *v.* S., 43 Ala. 316, [94 Am. D. 684;] Campbell *v.* S., 46 Ala. 116; Nicrosi *v.* S., 52 Ala. 336; S. *v.* Miller, 24 Conn. 522; Prather *v.* P., 85 Ill. 36; Ulmer *v.* S., 61 Ala. 208; S. *v.* Joyner, 81 N. C. 534; S. *v.* Smouse, 49 Iowa, 634; Wilson *v.* Com., 14 Bush, 159; S. *v.* Thompson, 44 Iowa, 399; Glass *v.* Com., 33 Grat. 827; S. *v.* Graffmuller, 26 Minn. 6; S. *v.* Lavake, 26 Minn. 526, [37 Am. R. 415;] Allman *v.* S., 69 Ind. 387; S. *v.* Martin, 34 Ark. 340; S. *v.* Conner, 30 Ohio St. 405; S. *v.* OnGee How, 15 Nev. 184; S. *v.* Strauss, 77 N. C. 500; S. *v.* Stamey, 71 N. C. 202; Ward *v.* S., 48 Ind. 293; S. *v.* Lisles, 58 Mo. 359; S. *v.* Wentworth, 65 Me. 234; S. *v.* Gorham, 65 Me. 270; Blakely *v.* S., 57 Miss. 680; Miller *v.* S., 3 Ohio St. 475; Peer's Case, 5 Grat. 674; S. *v.*

Time and place.— The allegations of time[1] and place[2] must accord with the requirements in other like cases.

§ 1034. Unlicensed selling.— If the thing forbidden is the selling, by an unlicensed person, of a quantity, less than so much, of a particular kind of intoxicating liquor, the allegation may be that, at a time and place named, the defendant, not being then and there licensed to sell intoxicating liquor, did sell to one B. a certain quantity less than [so much], to wit, one gill of whiskey, the same then and there being intoxicating liquor, against, etc.[3]

§ 1034a. To minor — To drunkard.— If a sale, or if a gift of the liquor, was to a minor, the fact of the minority — and, under a statute making it material, the absence of any permit from the parent — should also be alleged, with the defendant's

Brown, 31 Me. 520; S. *v.* Bartlett, 43 Vt. 86; Herine *v.* Com., 13 Bush, 295; Hainline *v.* Com., 13 Bush, 350; Whiting *v.* S., 14 Conn. 487, [36 Am. D. 499;] S. *v.* Crabtree, 27 Mo. 232; Devine *v.* S., 4 Iowa, 443; Woodworth *v.* S., 4 Ohio St. 487; Com. *v.* Baker, 2 Gray, 78; Benalleck *v.* P., 31 Mich. 200; Com. *v.* Burke, 15 Gray, 408; Com. *v.* Hickey, 126 Mass. 250; S. *v.* Cottle, 15 Me. 473; S. *v.* Haynes, 35 Vt. 565; S. *v.* Freeman, 27 Iowa, 333; Blackwell *v.* S., 36 Ark. 178; Wilson *v.* S., 35 Ark. 414; S. *v.* Stamey, 71 N. C. 202; S. *v.* Odam, 2 Lea, 220; S. *v.* Irvine, 3 Heisk. 155; [Hubbard *v.* S. (Ala.), 19 S. R. 519; Wood *v.* S., 9 Ind. Ap. 42; Hatfield *v.* S., 9 Ind. Ap. 296; S. *v.* Rafter, 62 Mo. Ap. 101; S. *v.* Baskett, 52 Mo. Ap. 389; P. *v.* Harmon, 49 Hun, 558; S. *v.* Lowenhaupt, 11 Lea (Tenn.), 13; Arrington *v.* Com., 87 Va. 96, 12 S. E. R. 224.]

[1] S. *v.* Kobe, 26 Minn. 148; Com. *v.* Butler, 1 Allen, 4; Atkins *v.* S., 60 Ala. 45; Collins *v.* S., 58 Ind. 5; Clark *v.* S., 34 Ind. 436; Com. *v.* Kingman, 14 Gray, 85; Com. *v.* Donnelly, 14 Gray, 86, note; Koch *v.* S., 32 Ohio St. 353; Com. *v.* McKiernan, 128 Mass. 414.

[2] S. *v.* Pittman, 10 Kan. 593; S. *v.* Odam, 2 Lea, 220; Aultfather *v.* S., 4 Ohio St. 467; S. *v.* Graeter, 6 Blackf. 105; Conley *v.* S., 5 W. Va. 522; Hafter *v.* S., 51 Ala. 37; [S. *v.* McBride, 64 Mo. Ap. 364; S. *v.* Burkitt, 51 Kan. 175, 32 Pac. R. 925; McCreary *v.* S., 73 Ala. 480; Dansey *v.* S., 23 Fla. 316, 2 S. R. 692.]

[3] Com. *v.* Eaton, 9 Pick. 165; Com. *v.* Hart, 11 Cush. 130; Miller *v.* S., 3 Ohio St. 475; Kern *v.* S., 7 Ohio St. 411; Kliffield *v.* S., 4 How. (Miss.) 304; S. *v.* Marcus, 20 Ark. 201; Com. *v.* Odlin, 23 Pick. 275; S. *v.* Williamson, 19 Mo. 384; Com. *v.* Wilcox, 1 Cush. 503; S. *v.* Lane, 33 Me. 536; Com. *v.* White, 18 B. Monr. 492; Com. *v.* Macuboy, 3 Dana, 70; McCuen *v.* S., 19 Ark. 630; Burch *v.* Republic, 1 Tex. 608; S. *v.* Cox, 29 Mo. 475; White *v.* S., 11 Tex. Ap. 476; Needham *v.* S., 19 Tex. 332; Higgins *v.* P., 69 Ill. 11; Byars *v.* Mt. Vernon, 78 Ill. 11; S. *v.* Abbott, 11 Fost. (N. H.) 434; Com. *v.* McKiernan, 128 Mass. 414; S. *v.* Lavake, 26 Minn. 526, [37 Am. R. 415;] Com. *v.* Davis, 121 Mass. 352; Wilson *v.* Com., 14 Bush, 159; Austin *v.* S., 10 Mo. 591; Goodhue *v.* Com., 5 Met. 553; Anderson *v.* P., 63 Ill. 53; S. *v.* Allen, 32 Iowa, 248.

knowledge of the minority, or not, according to the terms of the statute, under the principles already explained.[1] And the like rules govern an indictment for disposing of liquor to a drunkard.[2] It has been adjudged ill simply to say that the purchaser "was in the habit of getting intoxicated," not specifying time; the existence of the habit at the time of the sale should appear.[3]

§ 1034b. Drank on premises.— It must likewise be alleged that the liquor was sold to be drank on the premises, or other designated place, where such is an element in the offense; otherwise, where it is not.[4] The actual drinking need not also be stated, if without it the statutory terms are covered.[5] So —

Drank as beverage,— if in the statute, must be also in the indictment.[6]

§ 1035. Common seller.— The indictment for being, without license, a common seller,[7] may, if so the statutory terms will be covered, aver that the defendant was at a time and place specified a common seller of spirituous and intoxicating liquors, without being thereto duly appointed or authorized.[8] So,—

Pursue business.— Where the offense is pursuing the business of liquor-selling, there would seem to be no necessity for specific allegations beyond the statutory terms, while yet all the particulars to bring the case within the statute should be set out. But the authorities, as to this, have not apparently developed any distinct rules.[9]

[1] *Ante*, §§ 1021, 1022; Meyer *v.* S., 50 Ind. 18; Aultfather *v.* S., 4 Ohio St. 467; Newman *v.* S., 63 Ga. 533; Weed *v.* S., 55 Ala. 13; S. *v.* Emerick, 35 Ark. 324; Grunkemeyer *v.* S., 25 Ohio St. 548; [Com. *v.* Murphy, 155 Mass. 284, 29 N. E. R. 469.]

[2] Berry *v.* S., 67 Ind. 222; Zeizer *v.* S., 47 Ind. 129; Buell *v.* S., 72 Ind. 523; Tatum *v.* S., 63 Ala. 147; [Dolan *v.* S., 122 Ind. 141, 23 N. E. R. 761; S. *v.* Smith, 122 Ind. 178. 23 N. E. R. 714.]

[3] Wiedemann *v.* P., 92 Ill. 314.

[4] *Post*, § 1061; S. *v.* Charlton, 11 W. Va. 332; Clark *v.* S., 34 Ind. 436; Burke *v.* S., 52 Ind. 461; Vanderwood *v.* S., 50 Ind. 26; Vanderwood *v.* S., 50 Ind. 295; Higgins *v.* P., 69 Ill. 11; Plunkett *v.* S., 69 Ind. 68; Atkins *v.* S., 60 Ala. 45; Com. *v.* Young, 15 Grat. 664; Com. *v.* Goe, 9 Leigh, 620; S. *v.* Smith, 35 Tex. 132; [Blough *v.* S., 121 Ind. 355, 23 N. E. R. 153; S. *v.* Stiefel, 74 Md. 546.]

[5] Eisenman *v.* S., 49 Ind. 511.

[6] Dowdell *v.* S., 58 Ind. 338.

[7] *Ante*, § 1018.

[8] S. *v.* Johnson, 3 R. I. 94; Com. *v.* Kendall, 12 Cush. 414; S. *v.* Cottle, 15 Me. 473; S. *v.* Stinson, 17 Me. 154; Com. *v.* Leonard, 8 Met. 529; S. *v.* Barker, 3 R. I. 280; S. *v.* Churchill, 25 Me. 306; Com. *v.* Kingman, 14 Gray, 85; Com. *v.* Donnelly, 14 Gray, 86, note; P. *v.* Webster, 2 Doug. (Mich.) 92.

[9] Carr *v.* S., 5 Tex. Ap. 153; Eppstein *v.* S., 11 Tex. Ap. 480; S. *v.* Martin, 34

§ 1036. Satisfying constitutional requirements — (Modifying statutes).— An obvious method for increasing the efficacy of these laws, so difficult of enforcement,[1] would be to promote, by statute, true legal learning in prosecuting officers and the judges by whom these causes are heard. But this is an experiment which has never been tried. Instead of it, wholly uncalled-for provisions have in many of our states been enacted, commanding the tribunals to proceed on meagre and indefinite forms of allegation. They are to be obeyed, except when in conflict with constitutional guaranties, elsewhere considered.[2] Upon which question the leading rule, under our constitutions as ordinarily drawn, is that every fact which the law has made an affirmative element in the offense must, in distinct terms, and with identifying particularity, be charged; and a statute which undertakes to dispense with anything of this, is, so far, unconstitutional and void.[3]

§ 1037. Name of person to whom sold.— Where the wrong consists of specific sales, the most ready and apt way of pointing out and identifying the transaction[4] is to give the names of the persons to whom the sales were made. And, in the absence of any other adequate identification,[5] such names should, in principle, be alleged if known, or the fact of their being unknown should be averred in excuse. Yet there is a good deal of authority, more in the older cases than in the later ones,[6] to the proposition that the names are not essential.[7] On the other

Ark. 340; S. *v.* Woodward, 25 Vt. 616; Hafter *v.* S., 51 Ala. 37.

[1] *Ante*, § 987.

[2] Crim. Pro., I, §§ 86–88, 95–112.

[3] Byran *v.* S., 45 Ala. 86, 87, 88; McLaughlin *v.* S., 45 Ind. 338.

[4] Crim. Pro., I, § 571; *ante*, §§ 894–897, 944; [P. *v.* Keefer, 97 Mich. 15, 56 N. W. R. 105; P. *v.* Heffron, 53 Mich. 527, 19 N. W. R. 170; P. *v.* Minnock, 52 Mich. 628, 18 N. W. R. 390.]

[5] Burch *v.* Republic, 1 Tex. 608. And see Alexander *v.* S., 29 Tex. 495; [S. *v.* Brown, 41 La. An. 772, 6 S. R. 638; Martin *v.* S., 30 Neb. 507, 46 N. W. R. 618.]

[6] Thus it was held in Rhode Island that the name must be averred, Durfee, C. J., observing: "In this state the practice is to omit the name. This practice has prevailed for more than a generation. We do not know that it has ever been questioned. If it has, it has doubtless been sustained. We should be glad if we could sanction it for pending complaints, but we are declaring the law, not simply for pending complaints, but for them and all others after them, and we do not see how, upon either principle or precedent, the practice can be upheld." S. *v.* Doyle, 11 R. I. 574, 576.

[7] S. *v.* Spain, 29 Mo. 415; S. *v.* Munger, 15 Vt. 290; Hulstead *v.* Com., 5 Leigh, 724; S. *v.* Parnell, 16 Ark. 506, [63 Am. D. 72;] P. *v.* Adams, 17 Wend. 475; Cannady *v.* P., 17 Ill. 158; McCuen *v.* S., 19 Ark. 630; Green *v.* P.,

hand, it has been even held that a statute dispensing with this allegation is unconstitutional and void;[1] and, in one way or another, the doctrine which requires the name, or the averred excuse for its omission, is widely maintained.[2] Where the charge is being a common seller,[3] no names of persons to whom sales are made need be set out;[4] for in this offense not even instances of sale are required to be averred.[5]

§ 1038. Name of liquor.—The statutes on which depends the question of naming or describing the liquor sold are in varying terms, indicating diverse answers. Therefore, and because the decisions are not all quite satisfactory, the reader is referred to some earlier discussions, wherein the principles involved appear.[6] If the prohibition is of the sale of a particular kind of liquor named, the better doctrine requires the indictment to designate it by the statutory word.[7] But this is not

21 Ill. 125; S. *v.* Ladd, 15 Mo. 430, overruling Neales *v.* S., 10 Mo. 498; S. *v.* Muse, 4 Dev. & Bat. 319; S. *v.* Blelby, 21 Wis. 204; S. *v.* Gummer, 22 Wis. 441; Com. *v.* Dove, 2 Va. Cas. 26; Riley *v.* S., 43 Miss. 397; Rice *v.* P., 38 Ill. 435; S. *v.* Hickerson, 3 Heisk. 375; S. *v.* Staley, 3 Lea, 565; S. *v.* Rogers, 39 Mo. 431; S. *v.* Kuhn, 24 La. An. 474; S. *v.* Schweiter, 27 Kan. 499; S. *v.* Jaques, 68 Mo. 260. In P. *v.* Adams, *supra*, Nelson, C. J., referring to some English precedents, maintains that so is the English law. And Rex *v.* Gibbs, 8 Mod. 58, 1 Stra. 497, might seem, from some language in the report, to confirm this view; but in fact the indictment averred that the purchasers were, as said in Strange, "to the jury unknown." [S. *v.* Duffy, 66 Conn. 551; Moore *v.* S., 79 Ga. 498, 5 S. E. R. 51; S. *v.* Stevens, 28 Kan. 108; S. *v.* Goodwin, 33 Kan. 538, 6 Pac. R. 899; Junction City *v.* Webb, 44 Kan. 471, 23 Pac. R. 1073; S. *v.* Moseli, 49 Kan. 142, 30 Pac. R. 189; S. *v.* Wingfield, 115 Mo. 428, 22 S. W. R. 363; S. *v.* Elam, 21 Mo. Ap. 290; S. *v.* Houts, 36 Mo. Ap. 265; S. *v.* Gibson, 61 Mo. Ap. 368.]

[1] McLaughlin *v.* S., 45 Ind. 338.

[2] S. *v.* Steedman, 8 Rich. 312; Capritz *v.* S., 1 Md. 569; S. *v.* Faucett, 4 Dev. & Bat. 107; Dorman *v.* S., 34 Ala. 216; S. *v.* Walker, 3 Harring. (Del.) 547; S. *v.* Jackson, 4 Blackf. 49; S. *v.* Allen, 32 Iowa, 491, 493; Wilson *v.* Com., 14 Bush, 159; S. *v.* Schmail, 25 Minn. 368, 369; S. *v.* Doyle, *supra;* Wreidt *v.* S., 48 Ind. 579. And see Com. *v.* Cook, 13 B. Monr. 149; S. *v.* Carter, 7 Humph. 158; Com. *v.* Smith, 1 Grat. 553; Com. *v.* Taggart, 8 Grat. 697; Hulstead *v.* Com., 5 Leigh, 724; S. *v.* Stinson, 17 Me. 154; Com. *v.* Blood, 4 Gray, 31; S. *v.* Nutwell, 1 Gill, 54; S. *v.* Cox, 29 Mo. 475; Com. *v.* Trainor, 123 Mass. 414; Com. *v.* Crawford, 9 Gray, 129; Com. *v.* Remby, 2 Gray, 508; S. *v.* Wentworth, 35 N. H. 442.

[3] *Ante*, § 1018.

[4] Com. *v.* Hart, 11 Cush. 130; Com. *v.* Wilcox, 1 Cush. 503; S. *v.* Cottle, 15 Me. 473.

[5] Com. *v.* Pray, 13 Pick. 359; Com. *v.* Odlin, 23 Pick. 275. See, as to different form of the provision, Com. *v.* Thurlow, 24 Pick. 374.

[6] *Ante*, §§ 426, 440–442.

[7] S. *v.* Fox, 1 Harrison, 152. And see Murphy *v.* Montclair, 10 Vroom,

necessary in all the states and under all forms of the law.[1] Where the statutory expression was "any fermented and distilled liquor," it was adjudged sufficient for the indictment to say "whiskey;" because the court knows[2] judicially that whiskey is distilled liquor.[3] And, in principle, the rule plainly is that, under the very common term "intoxicating liquor" in the statute, the indictment may simply mention by name any liquor which the court judicially knows to be intoxicating;[4] but if any other liquor is thus specified, there must be the additional averment that it is intoxicating.[5] Under which form of the statute also it is widely held good to say "intoxicating liquor," and no more.[6] But the correctness of this is not so clear in principle[7] as one might desire. If the statute has a provision that, for example, "cider" shall be deemed intoxicating within its meaning, sales of unfermented cider may be indicted and punished as sales of "intoxicating liquor."[8]

§ 1039. Quantity.— If the statute does not make the offense or punishment vary with the quantity sold, it need not be alleged;[9] otherwise it must be.[10] Or, in the former case, the averment may simply be that the defendant sold of the liquor, for example, one pint or one "glass."[11] There is authority for maintaining that, where the quantity is material,[12] it must be

673; [McDuffie *v.* S., 87 Ga. 687, 13 S. E. R. 596; Callehan *v.* S., 2 Ind. Ap. 417; S. *v.* Leavitt, 63 N. H. 381.]

[1] S. *v.* Mullinix, 6 Blackf. 554; Fetterer *v.* S., 18 Ind. 388; Downey *v.* S., 20 Ind. 82; S. *v.* Carpenter, 20 Ind. 219; Leary *v.* S., 39 Ind. 360; Noonan *v.* S., 1 Sm. & M. 562; Connell *v.* S., 46 Ind. 446; Wells *v.* S., 69 Ind. 286; S. *v.* Rogers, 39 Mo. 431; Hooper *v.* S., 56 Ind. 153; [S. *v.* Stevens, 28 Kan. 108; S. *v.* Goodwin, 33 Kan. 538, 6 Pac. R. 899; S. *v.* Houts, 36 Mo. Ap. 265; S. *v.* Nations, 75 Mo. Ap. 53; Wilson *v.* S. (Tex. Cr. R.), 55 S. W. R. 68.]

[2] *Ante*, § 1006*a*.

[3] S. *v.* Williamson, 21 Mo. 496; S. *v.* Munger, 15 Vt. 290.

[4] *Ante*, § 1006*a*; S. *v.* Packer, 80 N. C. 439; [S. *v.* Jones, 3 Ind. Ap. 121; S. *v.* Dengolensky, 82 Mo. 44.]

[5] S. *v.* Packer, *supra*.

[6] Com. *v.* Conant, 6 Gray, 482; Com. *v.* Ryan, 9 Gray, 137; S. *v.* Blaisdell, 33 N. H. 388; Plunkett *v.* S., 69 Ind. 68; Buell *v.* S., 72 Ind. 528.

[7] *Ante*, § 440; [S. *v.* Elam, 21 Mo. Ap. 290; S. *v.* Smith, 38 Mo. Ap. 618; S. *v.* Gibson, 61 Mo. Ap. 368; S. *v.* Wingfield, 115 Mo. 428, 22 S. W. R. 363.]

[8] Com. *v.* Dean, 14 Gray, 99. And see Plunkett *v.* S., 69 Ind. 68.

[9] Plunkett *v.* S., 69 Ind. 68; White *v.* S., 11 Tex. Ap. 476.

[10] Manvelle *v.* S., 58 Ind. 63; S. *v.* Zeitler, 63 Ind. 441; Bridgeford *v.* Lexington, 7 B. Monr. 47; S. *v.* Clayton, 32 Ark. 185; [S. *v.* Chambliss, 45 Ark. 349; S. *v.* Biskett, 52 Mo. Ap. 389; S. *v.* Sills, 56 Mo. Ap. 405.]

[11] Com. *v.* Brown, 12 Met. 522.

[12] Hubbard *v.* S., 11 Ind. 554.

expressed by some term known to the law, and "one glass of rum"[1] or "one drink"[2] of it will not do; though, by other opinions, "glass" will suffice.[3] Probably, in a just view, either of these forms is well enough when the proper addition is made, while without more neither is good. Thus, if the statute forbids the sale of less than fifteen gallons and permits it of more, and the averment is of one pint, it will be supported by proof of twenty gallons, whereof it constitutes a part; so that it alone will not suffice, but the averment should contain the additional idea that the quantity was less than fifteen gallons. "We do not consider," said Shaw, C. J., "that any particular form of words must be adopted; but some words must be used which do convey to the mind the idea of a sale under fifteen gallons. Were it said, 'less than fifteen gallons, to wit, one pint,' or 'one pint and no more,' or words equivalent, it would be sufficient. But simply averring affirmatively that the defendant did sell one pint, without some words negativing a larger quantity, is not bringing the case within the statute."[4]

§ 1040. Price.—It has in some states been held necessary to say for what price the liquor was sold,[5] but the general doctrine and practice do not require this averment.[6] Hence,—

§ 1041. Other things with liquor.—Where the sale is of liquor and other things in one transaction and for one sum, it

[1] S. *v.* Reed, 35 Me. 489, [58 Am. D. 727.]

[2] Cool *v.* S., 16 Ind. 355.

[3] S. *v.* Rust, 35 N. H. 438; Wrocklege *v.* S., 1 Iowa, 167; Hintermiester *v.* S., 1 Iowa, 101.

[4] Com. *v.* Odlin, 23 Pick. 275, 280; S. *v.* Shaw, 2 Dev. 198; Struckman *v.* S., 21 Ind. 160; Arbintrode *v.* S., 67 Ind. 267, [33 Am. R. 86.] There are cases, at least in Indiana, in real or apparent dissent. For these, and for others, most of which are in confirmation of the text, see Willard *v.* S., 4 Ind. 407. 408; Reams *v.* S., 23 Ind. 111, 113; Com. *v.* Pearson, 23 Pick. 280, note; S. *v.* Arbogast, 24 Mo. 363; S. *v.* Paddock, 24 Vt. 312; Redding *v.* Com., 3 B. Monr. 339; Haskill *v.* Com., 3 B. Monr. 342; S. *v.* Young, 5 Coldw. 51; Zarresseller *v.* P., 17 Ill. 101; S. *v.* Jacks, 54 Ind. 412; [P. *v.* Bradt, 46 Hun, 445; S. *v.* Baldwin, 36 Mo. Ap. 24; S. *v.* Stephens, 62 Mo. Ap. 232.]

[5] Crim. Pro., I, § 514; Neales *v.* S., 10 Mo. 498; Segur *v.* S., 6 Ind. 451; Hubbard *v.* S., 11 Ind. 554; S. *v.* Ladd, 15 Mo. 430. And see Miles *v.* S., 5 Ind. 239; Harrison *v.* Bryant, 5 Ind. 240; S. *v.* Jacks, 54 Ind. 412. See O'Connor *v.* S., 45 Ind. 347; Farrell *v.* S., 45 Ind. 371.

[6] Crim. Pro., I, § 514; Clare *v.* S., 5 Iowa, 509; Com. *v.* Roberts, 1 Cush. 505; S. *v.* Finan, 10 Iowa, 19; S. *v.* Miller, 24 Mo. 532; S. *v.* Rogers, 39 Mo. 431; S. *v.* Downer, 21 Wis. 274.

is adequate to charge a sale of the liquor only, with no mention of the other things.[1]

§ 1042. Negativing authority to sell.— In "Criminal Procedure" the rules are stated as to when the indictment on a statute must negative the matter of its exceptions and provisos, and in what form of words.[2] Now, in the present class of cases, assuming that there must be a denial of the defendant's authority to make the sales charged, the rule for it is that it may be in general language, yet it must be as broad as the law;[3] thus, if licenses from different sources or in different forms are provided for, and any one of them would justify the sales, the denial must cover all the sources and forms, being of no avail if less broad.[4] Brief expressions like the following have been adjudged adequate: "not being first duly licensed," etc.;[5] "without then having a grocer's license, dram-shop keeper's license, an innkeeper's license, or any legal authority to sell;"[6] "not having then and there any authority or appointment according to law to make such sale;"[7] "without having a license for that purpose, continuing in force;"[8] "without being duly appointed and authorized therefor;"[9] "without having any license, appointment or authority therefor, first duly had and obtained according to law;"[10] and various other phrases of the like kind.[11] And it is sufficient if the affirmative allegation

[1] Com. *v.* Thayer, 8 Met. 525, 526. See S. *v.* Munger, 15 Vt. 290.

[2] Crim. Pro., I, §§ 631–642.

[3] Id., § 641; S. *v.* Adams, 6 N. H. 532; Com. *v.* Hoyer, 125 Mass. 209; S. *v.* Shaw, 35 N. H. 217. For illustrations in analogous cases, see S. *v.* Moreland, 27 Tex. 726; Reg. *v.* Smith, 7 Mod. 77; Schutze *v.* S., 30 Tex. 508.

[4] S. *v.* McBride, 64 Mo. 364; S. *v.* Webster, 5 Halst. 293; Com. *v.* Roberts, 1 Cush. 505; Davis *v.* S., 39 Ala. 521; Neales *v.* S., 10 Mo. 498; Agee *v.* S., 25 Ala. 67; S. *v.* Haden, 15 Mo. 447; Meier *v.* S., 57 Ind. 386; Henderson *v.* S., 60 Ind. 296; Newman *v.* S., 63 Ga. 533; S. *v.* Pitzer, 23 Kan. 250; S. *v.* Pittman, 10 Kan. 593; O'Brien *v.* S., 63 Ind. 242; S. *v.* Emerick, 35 Ark. 324; Burke *v.* S., 52 Ind. 522; Franklin *v.* S., 12 Md. 236; S. *v.* Blaisdell, 33 N. H. 388; Com. *v.* Kimball, 7 Met. 304; S. *v.* Clark, 23 Vt. 298; Com. *v.* Baker, 10 Cush. 405.

[5] Com. *v.* Pray, 13 Pick. 359; Com. *v.* Leonard, 8 Met. 529; S. *v.* Wickey, 57 Ind. 596; S. *v.* Wickey, 54 Ind. 438.

[6] S. *v.* Hornbeak, 15 Mo. 478; S. *v.* Andrews, 28 Mo. 17; S. *v.* Owen, 15 Mo. 506; S. *v.* Sutton, 25 Mo. 300; Com. *v.* Burke, 121 Mass. 39.

[7] Com. *v.* Conant, 6 Gray, 482.

[8] S. *v.* Wishon, 15 Mo. 503.

[9] Com. *v.* Murphy, 2 Gray, 510; Com. *v.* Roland, 12 Gray, 132; Com. *v.* Lafontaine, 3 Gray, 479; Com. *v.* McSherry, 3 Gray, 481, note; Com. *v.* Clapp, 5 Gray, 97; Com. *v.* Keefe, 7 Gray, 332; Com. *v.* Boyle, 14 Gray, 3.

[10] Com. *v.* Wilson, 11 Cush. 412; Com. *v.* Hatcher, 6 Grat. 667.

[11] Martin *v.* S., 6 Humph. 204.

necessarily involves the required negative.[1] There is a distinction to be noted as to the disjunctive —

§ **1043. "Or."**— We have seen in other connections that, while "or" is ordinarily a dangerous word in allegation, there are circumstances in which it is proper and even necessary.[2] For example, it should be used in charging a duty, thus following the statute literally; though, in alleging a breach of duty, the statutory "or" must commonly be made "and" in the indictment.[3] In the nature of a duty is the procuring of the authorizing license; so that, as the examples cited in the last section disclose,[4] if by the statute the offense consists of selling without this license, *or* that license, *or* that, the negative would be bad should it say, "not having this license *and* that one *and* that one." The statutory "or" should be retained in this averment. Thus, in Kentucky, a statute prohibited a sale to an infant without "the written consent *or* request" of the father, and it was held ill to say "without the written consent *and* request."[5]

§ **1044. When negation of authority required.**— If the law has forbidden such a sale as the indictment sets out, with no provision authorizing it under any circumstances, there is no authority to negative, and no allegation of this sort is required. And there may be other circumstances wherein no negative averment is necessary.[6] But the cases, under our statutes as

[1] Sword *v.* S., 5 Humph. 102.

[2] Crim. Pro., I, §§ 434–443, 484, 585–592; II, §§ 438–440, 647; [Powell *v.* S., 69 Ala. 10; Sills *v.* S., 76 Ala. 92; Allred *v.* S., 89 Ala. 112, 8 S. R. 56; Brantley *v.* S., 91 Ala. 47, 8 S. R. 816; Grantham *v.* S., 89 Ga. 121, 14 S. E. R. 892; Thomas *v.* Com., 90 Va. 92, 17 S. E. R. 788.]

[3] Crim. Pro., I, §§ 436, 484, 486, 591.

[4] See also S. *v.* Swadley, 15 Mo. 515; P. *v.* Gilkinson, 4 Park. Cr. 26; S. *v.* Burns, 20 N. H. 550; S. *v.* Boice, Cheves, 77.

[5] Com. *v.* Hadcraft, 6 Bush, 91, Hardin, J., observing: "The act defines the offense to be a sale of liquor to a minor 'without the written consent *or* request' of the father, mother or guardian of the minor; but the indictment in this case is so framed as to make the offense complete by so selling, if done without the 'written consent and request' of the father, mother or guardian; so that, according to the indictment, to have exonerated the defendant on that ground he should not only have the *written consent* but also the *written request* of the parent or guardian. It is obvious, therefore, that the facts stated in the indictment did not constitute the offense defined by the statute." Page 93.

[6] Com. *v.* Tuttle, 12 Cush. 502; S. *v.* Jaques, 68 Mo. 260; Stein *v.* S., 50 Ind. 21; S. *v.* Hutzell, 53 Ind. 160; Meyer *v.* S., 50 Ind. 18; [Bogan *v.* S., 84 Ala. 449, 4 S. R. 355; P. *v.* Taylor, 110 Mich. 491; S. *v.* Harris, 47 Mo. Ap. 558; S.

ordinarily drawn, show but few exceptions to the proposition that the authority to sell must be negatived. The same rules apply here as in other classes of criminal statutes.[1]

§ 1044a. Second offense.— When the offense is the second or third, and the punishment is to be made heavier by reason of former convictions, they must be alleged,[2] as explained in another connection.[3]

§ 1045. Joinder.— The common rules as to the joinder of offenses and offenders prevail in these cases.[4] Thus,—

Combined offenders — (*One sale one offense*).— "If one procure the spirits for the purpose of retailing, and hire another to attend to the bar as his servant, and he retails, both are guilty;" and, if the prosecutor pleases, they may be proceeded against jointly.[5] Sales made by an agent may, at the election of the pleader, be charged against the principal as if made by his own hand.[6] Where the sales are neither in law nor fact joint, the indictment should not be so;[7] or, if it is, only one defendant can be convicted.[8] Two separate sales, made to two distinct persons, though at one time, constitute two offenses.[9]

v. Quinn, 49 Mo. Ap. 602; S. *v.* McAdoo, 80 Mo. 216; S. *v.* Martin, 108 Mo. 117, 18 S. W. R. 1045.]

[1] U. S. *v.* Winslow, 3 Saw. 337; S. *v.* Savage, 48 N. H. 484; Com. *v.* Thurlow, 24 Pick. 374; S. *v.* Watson, 5 Blackf. 155; S. *v.* Robbins, 9 Ire. 356; S. *v.* Miller, 7 Ire. 275; S. *v.* Wade, 34 N. H. 495; S. *v.* Gurney, 37 Me. 149; S. *v.* Shaw, 35 N. H. 217; S. *v.* Crowell, 30 Me. 115; S. *v.* Abbott, 11 Fost. (N. H.) 434; S. *v.* Fuller, 33 N. H. 259; S. *v.* Blaisdell, 33 N. H. 388; Sword *v.* S., 5 Humph. 102; S. *v.* Buford, 10 Mo. 703; Com. *v.* Shaw, 5 Cush. 522; Becker *v.* S., 8 Ohio St. 391; S. *v.* Miller, 24 Conn. 522; Bode *v.* S., 7 Gill, 326; S. *v.* Horan, 25 Tex. Supp. 271; Hirn *v.* S., 1 Ohio St. 15; Townley *v.* S., 3 Harrison, 311; Brutton *v.* S., 4 Ind. 601; Kinser *v.* S., 9 Ind. 543; Com. *v.* Edwards, 12 Cush. 187; Com. *v.* Hill, 5 Grat. 682; S. *v.* Powers, 25 Conn. 48; [Page *v.* S., 84 Ala. 446.]

[2] S. *v.* Gorham, 65 Me. 270; Rauch *v.* Com., 78 Pa. St. 490; S. *v.* Robinson, 39 Me. 150; Maguire *v.* S., 47 Md. 485.

[3] Crim. Law, I, §§ 961, 962.

[4] Stephens *v.* S., 14 Ohio, 386; Com. *v.* Moorhouse, 1 Gray, 470; Com. *v.* Tuttle, 12 Cush. 505; S. *v.* Priester, Cheves, 103; [Segars *v.* S., 88 Ala. 144, 7 S. R. 46; S. *v.* Tanner, 50 Kan. 365, 31 Pac. R. 1096; P. *v.* Charbineau, 115 N. Y. 433.]

[5] S. *v.* Caswell, 2 Humph. 399. And see Com. *v.* Major, 6 Dana, 293; S. *v.* Wadsworth, 30 Conn. 55; [S. *v.* McLaughlin, 47 Kan. 143, 27 Pac. R. 840.]

[6] Com. *v.* Park, 1 Gray, 553. See Crim. Pro., I, §§ 332–334.

[7] Farrell *v.* S., 3 Ind. 573. A defect sometimes cured by a statute. S. *v.* Edwards, 60 Mo. 490. See also Jackson *v.* Boyd, 53 Iowa, 536.

[8] S. *v.* Simmons, 66 N. C. 622; Com. *v.* Griffin, 3 Cush. 523.

[9] Com. *v.* Dove, 2 Va. Cas. 26; Com. *v.* Very, 12 Gray, 124. Perhaps this may not be exactly so under every form of the inhibition. Thus, in

One who has made several unlawful sales may be charged with them in as many separate counts; and, on his conviction, a judgment for all the penalties will be rendered against him, as explained elsewhere.[1] And the Illinois court further held that, in such a case, the state's attorney is entitled to his conviction fee on each count, the same as though there had been separate indictments.[2]

II. The Evidence.

§ 1045a. In general.— Practically, in these cases, most of the evidence will depend on familiar rules, common under all issues, the elucidations whereof in "Criminal Procedure"[3] will suffice for this place. Some of the decisions of this class are cited in a note.[4]

§ 1046. Every fact — which is an indispensable element in the offense must be proved, but no more need be.[5] For example,—

Common seller — (*Within alleged time*).— A charge of being a common seller continuously between specified dates may be

South Carolina, it is laid down that, in an indictment for *retailing*, several acts of selling to different persons may be united in one count. "Retailing," said the court, "may be complete by one act, or it may consist of a succession of acts. In this indictment various acts of retailing to different persons are grouped together in one count as constituting a single offense. In this there is no duplicity or misjoinder, but rather a favor to the defendant in enumerating, as aggravations or characteristic repetitions of the principal act, other acts, each of which might have been alleged as a separate offense." S. *v.* Anderson, 3 Rich. 172. And see Osgood *v.* P., 39 N. Y. 449; Peer's Case, 5 Grat. 674; S. *v.* Barron, 37 Vt. 57; McPherson *v.* S., 54 Ala. 221; [P. *v.* O'Donnell, 46 Hun, 358.]

[1] Crim. Pro., I, §§ 452, 458, 1035–1037, 1326, 1327; [Lewis *v.* Com., 90 Va. 843, 20 S. E. R. 777; S. *v.* Keoby, 6 Kan. Ap. 334.]

[2] Borchsenius *v.* P., 41 Ill. 236.

[3] Crim. Pro., I, §§ 1046–1262.

[4] S. *v.* Fierline, 19 Mo. 380; Elam *v.* S., 25 Ala. 53; Com. *v.* Leonard, 9 Gray, 285; Tatum *v.* S., 63 Ala. 147; Garst *v.* S., 68 Ind. 37; Barnes *v.* S., 20 Conn. 232; Williams *v.* S., 35 Ark. 430; Long *v.* S., 56 Ind. 206; Barnes *v.* S., 20 Conn. 254; Smith *v.* S., 19 Conn. 493; Com. *v.* Ayers, 115 Mass. 137; S. *v.* McCafferty, 63 Me. 223; Com. *v.* Munsey, 112 Mass. 287; S. *v.* Munger, 15 Vt. 290; Com. *v.* Page, 6 Gray, 361; S. *v.* Kingston, 5 R. I. 297; S. *v.* Curley, 33 Iowa, 359; Winsett *v.* S., 57 Ind. 26; Curry *v.* S., 35 Tex. 364; S. *v.* Terry, 35 Tex. 366; *In re* Morton, 10 Mich. 208; Com. *v.* Sullivan, 123 Mass. 221; Rossett *v.* S., 16 Ala. 362; S. *v.* McGlynn, 34 N. H. 422; S. *v.* Stuart, 23 Me. 111; Pearce *v.* S., 40 Ala. 720; [S. *v.* Bradford, 79 Mo. Ap. 346.]

[5] Murphy *v.* S., 28 Miss. 687; Long *v.* S., 56 Ind. 117; Long *v.* S., 56 Ind. 206; Garst *v.* S., 68 Ind. 37; Massie *v.* Com., 30 Grat. 841; [Siegel *v.* P., 106 Ill. 89; Birr *v.* P., 103 Ill. 645.]

sustained, though it appears that, during a part of the time, the defendant had a justifying license.[1] Since this offense can be committed in a single day,[2] its existence during an entire alleged period is not essential.[3]

Sale.— The proof of a transaction which comes short of a sale will not sustain a charge of selling. It was so where the liquor called for was supplied by the defendant, who thereupon refused to accept pay therefor.[4]

§ 1047. Quantity.— Though the allegation is precise as to the quantity sold, the same quantity is not therefore as of course required to be proved.[5] It need be only what calls for the same punishment as that alleged.[6]

Name of purchaser.— Where the name of the purchaser must be and is averred,[7] it must appear also in the proofs; and a variance herein — as where the sale is alleged to have been to A., and a joint sale to A. and B. appears,[8] or the like,[9] or the two names are not *idem sonans*[10] — will be fatal.[11]

Mixed.— Proof of the sale of a liquor mixed with sugar and water will sustain a charge of selling the liquor.[12]

§ 1048. Circumstantial evidence — is admissible in these cases the same as in others.[13] Thus, as steps in the path to the conclusion of guilt, such facts may be shown as the presence of liquor in the defendant's place of business, the hustling out of bottles of it on the entrance of the officers of the law, tumblers on the bar, strong beer in the beer-pump;[14] declarations of the defendant that he had kept and would keep liquor for sale, though not pointing specially to the transaction in con-

[1] Com. *v.* Putman, 4 Gray, 16.

[2] *Ante*, §§ 1018, 1035.

[3] And see S. *v.* Hynes, 66 Me. 114.

[4] Com. *v.* Packard, 5 Gray, 101. See Seibert *v.* S., 40 Ala. 60.

[5] *Ante*, § 1039; Crim. Pro., I, §§ 488*b*, 488*c*; [Kaiser *v.* S., 84 Ind. 229; Hamilton *v.* S., 103 Ind. 96, 2 N. E. R. 299.]

[6] S. *v.* Connell, 38 N. H. 81; S. *v.* Moore, 14 N. H. 451; Brock *v.* Com., 6 Leigh, 634; Schlict *v.* S., 31 Ind. 246; S. *v.* Andrews, 28 Mo. 17.

[7] *Ante*, § 1037.

[8] Brown *v.* S., 48 Ind. 38.

[9] S. *v.* Wolf, 46 Mo. 584. [But charging a sale to two minors is sustained by evidence of a sale to one. Dukes *v.* S., 79 Ga. 795, 4 S. E. R. 876.]

[10] Crim. Pro., I, § 688.

[11] Com. *v.* Mehan, 11 Gray, 321; Com. *v.* Brown, 2 Gray, 358; Com. *v.* Shearman, 11 Cush. 546; Dyer *v.* P., 84 Ill. 624.

[12] Com. *v.* White, 10 Met. 14.

[13] S. *v.* Hynes, 66 Me. 114, 115; Rater *v.* S., 49 Ind. 507; S. *v.* Cunningham, 25 Conn. 195; S. *v.* Wilson, 5 R. I. 291; Stone *v.* S., 30 Ind. 115; Needham *v.* S., 19 Tex. 332.

[14] Com. *v.* Cotter, 97 Mass. 336; Com. *v.* Van Stone, 97 Mass. 548; Vallance *v.* Everts, 3 Barb. 553.

troversy;[1] his assertion that he deemed the law unconstitutional, and he meant to violate it;[2] the liquor on tap, and the implements around for measuring and drinking it;[3] a bar, and bottles in it;[4] a coming and going with bottles,[5] especially when they are empty at the entering and full of liquor at the exit.[6] The one competent fact may not be alone sufficient; and, unless all combined satisfy the jury beyond a reasonable doubt of the defendant's guilt, the case fails.[7] It is not even permissible to show a mere common report, or public notoriety, that the defendant has sold liquors.[8]

Instances.— It was adjudged admissible for a witness to testify that he and others went to the defendant's place of business, and, one of them calling for whiskey, he set out some liquid in a bottle, and they drank it.[9] So, where a witness had heard parties call for brandy, whereupon bottles labeled "brandy" were handed them, and they poured out what looked like brandy and drank it, this was held to be sufficient evidence that the liquor was brandy.[10] And —

A non-expert — may testify to the kind of liquor drank.[11]

Before grand jury.— There is no need to confine the evidence to sales actually testified to before the grand jury.[12]

§ 1048a. To minors and drunkards.— The facts required to be alleged where the sale is to a minor or drunkard [13] must be proved.[14] How the age [15] and being a drunkard [16] are shown we saw in earlier chapters.

[1] New Gloucester *v.* Bridgham, 82 Me. 60; S. *v.* Bonney, 39 N. H. 206.

[2] Com. *v.* Kimball, 24 Pick. 366.

[3] Com. *v.* Levy, 126 Mass. 240.

[4] P. *v.* Hulbut, 4 Denio, 133, [47 Am. D. 244:] S. *v.* Knott, 5 R. I. 293; [S. *v.* O'Connor, 3 Kan. Ap. 594.]

[5] Com. *v.* Intoxicating Liquors, 105 Mass. 595.

[6] S. *v.* Long, 7 Jones (N. C.), 24, 27; Huey *v.* S., 31 Ala. 349; Pannell *v.* S., 29 Ga. 681.

[7] Crim. Pro., I, §§ 1073–1079; New York *v.* Walker, 4 E. D. Smith, 258; U. S. *v.* Furlong, 2 Biss. 97.

[8] Cobleigh *v.* McBride, 45 Iowa, 116.

[9] State *v.* Jarrett, 35 Mo. 357. And see Com. *v.* Boyden, 14 Gray, 101.

[10] Baurose *v.* S., 1 Iowa, 374.

[11] Com. *v.* Timothy, 8 Gray, 480; [Carson *v.* S., 69 Ala. 235; Brantley *v.* S., 91 Ala. 47, 8 S. R. 816.]

[12] Com. *v.* Phelps, 11 Gray, 73; Crim. Pro., I, § 872. See Crain *v.* S., 14 Tex. 634. [Under Kansas statutes the rule is different. See S. *v.* Marshall, 2 Kan. Ap. 792; S. *v.* Etzel, 2 Kan. Ap. 673; S. *v.* Nield, 4 Kan. Ap. 627, and S. *v.* Hescher, 46 Kan. 534, 26 Pac. R. 1022.]

[13] *Ante*, § 1034*a*.

[14] Vangorden *v.* S., 49 Ind. 518; [Schurzer *v.* S. (Tex. Ap.), 25 S. W. R. 23.]

[15] *Ante*, § 491; S. *v.* Cain, 9 W. Va. 559; Johnson *v.* P., 83 Ill. 431; Robin-

[16] *Ante*, §§ 979, 982.

§ 1049. Sale by agent.— A sale by one acting as clerk or other agent of the defendant must appear also to have been authorized by him.[1] If he was present, the authority will ordinarily be inferred;[2] if absent, it may be presumed from the circumstances and other proofs. The mere fact that the person making the sale was the defendant's clerk in a lawful business is not enough;[3] for an authorization to do what is lawful is not an authority to commit a crime.[4] Within this principle, if the clerk or bar-tender of a licensed retailer, whom the law forbids to sell to minors and drunkards, makes such sale in his absence, he cannot be punished without some evidence indicating his consent to what is thus unlawful.[5] But, where the business itself, wherein the defendant is engaged, is unlawful, the common authorization of a clerk, as in civil cases, is all that need be shown.[6] Or, if the jury are satisfied that the defendant did not restrain the selling in premises over which he had control,[7] or that he in person had sold at other times,[8] or had suffered his clerk to sell at other times,[9] they may infer the authority. Nor will it avail the defendant that he forbade his clerk to make the sale, if the forbidding was not in good faith.[10] The question is, what was "the *real un-*

ius *v.* S.; 63 Ind. 235; Ihinger *v.* S., 53 Ind. 251; *ante*, §§ 979-982; [Bryant *v.* S., 82 Ala. 51, 2 S. R. 670; S. *v.* Douglass, 48 Mo. Ap. 39; Peterson *v.* S. (Md.), 34 Atl. R. 834.]

[1] Crim. Pro., I, § 488*d*; S. *v.* Tibbetts, 35 Me. 81; S. *v.* Foster, 3 Fost. (N. H.) 348, [55 Am. D. 191; Rosenbaum *v.* S. (Ind. Ap.), 57 N. E. R. 156; Wadsworth *v.* S. (Tex. Cr. R.), 34 S. W. R. 934; S. *v.* Beam, 1 Kan. Ap. 688.]

[2] Hall *v.* McKechnie, 23 Barb. 244; [Faircloth *v.* S., 73 Ga. 426.]

[3] S. *v.* Williams, 3 Hill (S. C.), 91. [*Contra*, Town *v.* Autenreith, 21 Mo. Ap. 73; S. *v.* Meagher, 49 Mo. Ap. 571; S. *v.* Heinze, 45 Mo. Ap. 403; S. *v.* Douglass, 110 Mo. 138.]

[4] Crim. Law, I, § 892; Seibert *v.* S., 40 Ala. 60, 63.

[5] Anderson *v.* S., 39 Ind. 553; S. *v.* Mahoney, 23 Minn. 181; Thompson *v.* S., 45 Ind. 495. [The following cases hold that sale to a minor is one of the perils of the business; that instructions or care may not shield the proprietor from, Boatright *v.* S., 77 Ga., 717, and Loch *v.* S., 75 Ga. 258; and the following announce same rule as to Sunday sales, P. *v.* Roby, 52 Mich. 577, and Bank *v.* City, 78 Ill. Ap. 298.]

[6] Crim. Law, I, § 892; Molihan *v.* S., 30 Ind. 266; Anderson *v.* S., 22 Ohio St. 305; [Kinnebrew *v.* S., 80 Ga. 232, 5 S. E. R. 56; S. *v.* Norton, 67 Iowa, 641, 25 N. W. R. 842.]

[7] Com. *v.* Major, 6 Dana, 293. And see Scott *v.* S., 25 Tex. Supp. 168; [S. *v.* Swallum (Iowa), 82 N. W. R. 439.]

[8] S. *v.* Bonney, 39 N. H. 206.

[9] S. *v.* Foster, 3 Fost. (N. H.) 348. But see Patterson *v.* S., 21 Ala. 571.

[10] Riley *v.* S., 43 Miss. 397. And see Com. *v.* Kimball, 24 Pick. 366.

derstanding between the principal and agent;"[1] for, in exact law, the principal, to be criminally liable, must consent, not merely know.[2] And whether or not he consented, and the effect of the presumptions[3] as to this, are plainly, in reason, mere facts for the jury.[4]

§ 1050. Statutory presumptions.— These statutes, in some of the states, make the delivery of the liquor under specified circumstances *prima facie* evidence of a sale. Such a provision is constitutional.[5]

§ 1051. Proof of negative of defendant's authority.— Must the negative averment, that the defendant was not licensed or otherwise authorized to make the sales,[6] be proved? Now,—

In principle,— as this negative matter is a part of the government's case against the defendant, it must in some way be made *prima facie* to appear at the trial.[7] But not all of every case is established by oral testimony, depositions, and other documents. Much is derived from presumption.[8] One of the presumptions is, that what is common in general prevails in the particular;[9] another, that a fact the existence of which is once shown, continues.[10] Therefore, where the general law withholds from the mass of the people the right to make the particular sale in controversy, and permits it only to exceptional persons, of every one of whom it is certainly true that at some time he was not allowed to do it, the *prima facie* presumption is double: first, that the instance in controversy accords with what is general; and secondly, that as at one time the defendant had no license he has none now. Hence, if he has a license,

[1] White, J., in Anderson *v.* S., *supra*, at p. 308.

[2] Com. *v.* Putnam, 4 Gray, 16.

[3] Crim. Pro., I, §§ 1096–1101.

[4] And see Com. *v.* Nichols, 10 Met. 259, [43 Am. D. 432;] Parker *v.* S., 4 Ohio St. 563.

[5] Com. *v.* Williams, 6 Gray, 1; Com. *v.* Rowe, 14 Gray, 47; S. *v.* Hurley, 54 Me. 562; Com. *v.* Wallace, 7 Gray, 222; S. *v.* Day, 37 Me. 244; Jones *v.* McLeod, 103 Mass. 58. And see *ante*, § 1035; [Dant *v.* S., 106 Ind. 79, 5 N. E. R. 870.]

[6] *Ante*, §§ 1042, 1043.

[7] Crim. Pro., I, §§ 1049–1052.

[8] Id., §§ 1096–1101.

[9] 1 Greenl. Ev., § 40; Peake, Ev. (Nor. ed.) 410, 411; Green *v.* Brown, 2 Stra. 1199; Wallace *v.* Hull, 28 Ga. 68; Bush *v.* Guion, 6 La. An. 797; Oppenheim *v.* Leo Wolf, 3 Sandf. Ch. 571; Sutton *v.* Sadler, 3 C. B. (N. S.) 87; [Swigert *v.* S., 99 Ind. 122.]

[10] Brown *v.* Burnham, 28 Me. 38; Brown *v.* King, 5 Met. 173; Bell *v.* Young, 1 Grant (Pa.), 175; Far *v.* Payne, 40 Vt. 615; Prather *v.* Palmer, 4 Pike, 456; Randolph *v.* Easton, 23 Pick. 242; Erskine *v.* Davis, 25 Ill. 251; Hix *v.* Whittimore, 4 Met. 545.

he must show it. And this doctrine promotes alike convenience and justice; for it is troublesome and it may be even impossible to prove a negative, while if the defendant has a license he can readily produce it. Still,—

§ 1052. In authority,— this question is sometimes muddled, and the decisions on it are contradictory. The principles governing it, as just explained, seem not often, if ever, to have occurred to the judges. In some of the states, wherein the courts had adjudged it necessary for the prosecution to prove in the first instance that there was no license, legislation has reversed the rule. In other states this rule remains; but, in most, the decisions have established the reverse. The question relates not only to the want of a license from the public authorities, but to the want also of the consent of parents, guardians, and the like. How it stands in various states the reader will see in the note.[1] While in much the greater number of our states the result indicated by principle has been reached, the reasons for it have been, in general, but imperfectly apprehended.

[1] *Alabama.*— On a trial for selling to a minor, "the defendant, if licensed by the consent of the parent, guardian or person having charge of the pupil, has peculiar knowledge of it, and can show it without the least inconvenience; and the burden of proving the consent is on him, the consent being in the nature of a license to him." Farrall *v.* S., 32 Ala. 557, 559. See *post*, *Mississippi* and *North Carolina*.

Arkansas.— The state need not prove the defendant's want of a license; he, if he has one, must produce it. Williams *v.* S., 35 Ark. 430; [Evans *v.* S., 54 Ark. 227, 15 S. W. R. 360; Rana *v.* S., 51 Ark. 481, 11 S. W. R. 692. But where the evidence showed the aiding or abetting of another, the state must show the other had no license. Benning *v.* S., 37 Ark. 550.]

[*Colorado.*— Liggett *v.* S. (Colo.), 58 Pac. R. 144.]

Georgia.— The government is not required to prove that the defendant had no license. Sharp *v.* S., 17 Ga. 290. If it were, the clerk of the licensing court would be a competent witness. Elkins *v.* S., 13 Ga. 435; [Mitchell *v.* S., 97 Ga. 213.]

Illinois. — The burden, to prove the license, is on the defendant. Noecker *v.* P., 91 Ill. 468; Gunnarssohn *v.* Sterling, 92 Ill. 569; Flora *v.* Lee, 5 Bradw. 629. But the other party could prove it by his prior plea of guilty to a like charge. Pendergast *v.* Peru, 20 Ill. 51; [Monroe *v.* P., 113 Ill. 670; Burr *v.* P., 113 Ill. 645.]

Indiana. — At one time it seems to have been necessary for the prosecutor to prove that the defendant had no license. Shearer *v.* S., 7 Blackf. 99. But it is not now. Taylor *v.* S., 49 Ind. 555. See also Howard *v.* S., 5 Ind. 516.

Iowa. — On a charge of using a building for the unlawful sale, the burden is on the defendant to prove that the wine sold was made from fruits grown in the state. S. *v.* Miller, 58 Iowa, 84; [S. *v.* Cloughly, 73 Iowa,

§ 1053. In conclusion,— the discussions of this chapter might be easily extended; but, as every practitioner will and

626, 35 N. W. R. 652; S. *v.* Gregory (Iowa), 82 N. W. R. 335.]

Kansas. — S. *v.* Crow, 53 Kan. 669, 37 Pac. R. 170; S. *v.* Nye, 32 Kan. 201, 4 Pac. R. 134; S. *v.* Kulinke, 26 Kan. 405.

Kentucky. — The defendant must show the license. Haskill *v.* Com., 3 B. Monr. 342.

Maine. — The burden to prove the license is on the defendant. S. *v.* Woodward, 34 Me. 293; S. *v.* Crowell, 25 Me. 171.

Massachusetts. — Except as statutes have provided otherwise, the state must show that the defendant had no license. Com. *v.* Bolkom, 3 Pick. 281. The common yet not exclusive proof was its absence from the records or memoranda of the licensing board. Com. *v.* Tuttle, 12 Cush. 502; Com. *v.* Kimball, 7 Met. 304. But the burden has been changed to the defendant by statutes applicable to most cases, not all. Com. *v.* Lahy, 8 Gray, 459; Com. *v.* Kelly, 10 Cush. 69; Trott *v.* Irish, 1 Allen, 481; Com. *v.* Keenan, 11 Allen, 262; Com. *v.* Putnam, 4 Gray, 16; Com. *v.* Cashman, 8 Allen. 580; Com. *v.* Leo, 110 Mass. 414; Com. *v.* Curran, 119 Mass. 206; [Com. *v.* Molten, 142 Mass. 270, 8 N. E. R. 428; Com. *v.* Towle, 138 Mass. 492.]

Michigan. — In an action for the penalty, the averment that the defendant had no license will be taken as true unless shown to be otherwise by the defendant. Smith *v.* Adrian, 1 Mich. 495; [P. *v.* Drennan, 86 Mich. 445, 49 N. W. R. 215.]

Minnesota. — "The burden of proving license was upon the defendant; because, all sales being prohibited except licensed sales, prohibition is the general rule, and license the exception. Hence, where a sale is shown, the presumption *prima facie* is that it is unlawful, and this presumption makes out a case of unlawful sale, unless it is overcome by proof of license. Bishop, Stat. Crimes, § 1051." Berry, J., in S. *v.* Schmail, 25 Minn. 370, 371; [S. *v.* Ahern, 54 Minn. 195, 55 N. W. R. 959.]

Mississippi. — On an indictment for selling to a slave, "without the permission of the owner, master or overseer," the prosecution, it was held, must affirmatively establish the want of permission. "We know of no exception to the rule," said Smith, J., "that whatever it is material to aver in an indictment it is necessary to prove." McGuire *v.* S., 13 Sm. & M. 257, 259. Afterward, on an indictment for ordinary selling without license, the court held that it was for the defendant to produce the license if he had one, not for the state to prove the want of it. "The rule is," said Handy, J., "that, when a fact is peculiarly within the knowledge of one of the parties, so that he can have no difficulty in showing it, the presumption of innocence, or of acting according to law, will not render it incumbent on the other side to prove the negative." Easterling *v.* S., 35 Miss. 210; Thomas *v.* S., 37 Miss. 353; Pond *v.* S., 47 Miss. 39. See *North Carolina* for a reconciliation of the apparent discrepancy in these decisions.

Missouri. — It devolves on the defendant, if he has a license, to produce it. Schmidt *v.* S., 14 Mo. 137; S. *v.* Lipscomb, 52 Mo. 32; S. *v.* Edwards, 60 Mo. 490; [S. *v.* Durkem, 23 Mo. Ap. 387; S. *v.* O'Connor, 65 Mo. Ap. 324; S. *v.* Moore, 107 Mo. 78.]

Nebraska. — Hamberger *v.* S. (Neb.), 66 N. W. R. 23.

New Hampshire. — The decisions on this question in this state furnish an instance of the unhappily common

should have before him the statutes and adjudications of his own state, it is believed that the foregoing will abundantly suffice.

course of things in our courts, the avoidance whereof by the present writer in his discussions has enabled him to render his books useful in correcting judicial errors and settling conflicts. The matter is explained in various places, and particularly in Crim. Law (7th ed.), "Introduction." The doctrine which the elucidations in the text show to be just was first laid down in a series of decisions; namely, that the burden devolved, not on the state to prove the defendant's want of authority, but on him to produce it. S. *v.* Foster, 3 Fost. (N. H.) 348, [55 Am. D. 191;] S. *v.* Shaw, 35 N. H. 217; S. *v.* Simons, 17 N. H. 83; S. *v.* McGlynn, 34 N. H. 422. And in the civil action by one seeking to recover the price of liquors sold, he was required affirmatively to prove his authority to sell them. Bliss *v.* Brainard, 41 N. H. 256. Afterward the court discovered that the *reasons* which had been judicially assigned for this doctrine were unsound; hence, not inquiring whether it did not admit of support by sound reasons, leaped to the conclusion that, of course, it was wrong, dividing on the further question whether the rule of *stare decisis* would permit its reversal. To quote: "In Lisbon *v.* Lyman, 49 N. H. 553, 568–582, the court were unanimously of opinion that the burden of proof, on the question of payment of all taxes duly assessed, was not shifted from the plaintiff to the defendant by any rule or supposed rule in relation to a subject-matter peculiarly within the knowledge of one of the parties. It was held (p. 582) that, if there was any such rule operating as a rule of law to shift the burden of proof, it was not applicable to that case; because it did not appear that the proof in relation to the assessment and payment of taxes was so peculiarly or exclusively in the power of the defendant as to require him to produce it,—a reason which (as was shown in that case) would forbid the application of the rule to cases like the present. It was there shown that, if there is any such rule, it has often been misapplied, and that its misapplication ought not to be extended. For reasons there stated, we are all of opinion that its application to cases like the present, as a matter of legal principle, is erroneous." S. *v.* Perkins, 53 N. H. 435.

North Carolina.— The prosecutor need not prove the want of a license, but the defendant, if he has one, must produce it. S. *v.* Morrison, 3 Dev. 299. Yet under a statute which made penal the selling of liquor to a slave without the master's written permission (see *Mississippi*, in this note), the prosecutor was required to prove the want of permission. It was deemed that the former case proceeded on the ground of "necessity," or the "great difficulty in procuring the proof" of there being no license. But here the master or his representative could easily be called in negation of the giving of a permit. S. *v.* Evans, 5 Jones (N. C.), 250, 251, 252. And see S. *v.* Woodly, 2 Jones (N. C.), 276. See *ante*, *Alabama* and *Mississippi*, in this note.

Ohio.— On an information under the statute to prevent adulterations, the prosecutor must give some evidence to the negative averment that the liquor sold by the defendant had not been inspected. Cheadle *v.* S., 4 Ohio St. 477.

Oregon.— The defendant must produce his license. S. *v.* Cutting, 3 Oreg. 260.

South Carolina.—It is for the indicted person to prove that he had a license. Geuing *v.* S., 1 McCord, 573.

Texas.—Lucia *v.* S. (Tex. Cr. R.), 33 S. W. R. 359.

Vermont.—S. *v.* Milty, 57 Vt. 543.

Wisconsin.—Some presumptive evidence must be given that the defendant had no license, before he is required to prove the contrary. Mehan *v.* S., 7 Wis. 670.

England.—On a prosecution against a licensed victualer, for selling liquors on a Sunday otherwise than to travelers, the burden of proving the case not to be within the exception is on the informer. Taylor *v.* Humphries, 17 C. B. (N. S.) 539. And, on an indictment for killing deer in an inclosed park, without the owner's leave, the prosecutor must show that he did not give permission. Rex *v.* Rogers, 2 Camp. 654.

CHAPTER LVII.

KEEPING INTOXICATING LIQUOR FOR UNLAWFUL SALE.

§ 1054. At common law.— The mere having of a thing, while not using it, with the intent to commit therewith a crime, even a felony, is not indictable at the common law.[1] Hence, *a fortiori*, it is not a common-law offense to be in possession of liquors with the intent to commit the misdemeanor of selling them contrary to the regulations of a statute.[2] But —

§ 1055. Under statutes.— Some of the more recent statutes make it punishable, most of them providing also for the forfeiture of the liquors, to have them in possession with the intent unlawfully to sell them.[3] And —

Transporting liquors,— sold or to be sold unlawfully, is in some of the states put on the like footing with keeping them for unlawful sale.[4]

§ 1056. Constitutional.— These statutes, when not incumbered by objectionable details, are clearly within the legislative power conferred by most or all of our constitutions.[5] Yet, in

[1] Crim. Law, I, § 204.

[2] Crim. Law, I, §§ 657-659, 759-761; *ante*, § 1029.

[3] *Ante*, §§ 993, 993, 994; S. *v.* Kaler, 56 Me. 88; Com. *v.* O'Reilly, 116 Mass. 15; [S. *v.* Arlan, 71 Iowa, 216, 32 N. W. R. 267; S. *v.* McEvoy, 69 Iowa, 63, 28 N. W. R. 437; S. *v.* Intoxicating Liquors, 64 Iowa, 300, 20 N. W. R. 445; S. *v.* Therrien, 86 Me. 144, 29 Atl. R. 1117; Com. *v.* Ryan, 160 Mass. 172, 35 N. E. R. 673.]

[4] Com. *v.* Commeskey, 13 Allen, 585; Com. *v.* Bentley, 97 Mass. 551; Mason *v.* Lathrop, 7 Gray, 354; S. *v.* Smith, 61 Me. 386; Jones *v.* Root, 6 Gray, 435; Kennedy *v.* Favor, 14 Gray, 200; Com. *v.* Kenney, 115 Mass. 149; Com. *v.* McCluskey, 116 Mass. 64; S. *v.* Grames, 68 Me. 418; Com. *v.* Doherty, 116 Mass. 413; Com. *v.* McLaughlin, 108 Mass. 477; [S. *v.* Rhodes, 90 Iowa, 496, 58 N. W. R. 887, 24 L. R. A. 245; S. *v.* Moffitt, 73 Me. 278; Com. *v.* Brown, 154 Mass. 55, 27 N. E. R. 776, 13 L. R. A. 195; S. *v.* Goss, 59 Vt. 266, 9 Atl. R. 829; Com. *v.* Currier, 164 Mass. 544, 42 N. E. R. 96; S. *v.* Campbell, 76 Iowa, 122, 40 N. W. R. 100; S. *v.* Rhodes, 90 Iowa, 496, 58 N. W. R. 887, 24 L. R. A. 245, reversed by Rhodes *v.* Iowa, 170 U. S. 412.]

[5] Jones *v.* Root, 6 Gray, 435; Mason *v.* Lothrop, 7 Gray, 354; Lincoln *v.* Smith, 27 Vt. 328; S. *v.* Prescott, 27 Vt. 194; Gray *v.* Kimball, 42 Me. 299; *ante*, §§ 993, 994; [Jordan *v.* Cir. Ct., 69 Iowa, 177; McClane *v.* Leicht, 69 Iowa, 411, 29 N. W. R. 327; McLane *v.* Brown, 70 Iowa, 752, 30 N. W. R.

Michigan, the search-warrant clause of a former act of this sort was adjudged void, because it did not require any notice to the accused, or even provide for informing him when, where or before whom the warrant was to be returned;[1] and something like this was held under former statutes in Rhode Island,[2] Massachusetts[3] and some of the other states.[4] These decisions occurred in the early period of this form of temperance legislation, and they were pronounced under great public excitement and pressure upon the courts. Still, beyond doubt and most plainly, they were right if the statutes were correctly interpreted. But were the questions to be freshly argued, ably and on just grounds, the conclusion would probably be reached by most enlightened judges that the constitutional, statutory and common-law provisions, all of which are equally laws,[5] should be interpreted together,[6] as commanding the notice which the courts justly said was required. Indeed, such is the doctrine established under other statutes by a mass of judicial authority overwhelming.[7] The rules to determine when the forfeiture *in rem* is permissible are explained in "Criminal Law."[8]

§ 1057. The procedure — under these enactments differs so much in our states that a detailed discussion of it here is not deemed advisable. Yet a reference to leading cases explaining

478; Craig *v.* Florenz, 71 Iowa, 761, 33 N. W. R. 356; S. *v.* Jordan, 72 Iowa, 377, 34 N. W. R. 285; Pearson *v.* Distill. Co., 72 Iowa, 348, 34 N. W. R. 1; Connolly *v* Scarr, 72 Iowa, 223, 33 N. W. R. 641; S. *v.* Le Clair, 86 Me. 522, 30 Atl. R. 7; Com. *v.* Intoxicating Liquors, 172 Mass. 311; Com. *v.* Intoxicating Liquors, 163 Mass. 42, 39 N. E. R. 348; Com. *v.* Brothers, 158 Mass. 200, 33 N. E. R. 386.]

[1] Hibbard *v.* P., 4 Mich. 125, Green, J., observing: "It is said that the proceedings under the liquor law *may* be so conducted, consistently with its provisions, as to secure the person whose property is seized all his constitutional rights. If this is *possible*, that is not enough. The law must afford to the accused the means of *demanding* and *enforcing* his constitutional rights, and if it authorizes a course of procedure which could deprive him of them it is void. It is not to be left to the discretion of prosecutors or magistrates to adopt a course of procedure which may or may not be in conformity with the requirements of the constitution, as they may elect." Pages 130, 131.

[2] S. *v.* Snow, 3 R. I. 64; Greene *v.* James, 2 Curt. C. C. 187.

[3] Fisher *v.* McGirr, 1 Gray, 1, [61 Am. D. 381.]

[4] *Ante*, §§ 992, 993.

[5] *Ante*, § 11a.

[6] *Ante*, §§ 86, 89, 90, 113b–121, 123.

[7] *Ante*, § 141.

[8] Crim. Law, I, §§ 816–835.

it will be helpful to the reader. Among them are some on the law alone.[1]

[1] *Connecticut.*—Barth *v.* S., 18 Conn. 432; S. *v.* Raymond, 24 Conn. 204; S. *v.* Mosier, 25 Conn. 40; S. *v.* Brennan's Liquors, 25 Conn. 278; Gray *v.* Davis, 27 Conn. 447; Hine *v.* Belden, 27 Conn. 384; S. *v.* Maxwell, 36 Conn. 157; S. *v.* Burrows, 37 Conn. 425; S. *v.* Mead, 46 Conn. 22. And see Boles *v.* Lynde, 1 Root, 195.

Iowa.—Santo *v.* S., 2 Iowa, 165, [63 Am. D. 487;] Bowen *v.* Hale, 4 Iowa, 430; Vaughn *v.* S., 5 Iowa, 369; S. *v.* Munzenmaier, 24 Iowa, 87; S. *v.* Harris, 36 Iowa. 136; S. *v.* Thompson, 44 Iowa, 399; Walker *v.* Shook, 49 Iowa, 264; Fries *v.* Porch, 49 Iowa, 351; S. *v.* Mohr, 53 Iowa, 261.

Maine.—S. *v.* Robinson, 33 Me. 564; S. *v.* Gurney, 33 Me. 527; Barnett *v.* S., 36 Me. 196; S. *v.* Leach, 38 Me. 432; S. *v.* Moran, 40 Me. 129; Androscoggin R. R. Co. *v.* Richards, 41 Me. 233; Thurston *v.* Adams, 41 Me. 419; Gray *v.* Kimball, 42 Me. 299; S. *v.* Stevens, 47 Me. 357; S. *v.* Bartlett, 47 Me. 388; S. *v.* Kaler, 56 Me. 88; S. *v.* McCann, 61 Me. 116; S. *v.* Smith, 61 Me. 386; S. *v.* Intoxicating Liquors, 61 Me. 520; S. *v.* Intoxicating Liquors, 63 Me. 121; S. *v.* Connelly, 63 Me. 212; S. *v.* Plunkett, 64 Me. 534; S. *v.* Kenniston, 67 Me. 558; S. *v.* Intoxicating Liquors, 68 Me. 187; S. *v.* Grames, 68 Me. 418; S. *v.* Intoxicating Liquors, 69 Me. 524; S. *v.* Knowlton, 70 Me. 200; Weston *v.* Carr, 71 Me. 356; [S. *v.* Sibly, 84 Me. 461, 24 Atl. R. 940; S. *v.* Busbey, 84 Me. 457, 24 Atl. R. 940; S. *v.* Landry, 85 Me. 93, 26 Atl. R. 998; Butler *v.* Wentworth, 84 Me. 251, 17 L. R. A. 764, 24 Atl. R. 456.]

Massachusetts.—Com. *v.* Edwards, 12 Cush. 187; Fisher *v.* McGirr, 1 Gray, 1, [61 Am. D. 381;] Jones *v.* Root, 6 Gray, 435; Allen *v.* Staples, 6 Gray, 491; Mason *v.* Lothrop, 7 Gray, 354; Com. *v.* Kimball, 7 Gray, 328; Com. *v.* Timothy, 8 Gray, 480; Downing *v.* Porter, 8 Gray, 539; Com. *v.* Purtle, 11 Gray, 78; Com. *v.* Intoxicating Liquors, 14 Gray, 375; Com. *v.* Intoxicating Liquors, 13 Allen, 52; Com. *v.* Intoxicating Liquors, 13 Allen, 561; Com. *v.* Commeskey, 13 Allen, 585; Com. *v.* Intoxicating Liquors, 97 Mass. 332; Com. *v.* Bentley, 97 Mass. 551; Com. *v.* Intoxicating Liquors, 97 Mass. 601; Com. *v.* Chisholm, 103 Mass. 213; Com. *v.* Desmond, 103 Mass. 445; Com. *v.* Intoxicating Liquors, 103 Mass. 448; Com. *v.* Intoxicating Liquors, 103 Mass. 454; Com. *v.* Intoxicating Liquors, 105 Mass. 181; Com. *v.* Leddy, 105 Mass. 381; Com. *v.* Cleary, 105 Mass. 384; Com. *v.* Kimball, 105 Mass. 465; Com. *v.* Maroney, 105 Mass. 467, note; Com. *v.* Intoxicating Liquors, 107 Mass. 216; Com. *v.* Intoxicating Liquors, 107 Mass. 386; Com. *v.* Intoxicating Liquors, 107 Mass. 396; Com. *v.* Intoxicating Liquors, 108 Mass. 19; Com. *v.* Grady, 108 Mass. 412; Com. *v.* McLaughlin, 108 Mass. 477; Com. *v.* Hazeltine, 108 Mass. 479; Com. *v.* Stoehr, 109 Mass. 365; Com. *v.* Berry, 109 Mass. 366; Com. *v.* Dearborn, 109 Mass. 368; Com. *v.* Intoxicating Liquors, 109 Mass. 371; Com. *v.* Intoxicating Liquors, 109 Mass. 378, note; Com. *v.* Intoxicating Liquors, 110 Mass. 182; Com. *v.* Intoxicating Liquors, 110 Mass. 172; Voetsch *v.* Phelps, 112 Mass. 407; Com. *v.* Intoxicating Liquors, 113 Mass. 23; Com. *v.* Haber, 113 Mass. 207; Com. *v.* Maloney, 113 Mass. 211; Com. *v.* Hayes, 114 Mass. 282; Com. *v.* Kenney, 115 Mass. 149; Com. *v.* Shaw, 116 Mass. 8; Com. *v.* Doherty, 116 Mass. 13; Com. *v.* Intoxicating Liquors, 116 Mass. 21, 24, 26, 27; Com. *v.* McCluskey, 116 Mass. 64; Com. *v.* Mason, 116 Mass. 66; Com. *v.* Intoxicating Liquors, 116 Mass. 342; Com. *v.* Intoxicating Liquors, 117 Mass. 427; Com.

§ 1058. Intent to sell.— The defendant's intent to sell the liquors, and in a manner to violate the law, must be proved.[1] Necessarily the evidence of it will in general be circumstantial;[2] as, for example, if he sells some of them, the presumption is that he means to sell the rest. Therefore sales before, after and at the time of the alleged keeping for sale may be shown in proof of the intent to sell.[3] And it is the same of a prior[4] or subsequent[5] keeping for sale. But there is no necessity for the circumstantial evidence to assume this form. "The jury," said Eastman, J., "might be well satisfied of the fact from the manner in which the liquors were kept in the building, or from the declarations of the defendant in regard to them, or from various circumstances which might be supposed, without its being shown that there had been an offer or at-

v. Davis, 121 Mass. 352; Com. *v.* McCue, 121 Mass. 358; Com. *v.* Dolan, 121 Mass. 374; Com. *v.* Hoar, 121 Mass. 375; Com. *v.* Hanley, 121 Mass. 377; Com. *v.* Intoxicating Liquors, 122 Mass. 8, 14, 36; Com. *v.* Powers, 123 Mass. 244; Com. *v.* Wallace, 123 Mass. 400; Com. *v.* Wallace, 123 Mass. 401; Com. *v.* Newton, 123 Mass. 420; Com. *v.* Gallagher, 124 Mass. 29; Com. *v.* Kahlmeyer, 124 Mass. 322; Com. *v.* Fraher, 126 Mass. 56; Com. *v.* Byrnes, 126 Mass. 248; Com. *v.* Intoxicating Liquors, 128 Mass. 72; Com. *v.* Sprague, 128 Mass. 75; Com. *v.* Matthews, 129 Mass. 487; Com. *v.* Ramsdell, 130 Mass. 68; [Com. *v.* Atkins, 136 Mass. 160; Com. *v.* Lalor, 138 Mass. 508; Com. *v.* Murray, 138 Mass. 498; Com. *v.* Henderson, 140 Mass. 303, 5 N. E. R. 832; Com. *v.* Galligan, 144 Mass. 171, 10 N. E. R. 778; Com. *v.* Chase, 147 Mass. 497, 18 N. E. R. 565; Com. *v.* Perry, 148 Mass. 160, 19 N. E. R. 212; Com. *v.* Gavin, 148 Mass. 449, 18 N. E. R. 675; Com. *v.* Lee, 148 Mass. 8, 18 N. E. R. 586; Com. *v.* Gillen, 148 Mass. 15, 18 N. E. R. 584; Com. *v.* Banks, 156 Mass. 233, 30 N. E. R. 104; Com. *v.* Ahearn, 160 Mass. 300, 35 N. E. R. 853.]

Missouri.—McCoy *v.* Zane, 65 Mo. 1.

[*Nebraska.*— Hornberger *v.* S. (Neb.), 66 N. W. R. 23.]

New Hampshire.— S. *v.* McGlynn, 34 N. H. 422; S. *v.* Rum, 35 N. H. 222; S. *v.* Barrels of Liquor, 47 N. H. 369; S. *v.* Colston, 53 N. H. 483; S. *v.* Keggon, 55 N. H. 19; S. *v.* Tufts, 56 N. H. 137.

Rhode Island.— S. *v.* Snow, 3 R. I. 64; Fenner *v.* S., 3 R. I. 107; S. *v.* Campbell, 12 R. I. 147.

South Carolina.—Weikman *v.* City Council, 2 Speers, 371.

Vermont.— Lincoln *v.* Smith, 27 Vt. 328; Gill *v.* Parker, 31 Vt. 610; S. *v.* Intoxicating Liquors, 44 Vt. 208; S. *v.* Hoffman, 46 Vt. 176; S. *v.* Reynolds, 47 Vt. 297; [S. *v.* McGuire, 64 Vt. 529, 15 Atl. R. 213.]

[1] S. *v.* Harris, 36 Iowa, 136; [S. *v.* Libby, 84 Me. 461, 24 Atl. R. 940.]

[2] Crim. Pro., I, § 1101.

[3] S. *v.* Munzenmaier, 24 Iowa, 87; S. *v.* Raymond, 24 Conn. 204; S. *v.* Plunkett 64 Me. 534, 539; S. *v.* Neagle, 65 Me. 468; S. *v.* Mead, 46 Conn. 22; [Com. *v.* Vincent, 165 Mass. 18.]

[4] S. *v.* Colston, 53 N. H. 483; [Com. *v.* Colton, 136 Mass. 500; P. *v.* Caldwell (Mich.), 65 N. W. R. 213.]

[5] *Ante*, §§ 681, 682; Com. *v.* Matthews, 129 Mass. 487; [Com. *v.* Moore, 147 Mass. 528, 18 N. E. R. 402.]

tempt to sell."[1] That there were found on the premises jugs which recently contained liquors,[2] or that liquors were concealed there,[3] or that packages apparently containing liquor were often consigned to the defendant,[4] or that he kept a saloon,[5] or a public bar and its ordinary accompaniments,[6]— these and other like facts are pertinent to the question of intent, the decision whereof is for the jury.[7] In Vermont, under the statute of 1852, the finding of liquor in one's house was *prima facie* evidence of his having it for sale.[8]

[1] S. *v.* McGlynn, 34 N. H. 422, 427; [Com. *v.* Meskill, 165 Mass. 142, 42 N. E. R. 562; S. *v.* Dugan, 52 Kan. 23, 34 Pac. R. 409.]

[2] Com. *v.* Timothy, 8 Gray, 480.

[3] Com. *v.* Gallagher, 124 Mass. 29.

[4] S. *v.* Mead, 46 Conn. 22.

[5] Com. *v.* Intoxicating Liquors, 107 Mass. 386; [Com. *v.* Hugo, 164 Mass. 157.]

[6] Com. *v.* Wallace, 123 Mass. 401.

[7] Com. *v.* Wallace, 123 Mass. 400; Com. *v.* Powers, 123 Mass. 244; Com. *v.* Hayes, 114 Mass. 282; [S. *v.* Burroughs, 72 Me. 480.]

[8] Lincoln *v.* Smith, 27 Vt. 328; [S. *v.* Arie (Iowa), 64 N. W. R. 268; S. *v.* Hale, 91 Iowa, 367.]

CHAPTER LVIII.

LIQUOR NUISANCES.

§ 1059. Introduction.
1060–1063. Selling to be drank on premises.
1064–1067. Tippling-shops.
1068–1070. Buildings for illegal sales.
1070*a*, 1070*b*. Keeping open at forbidden times.

§ 1059. At common law,— houses wherein are sold intoxicating drinks are indictable only when disorderly.[1] But,—

By statutes,— with us, this sort of offense has been greatly extended. The statutes are in terms so varying as scarcely to admit of classification; yet, for convenience,—

How chapter divided.— We shall consider, I. The selling of liquor to be drank on the premises; II. Tippling-shops; III. The nuisance of keeping a building for illegal sales; IV. The keeping open of liquor-selling places at forbidden times.

I. The Selling of Liquor to be Drank on the Premises.

§ 1060. Already,— scattered through this chapter and the one before the last, something has been explained on the subject of this sub-title.

Terms and effect of provision.— Statutes forbidding the sale of liquor to be drank where sold are indirect prohibitions of tippling-shops.[2] Their terms are various. Generally they make the essence of the offense consist in the seller's intent to have the liquor drank on the premises; so that, as observed in a Tennessee case, if he "did not so *intend* he would not be guilty, though the purchaser against" his will drank it there. Or, "on the other hand, if he intended it to be drank there he would be guilty, though the purchaser might take it away

[1] *Ante*, § 984; Rex *v.* Fawkner, 2 Keb. 506, pl. 79.

[2] S. *v.* Slate, 24 Mo. 530; S. *v.* Shearer, 8 Blackf. 262; Moore *v.* S., 12 Ohio St. 387; Com. *v.* Moulton, 10 Cush. 404; Noecker *v.* P., 91 Ill. 468.

from the place."[1] Yet where the statutory expression is, "if the same is drank on or about the premises," a different interpretation is required.[2] The prohibition includes places not under the seller's legal control, if so near and so situated as to be within the mischief to be remedied. But where the purchaser takes the liquor, in the seller's quart measure, to a place out of view on the opposite side of the street, some fifty feet away, and there drinks it in front of another store, the court cannot say, as matter of law, that this place is within the statutory prohibition.[3]

§ 1061. The indictment — may be the same as for simple selling, explained in the chapter before the last, augmented by the allegation of the intent or actual drinking just stated.[4] But this added matter is likewise an added identification of the transaction;[5] so that possibly, by reason of this, the courts may accept as sufficient some of the other allegations in forms less minute than when only the selling is charged.[6] The statutory terms must be duly covered; and, where they were "sell, by retail, wine, ardent spirits or a mixture thereof, to be drank in or at the store or other place of sale," it was adjudged ill to omit the words "by retail," and simply aver that the defendant "did, without license so to do, sell ardent spirits to be drank where sold, in a room occupied by him."[7]

§ 1062. Adequate.— Under a statute making it an offense to sell liquor "*if intended* to be drank," etc., an indictment was adjudged good which charged that the defendant, at a time and place specified, did unlawfully sell and retail spirituous liquor to a person named, by the quart, to be drank on the premises, and which was then and there drank on the premises, etc., without having obtained a license so to do. "To be drank,"

[1] Sanderlin *v.* S., 2 Humph. 315, 319; S. P., Wrocklege *v.* S., 1 Iowa, 167.

[2] Christian *v.* S., 40 Ala. 376; [Jones *v.* S., 96 Ala. 56, 11 S. R. 192.]

[3] Easterling *v.* S., 30 Ala. 46; [Whaley *v.* S., 87 Ala. 83, 6 S. R. 380.]

[4] *Ante*, § 1034*b*.

[5] *Ante*, § 1037.

[6] Overshiner *v.* Com., 2 B. Monr. 344; Com. *v.* Pearson, 3 Met. 449; S. *v.* Auberry, 7 Mo. 304; P. *v.* Gilkinson, 4 Park. Cr. 26; Com. *v.* Head, 11 Grat. 819; Kilbourn *v.* S., 9 Conn. 560; S. *v.* Freeman, 6 Blackf. 248; Com. *v.* Stowell, 9 Met. 569; Rawson *v.* S., 19 Conn. 292; Sanderlin *v.* S., 2 Humph. 315; [Foreman *v.* Hunter, 59 Iowa, 466, 13 N. W. R. 659; S. *v.* Dorr, 82 Me. 341, 19 Atl. R. 861.]

[7] Boyle *v.* Com., 14 Grat. 674; [S. *v.* Woolsey, 91 Ind. 131.]

in the allegation, satisfied the statutory words "intended to be drank."[1]

§ 1063. Evidence.— If the purchaser drinks the liquor on the premises without objection from the seller, the presumption is that it was sold to be drank there,[2] or was drank with the seller's consent.[3] Or if the seller furnished bottles, glasses, sugar, water, etc., the jury are justified in inferring the intent that the liquor should be drank where sold.[4]

II. Tippling-shops.

§ 1064. Elsewhere — Common law.— A tippling-shop, or tippling-house, when disorderly, is indictable at the common law. But this subject is explained elsewhere.[5]

Statutes,— in some of our states, have made the keeping of such a place, though not disorderly, an offense. Thus, in Kentucky: "Any person, unless he shall have a license therefor, who shall sell, in any quantity, wine or spirituous liquors, or the mixture of either, in any house, to be drunk therein, or on or adjacent to the premises where sold, or shall sell the same and it shall be so drunk, shall be deemed guilty of keeping a tippling-house and fined the sum of $60."[6] And, in Maine: "No person shall keep a drinking-house, or tippling-house, within this state;" proceeding, in another section, to define the offense.[7] We have also other forms of the statutory inhibition.[8]

§ 1065. What a tippling-shop.— While some of our statutes define, as just seen, "tippling-shop" or "tippling-house," the meaning of the term in others doubtless varies somewhat with the connection in which it stands.[9] But, in general, it may be

[1] Bilbro *v.* S., 7 Humph. 534.

[2] Sanderlin *v.* S., 2 Humph. 315.

[3] Casey *v.* S., 6 Mo. 646. See Lucker *v.* Com., 4 Bush, 440.

[4] Sanderlin *v.* S., *supra*.

[5] Crim. Law, I, §§ 818, 1113–1117. See *post*, § 1068.

[6] Com. *v.* Harvey, 16 B. Monr. 1; Com. *v.* Allen, 15 B. Monr. 1.

[7] S. *v.* Casey, 45 Me. 435.

[8] In Iowa, "houses where drunkenness, quarreling, fighting or breaches of the peace are carried on or permitted, to the disturbance of others, are nuisances, and may be abated and punished." Thereupon one who at his farm-house sold wine of his own manufacture, and the buyers became intoxicated on it in the highway, and disturbed the neighbors from one-half to one and a half miles from his house, was held not to have committed the offense. S. *v.* Dieffenbach, 47 Iowa, 638.

[9] *Ante*, §§ 82, 86, 87, 92*d*, 93, 246.

said to be a building or room wherein intoxicating liquors are habitually sold to be drank there. This definition is framed from a consideration of the principles which govern this sort of subject; though, simply from the few cases we have on the question, it might not be easy to say exactly what constitutes a tippling-house.[1] It is not created by a single sale;[2] though in matter of proof, the evidence of one sale is competent.[3]

§ 1066. The indictment — is required only to charge, in the general words of the statute,[4] if so its terms are duly covered, that, at a specified time and place, the defendant "did keep a drinking-house and tippling-shop."[5] And this is held to be so though, in the language of Davis, J., "there is another section [or clause[6]] of the same statute defining the offense and providing that it shall consist in certain specified acts."[7]

§ 1067. Negativing authority. — The question of negativing the authority to sell, discussed in a previous chapter,[8] has arisen in some of these cases, but they have developed no distinguishing principles.[9]

Statutory terms. — The indictment must reasonably pursue the terms of the statute.[10] Where they were, "keep any tavern

[1] See Moore *v.* S., 9 Yerg. 353; Morrison *v.* Com., 7 Dana, 218; Howard *v.* S., 6 Ind. 444; Bush *v.* The Republic, 1 Tex. 455; Burner *v.* Com., 13 Grat. 778; Com. *v.* Worcester, 126 Mass. 256; Lucker *v.* Com., 4 Bush, 440. "A tippling-shop, literally, is a place where liquor is drank habitually, in small quantities, without reference to the place where purchased. But such is not the well-understood legal definition (Bishop, Stat. Crimes, § 1065); nor is it in accordance with the statutory definition (R. S., ch. 27, § 81). On the contrary, to constitute a drinking-house or tippling-shop, the liquor must be drank on the premises where purchased. S. *v.* Inness, 53 Me. 536, 539. So, when cider is sold for 'tippling purposes,' as the term is used in section 22, the place of drinking and the place of sale must be the same." Virgin, J., in S. *v.* McNamara, 69 Me. 133, 135; [Hussey *v.* S., 69 Ga. 54; Nicholson *v.* P., 29 Ill. Ap. 57; Harney *v.* S., 8 Lea (Tenn.), 113.]

[2] Dunnaway *v.* S., 9 Yerg. 350; Hinton *v.* Com., 7 Dana. 216.

[3] S. *v.* Gorham, 67 Me. 247. See Lucker *v.* Com., *supra*.

[4] Crim. Pro., I, § 494; Com. *v.* Riley, 14 Bush, 44, referring to Morrison *v.* Com., 7 Dana, 218; Com. *v.* Turner, 4 B. Monr. 4; Com. *v.* Allen, 15 B. Monr. 1; Com. *v.* Harvey, 16 B. Monr. 1.

[5] To the like effect are S. *v.* Allen, 32 Iowa, 248; S. *v.* Freeman, 27 Iowa, 333.

[6] S. *v.* Collins, 48 Me. 217.

[7] S. *v.* Casey, 45 Me. 435; S. *v.* Collins, *supra*. And see Com. *v.* Turner, 4 B. Monr. 4; Woods *v.* Com., 1 B. Monr. 74.

[8] *Ante*, §§ 1042–1044.

[9] S. *v.* Brown, 8 Mo. 210; Webster *v.* Com., 7 Dana, 215; Com. *v.* Allen, 15 B. Monr. 1; Com. *v.* Harvey, 16 B. Monr. 1.

[10] Our *v.* Com., 9 Dana, 30.

or grocery for the retail of," etc., an allegation that the defendant kept a grocery, and did retail, etc., not saying that he kept it for retailing, was adjudged inadequate.[1]

Other points — appear in the cases cited in the note.[2]

III. The Nuisance of Keeping a Building for Illegal Sales.

§ 1068. Common law supplementing statutes.— By a doctrine explained in another connection,[3] and according to the opinion of some courts, on a question not widely considered in our tribunals, a house or other building or room wherein sales of liquor are habitually made contrary to the inhibitions of a statute is a common nuisance, the keeper whereof is indictable under the common law.[4] And —

Statutes — have, in a few of the states, by express terms made it so. Thus, in Massachusetts, "all buildings, places or tenements . . . used for the illegal keeping or sale of intoxicating liquors shall be deemed common nuisances."[5] And a provision is added for the punishment of the keeper. The Connecticut statute makes the offense consist in keeping a place where it is *reputed* that intoxicating liquors are sold.[6]

Constitutional.— These statutes are adjudged to be within the constitutional power of the legislature.[7]

§ 1068a. "Tenement."— This word, in the Massachusetts statute, signifies an apartment or apartments in a building, or the building itself.[8]

§ 1069. In general of the offense.— The offense, and the procedure for its punishment, are within the principles of the law of nuisance and the procedure thereon, and those of the last sub-title and the three chapters next preceding this. It

[1] Hensley *v.* S., 1 Eng. 252.

[2] S. *v.* Brown, *supra;* Shilling *v.* S., 5 Ind. 443; S. *v.* Rhodes, 2 Ind. 321; S. *v.* Tracey, 12 R. I. 216; Com. *v.* Sisson, 126 Mass. 48.

[3] Crim. Law, I, §§ 1119–1121.

[4] Meyer *v.* S., 13 Vroom, 145; Meyer *v.* S., 12 Vroom, 6; S. *v.* Williams, 1 Vroom. 102; S. *v.* Hall, 3 Vroom, 158; S. *v.* Waynick, 45 Iowa, 516; Smith *v.* Com., 6 B. Monr. 21; Wilson *v.* Com., 12 B. Monr. 2.

[5] Mass. Gen. Stats., ch. 87, § 6.

[6] S. *v.* Thomas, 47 Conn. 546, [36 Am. R. 98.]

[7] S. *v.* Thomas, *supra;* McLaughlin *v.* S., 45 Ind. 338; Streeter *v.* P., 69 Ill. 595; [Com. *v.* Patterson, 153 Mass. 5, 26 N. E. R. 136; Com. *v.* Quinlan, 153 Mass. 483, 27 N. E. R. 8.]

[8] Com. *v.* McCaughey, 9 Gray, 296; Com. *v.* Godley, 11 Gray, 454; Com. *v.* Cogan, 107 Mass. 212; Com. *v.* Fraher, 126 Mass. 56.

is limited to a few states. Therefore it is deemed best to close here the discussion of it, simply adding a reference to cases in the note.[1]

[1] [*Alabama.*— Boggery *v.* S., 78 Ala. 26.]

[*Arkansas.*— Bryant *v.* S., 62 Ark. 459; Adams *v.* S., 64 Ark. 188.]

Connecticut.—Rawson *v.* S., 19 Conn. 292; S. *v.* Morgan, 40 Conn. 44; S. *v.* Buckley, 40 Conn. 246; S. *v.* Thomas, 47 Conn. 546, [36 Am. R. 98.]

[*Illinois.*— Gallagher *v.* P., 29 Ill. Ap. 401.]

Indiana.— Howard *v.* S., 6 Ind. 444; Joseph *v.* S., 42 Ind. 370; McLaughlin *v.* S., 45 Ind. 338; Davis *v.* S., 52 Ind. 488; S. *v.* Jacks, 54 Ind. 412; S. *v.* Wickey, 54 Ind. 438.

Iowa.— Our House *v.* S., 4 Greene (Iowa), 172; Part of Lot *v.* S., 1 Iowa, 507; Bowen *v.* Hale, 4 Iowa, 430; S. *v.* McGrew, 11 Iowa, 112; S. *v.* Collins, 11 Iowa, 141; S. *v.* Kreig, 13 Iowa, 462; S. *v.* Schilling, 14 Iowa, 455; S. *v.* Baughman, 20 Iowa, 497; S. *v.* Hass, 22 Iowa, 193; S. *v.* Munzenmaier, 24 Iowa, 87; S. *v.* Verden, 24 Iowa, 126; S. *v.* Freeman, 27 Iowa, 333; S. *v.* Harris, 27 Iowa, 429; S. *v.* Allen, 32 Iowa, 248; S. *v.* Norton, 41 Iowa, 430; S. *v.* Dean, 44 Iowa, 648; [S. *v.* Pierce, 65 Iowa, 85, 21 N. W. R. 195; Schermerhorn *v.* Weiler, 67 Iowa, 278, 25 N. W. R. 160; S. *v.* Douglas, 73 Iowa, 279, 34 N. W. R. 856; S. *v.* Thompson, 73 Iowa, 282, 34 N. W. R. 857; S. *v.* Ward, 75 Iowa, 637, 36 N. W. R. 765; S. *v.* Webler, 76 Iowa, 686, 39 N. W. R. 286; Farley *v.* Geisbecker, 78 Iowa, 453, 43 N. W. R. 279; S. *v.* Rockwell, 82 Iowa, 429, 48 N. W. R. 721; S. *v.* Viers, 82 Iowa, 897, 48 N. W. R. 732; S. *v.* Fleming, 86 Iowa, 295, 53 N. W. R. 234; S. *v.* Herselus, 86 Iowa, 214, 53 N. W. R. 105; S. *v.* Oder, 92 Iowa, 767; Ritchie *v.* Zolosky, 98 Iowa, 589; Cameron *v.* Fellows (Iowa), 80 N. W. R. 567; Bartel *v.* Hobson, 107 Iowa, 644, 78 N. W. R. 689.]

[*Kansas.*— S. *v.* Lindgrove (Kan. Ap.), 41 Pac. R. 688; S. *v.* Dogan, 52 Kan. 23, 34 Pac. R. 409.]

Maine.— S. *v.* Lang, 63 Me. 215; S. *v.* Page, 66 Me. 418; S. *v.* Stafford, 67 Me. 125; S. *v.* Ruby, 68 Me. 543; [S. *v.* Roach, 75 Me. 123; S. *v.* Dodge, 78 Me. 439, 6 Atl. R. 875; S. *v.* Frazier, 79 Me. 95, 8 Atl. R. 347; S. *v.* Kelleher, 81 Me. 346, 17 Atl. R. 168; S. *v.* Ryan, 81 Me. 107, 16 Atl. R. 406; S. *v.* Dorr, 82 Me. 157, 19 Atl. R. 157; S. *v.* Cox, 82 Me. 417, 19 Atl. R. 857; S. *v.* Intoxicating Liquors, 83 Me. 158, 21 Atl. R. 840; S. *v.* Stanley, 84 Me. 555, 24 Atl. R. 983; S. *v.* Intoxicating Liquors, 85 Me. 304, 27 Atl. R. 178; S. *v.* Whalen, 85 Me. 469, 27 Atl. R. 348.]

Massachusetts.— Com. *v.* Kimball, 7 Gray, 328; Com. *v.* Buxton, 10 Gray, 9; Com. *v.* Skelley, 10 Gray, 464; Com. *v.* Godley, 11 Gray, 454; Com. *v.* McArty, 11 Gray, 456; Brown *v.* Perkins, 12 Gray, 89; Com. *v.* Logan, 12 Gray, 136; Com. *v.* Kelly, 12 Gray, 175; Com. *v.* Farrand, 12 Gray, 177; Com. *v.* Quinn, 12 Gray, 178; Com. *v.* Howe, 13 Gray, 26; Com. *v.* Langley, 14 Gray, 21; Com. *v.* Shattuck, 14 Gray, 23; Com. *v.* Hill, 14 Gray, 24; Com. *v.* Foss, 14 Gray, 50; Com. *v.* Bubser, 14 Gray, 83; Com. *v.* Shea, 14 Gray, 386; Com. *v.* Edds, 14 Gray, 406; Com. *v.* Donovan, 16 Gray, 18; Com. *v.* Higgins, 16 Gray, 19; Com. *v.* Welsh, 1 Allen, 1; Com. *v.* Gallagher, 1 Allen, 592; Com. *v.* Carolin, 2 Allen, 169; Com. *v.* Davenport, 2 Allen, 299; Com. *v.* Hill, 4 Allen, 589; Com. *v.* O'Donnell, 8 Allen, 548; Com. *v.* Cutler, 9 Allen, 486; Com. *v.* Greenen, 11 Allen, 241; Com. *v.* Wright, 12 Allen, 190; Com. *v.* McDonough, 13 Allen, 581; Com. *v.* Hogan, 97 Mass. 122; Com. *v.* Kennedy, 97 Mass. 224; Com. *v.* Austin, 97 Mass. 595; Com. *v.* Car-

§ 1070. Private abatement.—The right of private persons to abate public nuisances, and its limits, are considered in other connections.[1] Precisely how far the nuisance created by the statutes now in contemplation may be thus abated we may find it difficult to say. Under the Massachusetts statute,[2] per-

penter, 100 Mass. 204; Com. *v.* Smith, 102 Mass. 144; Com. *v.* Heffron, 102 Mass. 148; Jones *v.* McLeod, 103 Mass. 58; Prescott *v.* Kyle, 103 Mass. 381; Com. *v.* Cogan, 107 Mass. 212; Com. *v.* Kinsley, 108 Mass. 24; Com. *v.* Bacon, 108 Mass. 26; Com. *v.* Bennett, 108 Mass. 27; Com. *v.* Martin, 108 Mass. 29, note; Com. *v.* Kennedy, 108 Mass. 292; Com. *v.* Ryan, 108 Mass. 415; Com. *v.* Carney, 108 Mass. 417; Com. *v.* Doe, 108 Mass. 418; Com. *v.* Callahan, 108 Mass. 421; Com. *v.* Conneally, 108 Mass. 430; Com. *v.* Reichart, 108 Mass. 482; Com. *v.* Finnegan, 109 Mass. 363; Com. *v.* McCurdy, 109 Mass. 364; Com. *v.* Foran, 110 Mass. 179; Com. *v.* Welsh, 110 Mass. 359; Com. *v.* Pease, 110 Mass. 412; Com. *v.* Carr, 111 Mass. 423; Com. *v.* Dunn, 111 Mass. 425; Com. *v.* Bossidy, 112 Mass. 277; Com. *v.* McNamee, 113 Mass. 12; Com. *v.* Owens, 114 Mass. 252; Com. *v.* Aaron, 114 Mass. 255; Com. *v.* Dowdican, 114 Mass. 257; Com. *v.* Dowling, 114 Mass. 259; Com. *v.* Burke, 114 Mass. 261; Com. *v.* Shaw, 116 Mass. 8; Com. *v.* O'Reilly, 116 Mass. 15; Com. *v.* Campbell, 116 Mass. 32; Com. *v.* Mason, 116 Mass. 66; Com. *v.* Kelley, 116 Mass. 341; Com. *v.* McIvor, 117 Mass. 118; Com. *v.* Cronin, 117 Mass. 140; Com. *v.* Costello, 118 Mass. 454; Com. *v.* Twombly, 119 Mass. 104; Com. *v.* Gafley, 122 Mass. 334; Com. *v.* Sullivan, 123 Mass. 221; Com. *v.* McCluskey, 123 Mass. 401; Com. *v.* Hart, 123 Mass. 416; Com. *v.* Brown, 124 Mass. 318; Com. *v.* Finnegan, 124 Mass. 324; Com. *v.* Sisson, 126 Mass. 48; Com. *v.* Fraher, 126 Mass. 56; Com. *v.* Ronan, 126 Mass. 59; Com. *v.* Fraher, 126 Mass. 265; Com. *v.* Robinson, 126 Mass. 259; [Com. *v.* Kerrissey, 141 Mass. 110, 4 N. E. R. 820; Com. *v.* Hersey, 144 Mass. 297, 11 N. E. R. 116; Com. *v.* Pierce, 147 Mass. 171, 16 N. E. R. 705; Com. *v.* Intoxicating Liquor, 150 Mass. 164, 22 N. E. R. 628; Com. *v.* Marchand, 155 Mass. 8, 29 N. E. R. 578; Com. *v.* Gavin, 160 Mass. 523, 36 N. E. R. 484; Com. *v.* Lynch, 160 Mass. 298, 35 N. E. R. 854; Com. *v.* Reed, 162 Mass. 315, 38 N. E. R. 364; Com. *v.* Hodges, 167 Mass. 176; Com. *v.* Matthews, 167 Mass. 173; Com. *v.* Brown, 154 Mass. 55, 13 L. R. A. 195, 27 N. E. R. 776.]

[*Michigan.*—P. *v.* Rice (Mich.), 61 N. W. R. 540.]

Ohio.—Clinton *v.* S., 33 Ohio St. 27.

Rhode Island.—S. *v.* Hopkins, 5 R. I. 53; S. *v.* Paul, 5 R. I. 185; S. *v.* Knott, 5 R. I. 293; S. *v.* Kingston, 5 R. I. 297; S. *v.* Keeran, 5 R. I. 497.

Vermont.—S. *v.* Paige, 50 Vt. 445; S. *v.* Cox, 52 Vt. 471; S. *v.* Haley, 52 Vt. 476.

[Statutes have been enacted in a few states establishing dispensaries, and there are cited on that subject the following cases: *Ex parte* Keeler (S. C.), 23 S. E. R. 865; S. *v.* Porterfield (S. C.), 25 S. E. R. 37; Donald *v.* Scott, 74 Fed. R. 859; Garsed *v.* Greensboro (N. C.), 35 S. E. R. 254.]

[1] Crim. Law, I, §§ 490, 821, 823, 828, 829, 1080, 1081.

[2] *Ante*, § 1068; [Gray *v.* Stienes, 69 Iowa, 124, 28 N. W. R. 475; McLane *v.* Bonn, 70 Iowa, 752, 30 N. W. R. 478; Judge *v.* Kribs, 71 Iowa, 3, 32 N. W. R. 324; Pearson *v.* Distillery Co., 72 Iowa, 348, 34 N. W. R. 1; Kauffman *v.* Dostel, 73 Iowa, 691, 36 N. W. R. 643; Shear *v.* Green, 73 Iowa, 688, 36 N. W. R. 642; S. *v.* Waltz, 74 Iowa, 610,

sons whose friends frequented the forbidden nuisance to their injury broke open the place and destroyed a quantity of the liquor. But the court held this to be an unlawful proceeding, for which they must answer in damages to the owner.[1] So, in Rhode Island, under a similar enactment, the right to destroy the building by way of abating the nuisance was denied.[2] Under the terms of the statutes in these states, the question might arise whether the nuisance consists of the liquor, or the building, or both — whether it is not the *business*. And certainly it is not abating a nuisance to destroy what is not the nuisance. The words in Iowa are different; namely, that the building in which the unlawful manufacture, sale or keeping for sale is carried on may be abated as a nuisance, and whosoever shall use a building for such purposes shall be deemed guilty of a nuisance, and may be prosecuted, etc., accordingly.[3]

38 N. W. R. 494; S. *v.* Cranford, 29 Kan. 529; S. *v.* Davis, 44 Kan. 60, 24 Pac. R. 73.]

[1] Brown *v.* Perkins, 12 Gray, 89. The questionable feature of this case is, not probably that the court arrived at a wrong conclusion, but that is assigned a wholly untenable reason. It laid down the doctrine (see Crim. Law, I, § 1081) that the right to abate a public nuisance can be exercised only by those who are personally and specially injured by it. Certainly the authorities are not so, as the reader will see who consults them as cited in "Criminal Law." What is said sustaining this view in the cases referred to by the Massachusetts court is mere *dictum*. Moreover, in principle, if an evil-minded person has laid a dangerous obstruction upon a public highway, but at a place where I have never occasion to travel, then, at nightfall, just before I know the way will be thronged by persons moving along it in the dark, I go and remove the obstruction, and so prevent threatened injury to life or limb, it would be contrary to all just notions of law, and still more so to all just law, to hold that, in recompense for my good deed, I must answer to the villain in a civil suit. The better and just doctrine, generally held by our courts, is that every man is in theory of law injured by a public wrong (Crim. Law, I, §§ 231, 235 *et seq.*), and, in like manner, is injured by a public nuisance of the abatable sort; therefore, where the right to abate the public nuisance exists, it may be exercised by any person. If, in legal theory, the element of individual interest is important, as probably it is not, still the interest need not be special to the particular individual, but the general interest which is participated in by every member of the community is sufficient. I am speaking now of nuisances which are admitted to be abatable. Not everything which is indictable under the name of nuisance is abatable; at least, not every such thing is so by every means which a person ignorant of law might suggest. [Carleton *v.* Rugg, 149 Mass. 550, 22 N. E. R. 55.]

[2] S. *v.* Paul, 5 R. I. 185; S. *v.* Keeran, 5 R. I. 497.

[3] S. *v.* Freeman, 27 Iowa, 333, 336; *ante*, § 1064, note.

Here is foundation for a different construction, whatever the true construction may be.[1] This subject in its wider extent, and that of forfeitures, both with and without judicial proceedings, comprise a chapter in "Criminal Law."[2]

IV. The Keeping Open of Liquor-selling Places at Forbidden Times.

§ 1070a. In general.— For the protection of particular interests, we have statutes forbidding the keeping open of liquor-selling places at special times; as —

Lord's day.— The statutes on this subject[3] are in varying terms. They are to have a reasonable interpretation; as, for example, not forbidding boarding-house keepers to supply regular boarders with meals.[4] And to keep open the doors of a store, and even suffer people to congregate in it,[5] without traffic, is not to "keep open store," within these statutes;[6] while, on the other hand, one whose doors are shut breaks the inhibition if he permits access through the back door and supplies the liquor.[7] So the word "closed" requires that the sales be entirely stopped, and the conveniences for drinking be rendered practically inaccessible.[8] Again,—

[1] Bowen *v.* Hale, 4 Iowa, 430; Our House *v.* S., 4 Greene (Iowa), 172.

[2] Crim. Law, I, § 816 *et seq.*

[3] Crim. Law, II, § 961; [S. *v.* O'Connor (Minn.), 59 N. W. R. 999.]

[4] S. *v.* Gregory, 47 Conn. 276; [Edwards *v.* S., 121 Ind. 450, 23 N. E. R. 277; Com. *v.* Everson, 140 Mass. 292, 2 N. E. R. 839; Com. *v.* Moore, 145 Mass. 244, 13 N. E. R. 893; P. *v.* Hobson, 48 Mich. 27, 11 N. W. R. 771; Harris *v.* P., 1 Colo. App. 289, 28 Pac. R. 1133; Neill *v.* S., 92 Tenn. 719, 23 S. W. R. 52; P. *v.* Koob (Mich.), 67 N. W. R. 320.]

[5] Weidman *v.* P., 7 Bradw. 38.

[6] Snider *v.* S., 59 Ala. 64. But see Baldwin *v.* Chicago, 68 Ill. 418.

[7] Kroer *v.* P., 78 Ill. 294; Blahut *v.* S., 34 Ark. 447. And see Crim. Law, II, § 963; [P. *v.* Minter, 59 Mich. 557, 26 N. W. R. 701; P. *v.* Crowley, 90 Mich. 366, 51 N. W. R. 517; Hannan *v.* D. C., 1 Wash. App. 265.]

[8] Kurtz *v.* P., 33 Mich. 279. And see Harvey *v.* S., 65 Ga. 568. See also, on the subject of this section, Fant *v.* P., 45 Ill. 259; Coulbert *v.* Troke, 1 Q. B. D. 1; S. *v.* Crabtree, 27 Mo. 232; [Harris *v.* P., 21 Colo. 95; Lucas *v.* S., 92 Ga. 454, 17 S. E. R. 668; Hannon *v.* S., 92 Ga. 455, 17 S. E. R. 666; Thomasson *v.* S., 92 Ga. 456, 17 S. E. R. 858; Klug *v.* S., 77 Ga. 734; Barton *v.* S., 99 Ind. 84; P. *v.* Cox, 70 Mich. 247, 38 N. W. R. 235; P. *v.* Beller, 73 Mich. 640, 41 N. W. R. 827; P. *v.* Hughes, 97 Mich. 543, 56 N. W. R. 942; P. *v.* James, 100 Mich. 522, 59 N. W. R. 236; P. *v.* Bowkers, 109 Mich. 360; P. *v.* Shattens, 116 Mich. 1; S. *v.* O'Connor (Minn.), 59 N. W. R. 999; P. *v.* Chase, 55 N. Y. S. 292; S. *v.* Herbel (Ohio St.), 43 N. E. R. 328; Wagonstern *v.* Com., 94 Va. 787, 26 S. E. R. 402; Neill *v.* S., 92 Tenn. 719, 23 S. W. R. 52.]

§ 1070b. Election days.— The statutes against keeping open liquor-selling places on election days are in various terms. But they are not attended with difficulties demanding special expositions in this place.[1]

[1] *Ante*, § 803; S. *v.* Cady, 47 Conn. 44; Haines *v.* S., 7 Tex. Ap. 30; English *v.* S., 7 Tex. Ap. 171; Hoskey *v.* S., 9 Tex. Ap. 202; [Quatter *v.* S., 120 Ind. 92, 22 N. E. R. 100; S. *v.* Hirsch, 125 Ind. 207, 24 N. E. R. 1062; Com. *v.* Murphy, 95 Ky. 28, 23 S. W. R. 655. Some cases are hereto cited having reference to holidays and the Mondays following when the holidays fall on Sunday. Rose *v.* S. (Ga.), 33 S. E. R. 439; Com. *v.* Francis, 152 Mass. 508, 25 N. E. R. 836; P. *v.* Ackerman, 80 Mich. 588, 45 N. W. R. 367; P. *v.* Werderman, 115 Mich. 66, 74 N. W. R. 209, 39 L. R. A. 218; Schuck *v.* S., 50 Ohio St. 493, 34 N. E. R. 663; Jones *v.* S., 32 Tex. Cr. R. 533, 25 S. W. R. 124; Wear *v.* S., 35 Tex. Cr. R. 30, 26 S. W. R. 68.]

CHAPTER LIX.

HAWKERS AND PEDDLERS.

§ 1071. Introduction.
1072–1080. Law of the offense.
1081–1088. The procedure.

§ 1071. What for this chapter and how divided.— The unlicensed hawking and peddling of goods will here be considered in the following order: I. The law of the offense; II. The procedure.

I. The Law of the Offense.

§ 1072. In England,— from an early date, statutes, more or less modified from time to time, have provided for the licensing of hawkers and peddlers, and made infringements of their provisions punishable; partly for the protection of the community against frauds to which itinerant dealers in commodities are specially tempted, and partly for revenue.[1] At the time of this writing, the latest enactment, revising and consolidating what has gone before, is 34 and 35 Vict., ch. 96; supplemented by 44 and 45 Vict., ch. 45, and 44 and 45 Vict., ch. 67. And —

§ 1073. With us — a like fact prevails. The statutes differ in the respective states, and more or less at different periods in the same state.[2] And —

By-laws.— Municipal by-laws may, within the limitations of power explained in an earlier chapter,[3] and they sometimes do, forbid, except by license for which they provide, hawking and peddling in their respective localities.[4]

[1] Jacob, Law Dict., tit. Hawkers; Burn, Just., tit. Hawkers and Peddlers. And see Stats. 25 Hen. 8, ch. 9; 33 Hen. 8, ch. 4; 8 & 9 Will. 3, ch. 25; 22 & 23 Vict., ch. 36; 33 & 34 Vict., ch. 72; and multitudes of others.

[2] [Appeal of Brinton, 132 Pa. St. 69, 18 Atl. R. 1092.]

[3] *Ante*, § 18 *et seq.*; [City of St. Paul *v.* Stoltz, 33 Minn. 238, 22 N. W. R. 634.]

[4] P. *v.* Mulholland, 82 N. Y. 324, [37 Am. R. 568;] Chicago *v.* Bartee, 100 Ill. 57; Com. *v.* Elliott, 121 Mass. 367; Huntington *v.* Cheesbro, 57 Ind. 74; Thomas *v.* Hot Springs, 34 Ark. 553, [36 Am. R. 24;] Sledd *v.* Com., 19

§ 1074. Terms defined.—Aside from any statutory definings, the words "hawker" and "peddler" are almost equivalents in meaning: either denotes an itinerant vendor of goods which he carries with him, and perhaps it should be added that the vending must be by retail.[1] Formerly, and doubtless still, outcry was specially prominent in the idea of hawking, and the putting off of petty articles in that of peddling. In England,[2] and some of our states, and in the legislation of congress,[3] there are statutory definings of these terms; and, wherever they exist, the meanings so ascertained prevail over those of the unwritten law.

§ 1075. Single act — Business.—Hawking or peddling is a business, to the extent that it is not constituted by a single offering or selling, or even by occasional sales, made outside of one's ordinary employment.[4]

§ 1076. Other business — Supplying orders — Itinerancy. "The leading primary idea of a hawker and peddler is," said Shaw, C. J., "that of an itinerant or traveling trader, who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business." Therefore the court deemed that one would commit this offense, under the statute then in contemplation, though his sales were in connection with a non-prohibited employment, and at the

Grat. 813; [Bradley *v.* City of Rochester, 7 N. Y. S. 287; City of Kansas *v.* Collins, 34 Kan. 434, 8 Pac. R. 865.]

[1] And see and compare Higgins *v.* Rinker, 47 Tex. 393, 402; S. *v.* Wilson, 2 Lea, 28; Com. *v.* Ober, 12 Cush. 493, 495; Com. *v.* Farnum, 114 Mass. 267; Morrill *v.* S., 38 Wis. 428, [20 Am. R. 12;] Burbank *v.* McDuffee, 65 Me. 135; Com. *v.* Cusick, 120 Mass. 183; Chicago *v.* Bartee, 100 Ill. 57; [Com. *v.* Reid (Mass.), 56 N. E. R. 617; S. *v.* Foster (R. I.), 46 Atl. R. 833; P. *v.* Baker, 115 Mich. 179, 73 N. W. R. 115; Graffty *v.* Rushville, 107 Ind. 502, 57 Am. R. 128; City of Carrollton *v.* Bazette, 159 Ill. 284, 42 N. E. R. 837, 31 L. R. A. 522; Brownback *v.* Borough of North Wales, 194 Pa. St. 609, 45 Atl. R. 660; Hall *v.* S., 39 Fla. 687, 23 S. R. 119; S. *v.* Miller, 93 N. C. 511, 53 Am. R. 469.]

[2] By 34 & 35 Vict., ch. 96, § 3.

[3] See, for example, Stat. 1864, ch. 173, § 79, cl. 32, 13 U. S. Stats. at Large, 255; [Town of Trenton *v.* Clayton, 50 Mo. Ap. 535.]

[4] Rex *v.* Little, 1 Bur. 609, 613; Rex *v.* Buckle, 4 East, 346; Com. *v.* Farnum, 114 Mass. 267, 271; Alcott *v.* S., 8 Blackf. 6; S. *v.* Belcher, 1 McMul. 40. And see Merriam *v.* Langdon, 10 Conn. 460: Com. *v.* Willis, 14 S. & R. 398; Colson *v.* S., 7 Blackf. 590; Page *v.* S., 6 Mo. 205; [P. *v.* Jarvis, 46 N. Y. S. 596, 19 Ap. Div. 466; Roy *v.* Schuff, 51 La. An. 86, 24 S. R. 788; Ezell *v.* Thrasher, 76 Ga. 817; Keller *v.* S. (Ala.), 26 S. R. 323.]

unsolicited request of purchasers. But the unlicensed agent of a city firm could lawfully go about the country delivering to customers previously-ordered goods made by his principals, sometimes adding more than had been ordered.[1] Again,—

Selling by sample. — Except by express words, sometimes found in a statute,[2] it is not a violation of the law for one to sell by sample the goods of a permanent dealer.[3] The permanency of the real vendor, from whose place of business the sales are made within the spirit of the law, takes the case out of the reason[4] of the prohibition.

§ 1077. Manner of traveling. — It is immaterial how the traveling is done, "whether," in the words of Rogers, J., "on foot or horseback, in wagons, carts, sleighs, or canal boats."[5]

§ 1078. On commission — By auction. — Neither the fact that the traveling trader sells the goods on commission, nor

[1] Com. *v.* Ober, 12 Cush. 493, 495. And see Rex *v.* McKnight, 10 B. & C. 734; [Com. *v.* Crowell, 156 Mass. 215, 30 N. E. R. 1015; S. *v.* Rhyne, 119 N. C. 905, 26 S. E. R. 126; City of Greensboro *v.* Williams, 124 N. C. 167, 32 S. E. R. 492· S. *v.* Gouss, 85 Iowa, 21, 51 N. W. R. 1147; City of Stuart *v.* Cunningham, 88 Iowa, 191, 55 N. W. R. 311, 20 L. R. A. 430; S. *v.* Downing, 22 Mo. Ap. 504; S. *v.* Snoddy, 128 Mo. 523, 31 S. W. R. 36; S. *v.* Fetterer, 65 Conn. 287, 32 Atl. R. 394; S. *v.* Kumpel, 2 Marv. (Del.) 464, 43 Atl. R. 173; S. *v.* Powell (N. H.), 41 Atl. R. 171; S. *v.* Wells (N. H.), 45 Atl. R. 143; Neagle *v.* City of Centralia, 81 Ill. Ap. 334.]

[2] Burbank *v.* McDuffee, 65 Me. 135; *Ex parte* Robinson, 12 Nev. 263, [28 Am. R. 794;] Speer *v.* Com., 23 Grat. 935, [14 Am. R. 164;] Com. *v.* Smith, 6 Bush, 303; Mork *v.* Com., 6 Bush, 397; [White *v.* Com., 78 Va. 484; S. *v.* Moorhead, 42 S. C. 211, 20 S. E. R. 544, 46 Am. St. R. 719, 26 L. R. A. 585.]

[3] Com. *v.* Jones, 7 Bush, 502; Com. *v.* Farnum, 114 Mass. 267. But see Morrill *v.* S., 38 Wis. 428, [20 Am. R. 12; Kimmel *v.* City of Americus, 105 Ga. 694, 31 S. E. R. 623; Wrought Iron Range Co. *v.* Johnson, 84 Ga. 754, 11 S. E. R. 233, 8 L. R. A. 273; S. *v.* Gibbs, 115 N. C. 700, 20 S. E. R. 172; S. *v.* Lee, 113 N. C. 681, 18 S. E. R. 713, 37 Am. St. R. 649; Ballou *v.* S., 87 Ala. 144, 6 S. R. 393; Randolph *v.* Yellowstone Kit, 83 Ala. 471, 3 S. R. 706; Pegues *v.* Ray, 50 La. An. 574, 23 S. R. 904; City of Olney *v.* Todd, 47 Ill. Ap. 439; Village of Cerro Gordo *v.* Rawlings, 135 Ill. 36, 25 N. E. R. 1006; S. *v.* Hoffman, 50 Mo. Ap. 585; S. *v.* Smithson, 106 Mo. 149, 17 S. W. R. 221; Kennedy *v.* P., 9 Colo. Ap. 490, 49 Pac. R. 873; City of Davenport *v.* Rice, 75 Iowa, 74, 39 N. W. R. 191, 9 Am. St. R. 454; Standard Oil Co. *v.* Com. (Ky.), 55 S. W. R. 8.]

[4] *Ante*, § 1072; [Hewson *v.* Inhabitants of Englewood, 55 N. J. L. 522, 27 Atl. R. 904, 21 L. R. A. 736; Alexander *v.* Greenville County, 49 S. C. 527, 27 S. E. R. 469; Com. *v.* Eichenburg, 140 Pa. St. 158, 21 Atl. R. 258; Village of Stamford *v.* Fisher, 140 N. Y. 187, 35 N. E. R. 500; McClelland *v.* City of Marietta (Ga.), 23 S. E. R. 329.]

[5] Fisher *v.* Patterson, 13 Pa. St. 336, 338; Com. *v.* Cusick, 120 Mass. 183; [Duncan *v.* S., 105 Ga. 457, 30 S. E. R. 755.]

that he sells them by auction, prevents — it was held under 50 Geo. 3, ch. 41, § 6 — his being a hawker or peddler.[1] So likewise —

Through local auctioneers.— An itinerant vendor of goods is no less a peddler though he makes his sales through auctioneers residing in the several places he visits.[2]

§ 1079. Local questions.— Some questions have arisen, so local to particular states, that a special consideration of them here is not desirable.[3]

§ 1080. Constitutional restrictions. — In general, the legislation discussed in this chapter is not violative of our state constitutions or of the constitution of the United States.[4] But

[1] Rex *v.* Turner, 4 B. & Ald. 510; Dean *v.* King, 4 B. & Ald. 517. See Allen *v.* Sparkhall, 1 B. & Ald. 100; [*In re* Wilson, 19 D. C. 341, 12 L. R. A. 624; *In re* Spain, 47 Fed. R. 208, 14 L. R. A. 97.]

[2] Attorney-General *v.* Tongue, 12 Price, 51. And see Attorney-General *v.* Woolhouse, 1 Y. & J. 463, 12 Price, 65; S. *v.* Hodgdon, 41 Vt. 139; Myerdock *v.* Com., 26 Grat. 988; Gibson *v.* Kauffield, 63 Pa. St. 168. And see Benjamin *v.* Andrews, 5 C. B. (N. S.) 299; [Keller *v.* S. (Ala.), 26 S. R. 823. So even if the sale is made under the guise of a lease. Com. *v.* Harmel, 166 Pa. St. 89, 30 Atl. R. 1036, 27 L. R. A. 388.]

[3] Wolf *v.* Clark, 2 Watts, 298; Page *v.* S., 6 Mo. 205; Hirschfelder *v.* S., 18 Ala. 112; Colson *v.* S., 7 Blackf. 590; Foster *v.* Dow, 29 Me. 442; Mabry *v.* Bullock, 7 Dana, 337; Jones *v.* Berry, 33 N. H. 209; [Openshaw *v.* Oakley, 16 Cox, C. C. 671; Woolwich Local Board *v.* Gardiner, 18 Cox, C. C. 173; P. *v.* Sawyer, 106 Mich. 428, 64 N. W. R. 333; S. *v.* Montgomery, 92 Me. 433, 43 Atl. R. 13; City of South Bend *v.* Martin, 142 Ind. 30, 41 N. E. R. 315, 29 L. R. A. 531; S. *v.* Coop, 52 S. C. 508, 30 S. E. R. 609, 41 L. R. A. 501; Town of State Centre *v.* Barenstein, 66 Iowa, 249, 23 N. W. R. 652; Com. *v.* Newhall, 164 Mass. 338, 41 N. E. R. 647; Spanish Fork City *v.* Mortenson (Utah), 24 Pac. R. 620; *In re* Butin, 28 Tex. Ap. 304, 13 S. W. R. 10; Rawlings *v.* Village of Cerro Gordo, 32 Ill. Ap. 215; Delisle *v.* City of Danville, 36 Ill. Ap. 659; Twining *v.* City of Elgin, 38 Ill. Ap. 356; City of Waterloo *v.* Heely, 81 Ill. Ap. 310; Emmons *v.* City of Lewistown, 132 Ill. 380, 24 N. E. R. 58, 22 Am. St. R. 540, 8 L. R. A. 328; Borough of Warren *v.* Geer, 117 Pa. St. 207, 11 Atl. R. 415; Com. *v.* Gardner, 133 Pa. St. 284, 19 Atl. R. 550, 19 Am. St. R. 645, 7 L. R. A. 666.]

[4] Biddle *v.* Com., 13 S. & R. 405; Wynne *v.* Wright, 1 Dev. & Bat. 19; Beall *v.* S., 4 Blackf. 107; *Ex parte* Robinson, 12 Nev. 263, [28 Am. R. 794;] Seymour *v.* S., 51 Ala. 52; S. *v.* Norris, 78 N. C. 443; Howe Machine Co. *v.* Cage, 9 Baxt. 518; Com. *v.* Ober, 12 Cush. 493. *Contra*, S. *v.* North, 27 Mo. 464. See Hart *v.* Willetts, 62 Pa. St. 15; Speer *v.* Com., 23 Grat. 935, [14 Am. R. 164;] Noyes *v.* S., 46 Wis. 250, [32 Am. R. 710; Toronto Corp. *v.* Virgo, 73 Law T. 449; *In re* Butin, 28 Tex. Ap. 304, 13 S. W. R. 10; S. *v.* Harrington, 68 Vt. 622, 35 Atl. R. 515, 34 L. R. A. 100; S. *v.* Redmon, 43 Minn. 250, 45 N. W. R. 232; *Ex parte* Hanson, 28 Fed. R. 127; *Ex parte* Heyleman, 92 Cal. 492, 28 Pac. R. 675; Brooks *v.* Mangan, 86

the latter furnishes some restrictions; and some things, once deemed by the state courts permissible under it, have been adjudged by the supreme court of the United States, the tribunal of the last resort, not to be. Like the statutes restraining liquor-selling,[1] these upon peddling cannot be made to interfere with the vending of imports in the original packages,[2] or with any other rights under the constitution and laws of the United States.[3] Nor, though congress has not exercised its constitutional power to regulate commerce between the states, can they fetter it. Therefore they cannot discriminate against goods which are the growth, product or manufacture of other states,—or, probably, imported goods whereon duties have been paid,—by requiring a license to peddle or otherwise vend them, while none, or one at a less price, is exacted for selling in the same way what is grown or made in the state.[4] In Louisiana a statute required a license tax of "all traveling agents *from other states*, offering any species of merchandise for sale or selling the same," not including therein the people of the state; and this was by the state court held to violate the provision of the constitution of the United States,[5] that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[6] Apparently more or less in contradiction of this are various adjudications in other states.[7] But, if we should assume the Louisiana court to be wrong in attributing this consequence to this particular provision while thus standing alone, we might still inquire whether it does not result from it and the clause of the fourteenth amendment combined, that "no state shall make or enforce

Mich. 576, 49 N. W. R. 633; Borough of Sayre *v.* Phillips, 148 Pa. St. 482, 24 Atl. R. 76, 33 Am. St. R. 842, 16 L. R. A. 49; Borough of Shamokin *v.* Flannigan, 156 Pa. St. 43, 26 Atl. R. 780.]

[1] *Ante*, § 990.

[2] P. *v.* Moring, 47 Barb. 642; Cook *v.* Pennsylvania, 97 U. S. 566. See Woodruff *v.* Parham, 8 Wall. 123.

[3] S. *v.* Butler, 3 Lea, 222.

[4] Welton *v.* S., 91 U. S. 275 (reversing S. *v.* Welton, 55 Mo. 288); Hall *v.* De Cuir, 95 U. S. 485, 490; Webber *v.* Virginia, 103 U. S. 344; Mobile *v.* Kimball, 102 U. S. 691; Tiernan *v.* Rinker, 102 U. S. 123; S. *v.* McGinnis, 37 Ark. 362; S. *v.* Browning, 62 Mo. 591; Van Buren *v.* Downing, 41 Wis. 122. And see *ante*, § 990*b*; Guy *v.* Baltimore, 100 U. S. 434. [See also Village of Braceville *v.* Doherty, 80 Ill. Ap. 645.]

[5] Const. U. S., art. 4, § 2.

[6] McGuire *v.* Parker, 32 La. An. 832.

[7] Davis *v.* Dashiel, Phillips (N. C.), 114; Mork *v.* Com., 6 Bush, 397; Ward *v.* S., 31 Md. 279; [1 Am. R. 50;] Com. *v.* Smith, 6 Bush, 303.

any law which shall abridge the privileges or immunities of citizens of the United States." To burden a "citizen of the United States" with a tax not imposed on the citizens of the state would seem, in reason, to abridge his "privileges" and "immunities."[1]

II. The Procedure.

§ 1081. Indictment.— The terms of our statutes against hawking and peddling so vary as to render difficult the laying down of rules for the indictment, beyond the general ones which govern all indictments on statutes.[2] A few questions, hitherto considered, are —

§ 1082. As hawker and peddler.— Under a statute making it an offense for a peddler, etc., to go about without license "exposing to sale any goods," an allegation that, at a time and place mentioned, the defendant was a peddler, etc., and then and there went about exposing to sale goods, etc., and then and there sold a specified article, was held to be inadequate, because not charging that he sold the article as, or while going about as, such peddler.[3] Now,—

§ 1083. In reason,— this decision is wrong; because the statute did not make a selling an element in the offense, so that the allegation of it was mere surplusage; and because, if it did, to say that the defendant was a peddler and sold was to charge him with selling as peddler. Again,—

§ 1084. How specific as to act of sale.— Under a statute the terms whereof do not appear in the report, but it contained the word "business," an indictment was sustained which charged that, at a time and place named, the defendant "was engaged in the business of hawking and peddling, and, being so engaged, he then and there pursued the business of hawking and peddling in one wagon," etc.; not further particularizing the peddling,

[1] And compare with Guy *v.* Baltimore, 100 U. S. 434; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566; San Mateo *v.* Southern Pacific R. R. Co. (Railroad Tax Cases), Sept. 25, 1882, by Judges Field and Sawyer, 13 Fed. R. 722; [S. *v.* Wagener, 69 Minn. 206, 72 N. W. R. 67, 65 Am. St. R. 565, 38 L. R. A. 677. But see S. *v.* Conlon, 65 Conn. 478, 33 Atl. R. 519, 48 Am. St. R. 227, 31 L. R. A. 55.]

[2] Crim. Pro., I, §§ 593–642.

[3] Com. *v.* Bruckheimer, 14 Gray, 29; [Hays *v.* Com. (Ky.), 55 S. W. R. 425.]

or specifying any sale. Said Goldthwaite, J.: "The term 'business,' as employed in the statute, being continuous in its character, not necessarily implying a single act or any number of acts, forms an exception to the general rule, and falls within the principle applicable to barratry and some other offenses, that, where the charge is of a complicated nature, consisting of a repetition of acts, or where the offense includes a continuation of acts, it is unnecessary to set them out in the indictment."[1] For this doctrine there are analogies in the rulings respecting the form of the indictment for being an unlicensed common seller of intoxicating liquors.[2] But,—

§ 1085. Inadequate.— Under another statute it was adjudged insufficient to say that, at a specified time and place, the defendant "did sell and expose to sale divers goods, wares and merchandise," he "then and there being a peddler, and not having obtained a lawful license for that purpose." An accused person "should," said the court, "be so definitely charged that he may know how to shape his defense."[3] Here, it is perceived, individual sales, in distinction from a business, are the gravamen of the accusation, and they are not specifically set out. Again,—

§ 1086. Averment of business.— Under a statute not given in the report, it was held inadequate to charge, says the reporter, that the defendant, "not having any license or authority to vend clocks within the county of Wayne, did, in that county, unlawfully sell and vend to a certain person three brass clocks, for the sum of $20 each, whereby the revenue of the county was diminished and defrauded." The court deemed that the offense consisted, not in making a single unlicensed sale, but in being employed in the selling, and this was not charged.[4]

§ 1087. On the whole,— while these illustrations will be helpful, the main reliance of the pleader, under statutes so diverse as those on the present subject, will be upon the general principles of the art.

[1] Sterne *v.* S., 20 Ala. 43.
[2] Com. *v.* Pray, 13 Pick. 359.
[3] S. *v.* Powell, 10 Rich. 373, 374; [Keller *v.* S. (Ala.), 26 S. W. R. 323.]
[4] Alcott *v.* S., 8 Blackf. 6; [S. *v.* Foster (R. I.), 43 Atl. R. 66; Com. *v.* Heckinger (Ky.), 42 S. W. R. 101.]

§ 1088. **Negativing.**— The indictment must negative that there was a license.[1]

Other points,— not of much general interest, appear in the cases cited in the note.[2]

[1] May *v.* S., 9 Ala. 167; [S. *v.* Montgomery, 92 Me. 13, 43 Atl. R. 13; Hall *v.* S., 39 Fla. 637, 23 S. R. 119.]

[2] Higby *v.* P., 4 Scam. 165; Merriam *v.* Langdon, 10 Conn. 460; Hirschfelder *v.* S., 18 Ala. 112; S. *v.* Sprinkle, 7 Humph. 36; Com. *v.* Samuel, 2 Pick. 103; Com. *v.* Dudley, 3 Met. (Ky.) 221; S. *v.* Hirsch, 45 Mo. 429; S. *v.* Richeson, 45 Mo. 575; Campbell *v.* Thompson, 16 Me. 117; [Shiff *v.* S., 84 Ala. 454, 4 S. R. 412.]

CHAPTER LX.

FURTHER OF UNLICENSED BUSINESS.

§ 1089. Introduction.
1090–1092. Dealing as merchant.
1093–1097. In violation of public order.
1098. In breach of revenue laws.

§ 1089. Already,—in the last five chapters, and in those on gaming and lotteries, the leading principles relating to unlicensed business have been brought to view. Still,—

Here.—There being other occupations the conducting whereof without a license is by statutes made punishable, we shall in this chapter call to mind some of them, cite the principal cases, and add such explanations as seem desirable.

Classification — (*Order of society* — *Revenue*). — No attempt at precision in the classification of these statutes will be made. For mere convenience we shall distinguish between those the principal object whereof is the good order of society, and those whose chief aim is revenue. But the double motive — neither alone — has prompted the enactment of many of them; so that this division is unscientific and largely arbitrary. For convenience, then,—

How chapter divided.— We shall consider, I. Dealing as a merchant without license; II. Unlicensed business violative of public order; III. Unlicensed business in breach of the revenue laws.

I. Dealing as a Merchant Without License.

§ 1090. Statute — ("Deal" — "Merchant" — "Merchandise").— A statute in Missouri, and in one or more of the other states, makes punishable any person who, individually or as a partner, "shall deal as a merchant without a license." And the Missouri statute defines a merchant to be one "who shall deal in the selling of goods, wares and merchandise, at any store, stand or place occupied for that purpose." A single sale

does not constitute a dealing.[1] Nor is one who, by manufacture from goods which he keeps on hand, yet not for sale, supplies articles to order, a merchant.[2] The term "merchandise" includes as well animals trafficked in as inanimate property.[3]

Indictment.— The indictment must charge a dealing as merchant; merely to set out individual sales is not enough. Yet the exact word "deal," though it ought to be employed, may in some circumstances be dispensed with where equivalents are used.[4]

§ 1091. Specific sales and to whom.— Where the dealing is adequately charged in general terms, it would seem, on principle, not to be necessary to allege also specific sales.[5] Yet, in cases before the writer, something like this has been added to the general allegation;[6] and under the Maryland statute the names of the persons to whom the sales are made, it is held, must be given.[7]

§ 1092. Goods changed by labor.— It was in Michigan adjudged immaterial that the defendant had changed the goods in form by expending labor upon them.[8]

Other points — appear in cases cited in the note.[9]

II. Unlicensed Business Violative of Public Order.

§ 1093. Constitutional — (At common law).—In the absence of statutory restraints, any person is entitled to carry on any manufacture, business, trade or domestic or foreign commerce if he does not infringe the rights of another or commit a public

[1] S. *v.* Cox, 32 Mo. 566. And see Porter *v.* S., 58 Ala. 66; *ante*, § 1016; [Graham *v.* S., 71 Miss. 208, 13 S. R. 883; S. *v.* Barnes (N. C.), 35 S. E. R. 605; Standford *v.* S., 16 Tex. Ap. 331; City of Kansas *v.* Vindquest, 36 Mo. Ap. 584; *Ex parte* Mount, 66 Cal. 448, 6 Pac. R. 78; Campbell *v.* City of Anthony, 40 Kan. 652, 20 Pac. R. 492; Com. *v.* Teller, 144 Pa. St. 545, 22 Atl. R. 922; Com. *v.* American Tobacco Co., 173 Pa. St. 586, 34 Atl. R. 282.]

[2] S. *v.* Richeson, 45 Mo. 575. [But see Murray *v.* S., 11 Lea, 218; Com. *v.* Thos. Potter Sons & Co., 159 Pa. St. 583, 28 Atl. R. 492.]

[3] Weston *v.* McDowell, 20 Mich. 353; U. S. *v.* One Sorrel Horse, 22 Vt. 655; [City of Pittsburgh *v.* Kalchthater, 114 Pa. St. 547, 7 Atl. R. 221.]

[4] S. *v.* Cox, *supra;* S. *v.* Jacobs, 38 Mo. 379; S. *v.* Willis, 37 Mo. 192.

[5] *Ante*, § 1084.

[6] S. *v.* Jacobs, 38 Mo. 379; S. *v.* Willis, 37 Mo. 192; S. *v.* Cox, 32 Mo. 566.

[7] Spielman *v.* S., 27 Md. 520.

[8] S. *v.* Whittaker, 33 Mo. 457.

[9] S. *v.* Hunter, 5 Mo. 360; S. *v.* Martin, 5 Mo. 361; Tracy *v.* S., 8 Mo. 1; Williamson *v.* S., 16 Ala. 431; [Thibaut *v.* Dymond, 37 La. An. 902.]

nuisance.[1] But within principles already explained,[2] regulations such as we are now considering are constitutionally competent to our legislatures.[3] And —

Municipal by-laws — may and do more or less regulate things of this sort.[4] Among the subjects for statutes and by-laws, within our present sub-title, are —

§ 1094. Auctioneers. — It is common, for the protection of the community against frauds, as well as for revenue, to require auctioneers to act under license and not otherwise.[5] One who sells by auction his own goods is an auctioneer equally with one who after the common course thus sells the goods of others.[6] The essential principle of an auction consists of the endeavor to get an enhanced price for a thing through competition among buyers.[7] It is not an auction where no one but the auctioneer is present.[8] Nor is it such where the seller adheres to a fixed price, though he employs outcry otherwise after the manner of an auctioneer.[9] But he is an auctioneer

[1] East India Co. *v.* Sandys, Skin. 132, 133; Custom's Case, 12 Co. 33; Merchant Adventurer's Co. *v.* Rebow, 3 Mod. 126; Rex *v.* Kilderby, 1 Saund. 311, and the notes.

[2] *Ante*, §§ 989–996, 1080.

[3] Walters *v.* Duke, 31 La. An. 668; Shepperd *v.* Sumter, 59 Ga. 535. And see Sawyer *v.* State Board of Health, 125 Mass. 182; [Van Hook *v.* Selma, 70 Ala. 361, 45 Am. R. 85; City of Newton *v.* Atchison, 31 Kan. 151, 1 Pac. R. 288, 47 Am. R. 486; S. *v.* Wagener (Minn.), 30 N. W. R. 633, 46 L. R. A. 442; F. S. Royston Guano Co. *v.* Town of Tarboro (N. C.), 35 S. E. R. 231; Singer Mfg. Co. *v.* Wright, 97 Ga. 114, 25 S. E. R. 249, 35 L. R. A. 497; Hanfield *v.* City of Columbus (Ga.), 34 S. E. R. 288; City of St. Louis *v.* McCann (Mo.), 57 S. W. R. 1016; S. *v.* Camp Sing, 18 Mont. 128, 44 Pac. R. 516, 56 Am. St. R. 551, 32 L. R. A. 635.]

[4] *Ante*, §§ 18–26; Downham *v.* Alexandria, 10 Wall. 173; Goshen *v.* Kern, 63 Ind. 468, [30 Am. R. 234;] Deposit *v.* Pitts, 18 Hun, 475; American Union Express *v.* St. Joseph, 66 Mo. 675, [27 Am. R. 382;] Chicago Packing, etc. Co. *v.* Chicago, 88 Ill. 221, [30 Am. R. 545;] Thomas *v.* Hot Springs, 34 Ark. 553, [36 Am. R. 24;] Burlington *v.* Bumgartner, 42 Iowa, 678; [Town of Mandeville *v.* Baudot, 49 La. An. 236, 21 S. R. 258.]

[5] St. Louis Church *v.* Bonneval, 13 La. An. 321; Stone *v.* S., 12 Mo. 400; Com. *v.* Harnden, 19 Pick. 482; Clark *v.* Cushman, 5 Mass. 505; Hunt *v.* Philadelphia, 35 Pa. St. 277; S. *v.* Rucker, 24 Mo. 557; S. *v.* Conkling, 19 Cal. 501; Georgetown *v.* Baker, 2 Cranch, C. C. 291; Davis *v.* Com., 3 Watts, 297; Fretwell *v.* Troy, 18 Kan. 271; Daly *v.* Com., 75 Pa. St. 331; [City Hospital *v.* Girardey, 36 La. An. 605; City of Mankato *v.* Fowler, 33 Minn. 364, 20 N. E. R. 361.]

[6] Goshen *v.* Kern, 63 Ind. 468, [30 Am. R. 234; S. *v.* Withers, 3 Ohio St. (N. P.) 63.]

[7] Crandall *v.* S., 28 Ohio St. 479; [Village of Port Jervis *v.* Close, 6 N. Y. S. 211.]

[8] Campbell *v.* Swan, 43 Barb. 109, 113.

[9] Crandall *v.* S., *supra*.

who, contrary to custom, offers goods at a price which he lowers till he finds a purchaser.[1]

§ 1095. Practicing medicine.— We have statutes, in varying terms, forbidding any one to practice medicine except under a license.[2]

§ 1096. Places of amusement— are pretty generally forbidden to be opened except on license.[3]

§ 1097. Other business,— of various sorts, is in like manner regulated; but nothing further on this head seems to be required, except a simple reference to cases.[4]

III. Unlicensed Business in Breach of the Revenue Laws.

§ 1098. In general.— Statutes of the sort now in contemplation are a competent method of taxation[5] sometimes resorted to. They are construed and enforced like the others; and, beyond some reference to cases,[6] nothing more need be said of

[1] Deposit *v.* Pitts, 18 Hun, 475.

[2] S. *v.* Hale, 15 Mo. 606; Ellison *v.* S., 6 Tex. Ap. 248; Logan *v.* S., 5 Tex. Ap. 306; Antle *v.* S., 6 Tex. Ap. 202; Hilliard *v.* S., 7 Tex. Ap. 69; S. *v.* Goldman, 44 Tex. 104. For the principles which ought to govern this sort of legislation, see *ante*, § 988*a*; [S. *v.* Call, 121 N. C. 643, 28 S. E. R. 517; Nicholson *v.* S., 100 Ala. 132, 14 S. R. 746; S. *v.* Buswell, 40 Neb. 158, 58 N. W. R. 728, 24 L. R. A. 68.]

[3] Crim. Law, I, §§ 1147–1149; Com. *v.* Fox, 10 Phila. 204; Reg. *v.* Tucker, 2 Q. B. D. 417, 13 Cox, C. C. 600; Gillman *v.* S., 55 Ala. 248; Garrett *v.* Messenger, Law R. 2 C. P. 583, 10 Cox, C. C. 498; [S. *v.* O'Hara, 36 La. An. 94; S. *v.* Schonhausen, 37 La. An. 42; Negrotto *v.* City of Monett, 49 Mo. Ap. 286; City of New York *v.* Eden Musée American Co., 102 N. Y. 598, 8 N. E. R. 40.]

[4] Merritt *v.* S., 59 Ala. 46; Eastman *v.* Chicago, 79 Ill. 178; Carter *v.* S., 44 Ala. 29; Sledd *v.* Com., 19 Grat. 813; Little Rock *v.* Barton, 33 Ark. 436; S. *v.* Farmer, 49 Wis. 459; Wooddy *v.* Com., 29 Grat. 887; Norfolk *v.* Chamberlaine, 29 Grat. 534; P. *v.* Doty, 80 N. Y. 225; S. *v.* Hall, 73 N. C. 252; S. *v.* Smith, 44 Tex. 443; Elsberry *v.* S., 52 Ala. 8; Com. *v.* Smith, 6 Bush, 303; Mork *v.* Com., 6 Bush, 397; Slaughter *v.* Com., 13 Grat. 767; Reg. *v.* Bishop, 5 Q. B. D. 259, 14 Cox, C. C. 404; [Morgan *v.* S., 64 Miss. 511, 1 S. R. 749; Vicksburg, etc. R. R. Co. *v.* S., 62 Miss. 105; *In re* Wan Yin, 22 Fed. R. 701; U. S. Distilling Co. *v.* Chicago, 112 Ill. 19; City Council of Camden *v.* Roberts, 55 S. C. 374, 33 S. E. R. 456.]

[5] S. *v.* Cohen, 84 N. C. 771; Webber *v.* Com., 33 Grat. 898; Sacramento *v.* Crocker, 16 Cal. 119; Cousins *v.* S., 50 Ala. 118, [20 Am. R. 290;] Goldthwaite *v.* Montgomery, 50 Ala. 486; McCaskell *v.* S., 53 Ala. 510; [*In re* Guerero, 69 Cal. 88, 10 Pac. R. 261.]

[6] S. *v.* Chapeau, 4 S. C. 378; S. *v.* Hayne, 4 S. C. 403; S. *v.* Graham, 4 S. C. 380; Henback *v.* S., 53 Ala. 528, [25 Am. R. 650;] Weil *v.* S., 52 Ala.

them in this connection. Under authorizing statutes this form of tax may be provided for by municipal by-law.[1]

19; Spears v. S., 8 Tex. Ap. 467; Childs v. S., 52 Ala. 14; Iberia Parish v. Chiapella, 30 La. An. 1143; Williams v. Garignes, 30 La. An. 1094; Crews v. S., 10 Tex. Ap. 292; Archer v. S., 9 Tex. Ap. 78; S. v. Chadbourn, 80 N. C. 479, [30 Am. R. 94;] Cousins v. Com., 19 Grat. 807; New York Rectifying Co. v. U. S., 14 Blatch. 549; [S. v. City of Orange (N. J. L.), 13 Atl. R. 240.]

[1] New Iberia v. Megius, 33 La. An. 923; Lafayette v. Cummins, 3 La. An. 673. And see Tallapoosa v. Tarver, 21 Ala. 661; S. v. Demarest, 3 Vroom, 528; New Orleans v. Turpin, 13 La. An. 56; Bordelon v. Lewis, 8 La. An. 472; Cumming v. Police Jury, 9 La. An. 503; New Orleans v. Elliott, 10 La. An. 59; [Kinsley v. City of Chicago, 124 Ill. 359, 16 N. E. R. 260.]

CHAPTER LXI.

CRUELTY TO ANIMALS.

§ 1099. Introduction.
1100–1113. Law of the offense.
1114–1122. The procedure.

§ 1099. How chapter divided.— We shall consider, I. The law of the offense; II. The procedure.

I. The Law of the Offense.

§ 1100. At common law —(Distinguished from malicious mischief).— Cruelty to animals should not be confounded with malicious mischief[1] to such of them as have owners.[2] We saw, in "Criminal Law," that, while the latter is indictable at the common law, the former is not;[3] yet that if the cruelty is publicly inflicted, it may be punishable as a public nuisance;[4] or, though private, it may be an element in some other indictable wrong.[5]

§ 1101. Offense as recent.— This statutory offense, in its present forms, is of recent date. But —

Early statutes.— There were some inefficient enactments earlier. The first of them is said to have been one in the Massachusetts Colony in 1641, providing "that no man shall exercise any tyranny or cruelty towards any brute creatures which are usually kept for the use of man."[6] And probably something on this head always remained among the statutes of the colony and state; extending also, in comparatively early times, to some of the others.[7] The first English statute, "to prevent the cruel and improper treatment of cattle," was enacted in

[1] *Ante*, §§ 431–449.

[2] S. *v.* Rector, 34 Tex. 565; Benson *v.* S., 1 Tex. Ap. 6.

[3] Crim. Law, I, §§ 594–597*a*.

[4] U. S. *v.* Logan, 2 Cranch, C. C. 259; U. S. *v.* Jackson, 4 Cranch, C. C. 483; U. S. *v.* McDuell, 5 Cranch, C. C. 391.

[5] S. *v.* Briggs, 1 Aikens, 226; Com. *v.* Tilton, 8 Met. 232, 234; Kilpatrick *v.* P., 5 Denio, 277, 279.

[6] Old Colony Laws, p. 95.

[7] **New York.**— As to New York, see P. *v.* Brunell, 48 How. Pr. 435.

1822; namely, 3 Geo. 4, ch. 71. It empowered magistrates to inflict a penalty on any person who "shall wantonly and cruelly beat, abuse or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle." But the prosecution must be commenced within ten days; and, if the magistrate deemed it "frivolous or vexatious," he was to order the complainant to pay the defendant "any sum of money, not exceeding the sum of twenty shillings, as compensation for the trouble and expense to which said party may have been put by such complaint." In 1833, 3 and 4 Will. 4, ch. 19, §§ 28, 29, added some provisions. In 1835 all were superseded by more ample ones, constituting 5 and 6 Will. 4, ch. 59, in twenty-one sections, entitled "An act to consolidate and amend the several laws relating to the cruel and improper treatment of animals, and the mischiefs arising from the driving of cattle, and to make other provisions in regard thereto." This statute has constituted a sort of foundation for the present ones, English and American; though, in form, it is superseded. Succeeding English statutes are 12 and 13 Vict., ch. 92, amended by 17 and 18 Vict., ch. 60, and 39 and 40 Vict., ch. 77.

§ 1102. Present enactments.— The present enactments, English and American, are so far similar in terms that, as the reader will have before him those of his own state, it is not deemed necessary to insert their provisions here.

§ 1103. Constitutional.—Their constitutionality has not been much discussed in our courts; but there can be no doubt that, in general, they are within the constitutional power of our legislatures. Even as to one's own animals, the method of keeping and using them is a proper subject for legislation.[1]

§ 1104. Expositions.— The expositions of these statutes involve such questions as —

The animal — (*Fowls* — *Birds*).— In some there are terms explained by interpretation clauses.[2] By 12 and 13 Vict., ch. 92, § 2, cruelty to "any animal" is forbidden, and by § 29 "the word 'animal' shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or *any other domestic animal*." But

[1] Noffzigger *v.* McAllister, 12 Kan. 315; Walker *v.* Special Sessions, 4 Hun, 441; *ante*, §§ 989, 993, 995.

[2] *Ante*, §§ 54, 55.

notwithstanding the restraining influence of the particular words, and the contention that only quadrupeds were meant by the expression "any other domestic *animal*,"[1] it was held to include domestic fowls; and, in particular, a cock.[2] So likewise, in a statute imposing duties, the term "live animals" includes singing birds.[3] Under the statute of 3 Geo. 4, ch. 71, already quoted,[4] it was held that a bull was not within the expression "other cattle," not being of the same class with any enumerated.[5] But it is not certain that the construction would be so either in England or generally in our states.[6]

§ 1105. One's own.— This offense may be committed as well on one's own animal as on that of another.[7]

§ 1106. "Overload." — Under many of these statutes it is an offense to "overload" an animal. In reason, an overloading consists of compelling the animal to bear or tug at such a weight or draft as to cause pain or strain of muscle not incident to proper or necessary work. One extreme form of overloading is to put upon a vehicle, which it is compelled to endeavor to draw, an impossible weight.[8] By how much less than this the offense may, as a question of authority, be constituted, the reported decisions have not greatly enlightened us.

§ 1107. "Overdrive"[9]**—"Overwork"— "Deprive of necessary sustenance"** — are like statutory terms, not hitherto much illumined by decision. In reason, there is a point better indicated by good sense than exact definition to which the wrong must be carried to be indictable; perhaps the criterion is that it must proceed so far as to be "cruel." Between which point and the utmost imaginable extreme there is a wide distance.

§ 1108. "Cruelly ill-treat, abuse, torture." — To cut the combs of cocks, in order to fit them for cock-fighting or winning prizes at exhibitions, thereby inflicting great pain, is, how-

[1] See *ante*, §§ 245–248.
[2] Budge *v.* Parsons, 3 B. & S. 382.
[3] Reiche *v.* Smythe, 7 Blatch. 235.
[4] *Ante*, § 1101.
[5] *Ex parte* Hill, 3 Car. & P. 225.
[6] *Ante*, §§ 246–248; [S. *v.* Giles, 125 Ind. 124, 25 N. E. R. 159; S. *v.* Pruette, 61 Mo. Ap. 156, 1 Mo. Ap. R. 356.]
[7] S. *v.* Avery, 44 N. H. 392; Com. *v.* Whitman, 118 Mass. 458, 459; Benson *v.* S., 1 Tex. Ap. 6, 10. See Dargan *v.* Davies, 2 Q. B. D. 118.
[8] P. *v.* Tinsdale, 10 Abb. Pr. (N. S.) 374.
[9] Com. *v.* Wood, 111 Mass. 408; S. *v.* Comfort, 22 Minn. 271; [Com. *v.* Curry, 150 Mass. 509, 23 N. E. R. 212.]

ever quickly done, "to cruelly ill-treat, abuse and torture" them. "As," said Kelly, C. B., "it does not better fit the animal for the use of man or for any other lawful or proper purpose, it is wholly unjustifiable, and is a criminal act which comes within the statute."[1]

§ 1109. "Baiting."— It has been held that, if rabbits are put into a field of three or four acres from which they cannot escape, and two dogs are set upon them in a match to see which will kill the most, this is not a "baiting" of the rabbits. It is a hunting of them. The term "baiting," said Cockburn, C. J., "is usually applied when an animal is tied to a stake or confined so that it cannot escape."[2]

§ 1110. "Kill"— ("Cruelly"— "Needlessly").— The mere killing of an animal was never made an offense. Some of the statutes make punishable the killing of it "cruelly;" others, "needlessly;"[3] each of which expressions requires something more.[4]

§ 1111. "Cockfighting"— is a form of evil sport always deemed in the law reprehensible.[5] And it is cruelty to the creature, within some of the statutes.[6]

§ 1112. Justification.— These statutes are construed in accord with their spirit and reasons;[7] so as, following the obvious legislative intent, not to interfere with the proper use of the animal, and the higher claims of human beings to protection.[8] "Cruelty

[1] Murphy *v.* Manning, 2 Ex. D. 307, 313; [S. *v.* Porter, 112 N. C. 887, 16 S. E. R. 915.]

[2] Pitts *v.* Millar, Law R. 9 Q. B. 380, 382.

[3] Grise *v.* S., 37 Ark. 456; S. *v.* Bogardus, 4 Mo. Ap. 215; [Hodge *v.* S., 79 Tenn. 528, 47 Am. R. 307; Tinsley *v.* S. (Tex. Ap.), 22 S. W. R. 39.]

[4] And see Jones *v.* S., 9 Tex. Ap. 178; Colam *v.* Hall, Law R. 6 Q. B. 206.

[5] *Ante*, § 859; Com. *v.* Tilton, 8 Met. 232.

[6] Budge *v.* Parsons, 3 B. & S. 382; Clark *v.* Hague, 2 Ellis & E. 281, 8 Cox, C. C. 324; Morley *v.* Greenhalgh, 3 B. & S. 374. [In Massachusetts it is held that to let loose a captive fox to be hunted by dogs is punishable under a statute forbidding any one having any animal in his custody to knowingly permit it to be subjected to unnecessary torture, suffering or cruelty. Com. *v.* Turner, 145 Mass. 296, 14 N. E. R. 130. But in Pennsylvania it is held that shooting pigeons by a gun club, where they are set loose from a trap, and when wounded immediately killed, is not to wantonly or cruelly ill-treat. Com. *v.* Lewis, 140 Pa. St. 261, 21 Atl. R. 396, 11 L. R. A. 522.]

[7] *Ante*, §§ 1019, 1020, and places there referred to.

[8] Murphy *v.* Manning, 2 Ex. D. 307, 314; Walker *v.* Special Sessions, 4 Hun, 441; Cornelius *v.* Grant, 7 Scotch Sess. Cas. (4th ser.) Just. 18.

in the statute," said the Lord Justice Clerk in a Scotch case, "means cruelty without reason, cruelty in making one of the lower animals suffer without any reasonable object or to an unreasonable extent."[1] For example, blows inflicted on a horse in training, when reasonable and not prompted by evil passion;[2] a necessary "surgical operation, occasioning the most intense suffering" to the animal; the driving of "a horse at a rate of speed most distressing to the brute, when the object is to save human life;"[3] the severe wounding of a dog to prevent a boy's being torn to pieces by him,[4]— are specimens of what is permissible, though not in terms excepted out of the statute.

§ 1113. Evil intent — (Intoxication). — There must be such malice or other evil intent as the statute by its terms or interpretation requires.[5] But one is presumed to intend the natural and necessary consequences of his act.[6] Nor is it an excuse for him that he was drunk.[7]

II. The Procedure.

§ 1114. The indictment — should, after the usual manner of indictments on statutes,[8] cover the statutory terms.[9] Further as to which —

§ 1115. "Beat." — Under the statutory word "beat," as in the expression "cruelly beat any horse," it is sufficient to say, in allegation, that the defendant "did beat" the animal, not specifying more minutely the beating.[10] For the idea is simple,

[1] Cornelius *v.* Grant, *supra*, at p. 14.

[2] S. *v.* Avery, 44 N. H. 392; Com. *v.* Lufkin, 7 Allen, 579.

[3] Com. v. Lufkin, *supra*, at p. 582, opinion by Hoar, J.

[4] Cornelius *v.* Grant, *supra*.

[5] Cases cited to the last section; S. *v.* Brocker, 32 Tex. 611; Rembert *v.* S., 56 Miss. 280; S. *v.* Rector, 34 Tex. 565; [Grise *v.* S., 37 Ark. 456; McKinne *v.* S., 81 Ga. 164, 9 S. E. R. 1091; Stephens *v.* S., 65 Miss. 329, 8 S. R. 458; S. *v.* Soc. P. C. A., 47 N. J. L. 237.]

[6] Com. *v.* Wood, 111 Mass. 408; [S. *v.* Hackfath, 20 Mo. Ap. 614.]

[7] S. *v.* Avery, 44 N. H. 392; [Com. *v.* Curry, 150 Mass. 509, 23 N. E. R. 212.]

[8] Crim. Pro., I, § 593 *et seq.*

[9] Com. *v.* Brooks, 9 Gray, 299; S. *v.* Comfort, 22 Minn. 271; Benson *v.* S., 1 Tex. Ap. 6; Com. *v.* Brigham, 108 Mass. 457; Com. *v.* Thornton, 113 Mass. 457; Com. *v.* Whitman, 118 Mass. 458; Rembert *v.* S., 56 Miss. 280; S. *v.* Rector, 34 Tex. 565; [Com. *v.* Porter, 164 Mass. 516, 42 N. E. R. 97; S. *v.* Allison, 90 N. C. 733; Rountree *v.* S., 10 Tex. Ap. 110; Rivers *v.* S., 10 Tex. Ap. 170; Burgman *v.* S. (Tex. Cr. R.), 34 S. W. R. 111; S. *v.* Gould, 26 W. Va. 258; S. *v.* Clark, 86 Me. 194, 29 Atl. R. 984.]

[10] Com. *v.* McClellan, 101 Mass. 34; Com. *v.* Lufkin, 7 Allen, 579; [Com. *v.* Edmunds, 162 Mass. 517, 39 N. E. R. 183.]

and this word alone adequately particularizes the act and the instance.[1] But—

§ 1116. "Torture,"—in the statute, is less definite; and the indictment must state the method of torture and its effects; so far, at least, as to enable the court to see that it was of the sort and degree which the statute is construed to forbid.[2] But the omission of this particular is a formal defect, which, under the enactments as to procedure of some of our states, can be objected to only at an early stage of the cause.[3] Again,—

§ 1117. "Overload",—appears to have been deemed of the same class, requiring expansions of the averment into the particulars.[4] And, in reason, simply to say that the defendant "overloaded" a designated animal is not the sort of precise and full charge to which he ought to be required to answer. And—

§ 1118. "Overdrive,"—while more definite, is perhaps not sufficiently so to take it quite out of the same rule. But under the Minnesota statute it was adjudged adequate to say that, at a specified time and place, the defendant "did cruelly, wilfully, and with force and arms, overdrive two horses, . . . by reason of which said overdriving the said two horses were tortured and tormented."[5] Here, it is perceived, there is greater precision than simply to charge that the defendant, at the time and place, "did overdrive" the horses.

§ 1119. "Kill."—We have seen that, in malicious mischief, "kill," without specification of the manner, will suffice.[6] But, in this offense, it is otherwise of the law itself.[7] And where the terms of the statute are "cruelly kill," some specification of the cruelty would appear, in reason, to be required; though the precise question has probably not been adjudicated.[8]

[1] Crim. Pro., I, §§ 509, 514, 517, 520, 556–584, 619, 624, 625; [S. *v.* Goss, 74 Mo. 592.]

[2] Id., § 629; *ante*, § 447; S. *v.* Pugh, 15 Mo. 509; Com. *v.* Whitman, 118 Mass. 458; Com. *v.* Thornton, 113 Mass. 457; [S. *v.* Bruner, 111 Ind. 98, 12 N. E. R. 103; S. *v.* Giles, 125 Ind. 124, 25 N. E. R. 159; S. *v.* Watkins, 101 N. C. 702, 8 S. E. R. 346.]

[3] Com. *v.* Brigham, 108 Mass. 457.

[4] P. *v.* Tinsdale, 10 Abb. Pr. (N. S.) 374.

[5] S. *v.* Comfort, 22 Minn. 271. And see S. *v.* Shenton, 22 Minn. 311; [S. *v.* Haley, 52 Mo. Ap. 520. In Massachusetts it was held sufficient to allege that defendant "did cruelly overdrive a certain horse," etc. Com. *v.* Flannigan, 137 Mass. 560.]

[6] *Ante*, § 446.

[7] *Ante*, § 1110.

[8] In an excellent little manual of

§ 1120. The ownership — of the animal, not being important in the law of the offense,[1] need not be averred.[2] Yet it is descriptive of the particular creature; so that, if alleged, it must be proved as laid to avoid a variance.[3]

§ 1121. One offense or more. — How many offenses are constituted by a transaction contrary to these statutes may be determined by analogies from other crimes. If a man overdrives or overloads two horses harnessed together, the wrong is evidently but one.[4] Yet, if in the one transaction he beats the two severally, the case will, in reason, be governed by analogies from assault and battery, and from homicide, into which we need not enter.[5]

§ 1122. Injunction is a remedy in equity, not pertaining to crime.[6] One, therefore, cannot have an injunction against the agent of a society for preventing cruelty to animals, to restrain him from interfering in the applicant's business.[7]

"Forms of Complaints," issued by the "Massachusetts Society for the Prevention of Cruelty to Animals," this question is treated as follows: "It has been held, in numerous cases, that in proceedings under a statute punishing the *wilful and malicious* killing of the beast of another person, it is unnecessary to set forth in the complaint the mode of the killing, and that the statutory words alone are sufficient. Com. *v.* Sowle, 9 Gray, 304, 69 Am. D. 289. The case is widely different under a statute prohibiting the *cruel* killing of any animal. In the one case, the injury resulting to the owner of the animal killed is that which the law chiefly regards, viewed in connection with the evil mind of the offender; and that injury is properly set forth in the very words of the statute, the manner in which the offender performed the prohibited act being immaterial. In the other case, the *manner* in which the act was done is all-important, the owner's loss being entirely immaterial, and it is essential that such particulars of the defendant's act be averred that it will appear from the averments of the complaint that the act performed constituted a *cruel* killing." See Collier *v.* S., 4 Tex. Ap. 12; Darnell *v.* S., 6 Tex. Ap. 482; Reid *v.* S., 8 Tex. Ap. 430.

[1] *Ante*, § 1105.

[2] S. *v.* Brocker, 32 Tex. 611; Benson *v.* S., 1 Tex. Ap. 6.

[3] Crim. Pro., I, § 438*b*; Collier *v.* S., 4 Tex. Ap. 12; Darnell *v.* S., 6 Tex. Ap. 482; Rose *v.* S., 1 Tex. Ap. 400.

[4] P. *v.* Tinsdale, 10 Abb. Pr. (N. S.) 374; S. *v.* Comfort, 22 Minn. 271.

[5] And see Rex *v.* Mogg, 4 Car. & P. 364; S. *v.* Avery, 44 N. H. 392; Com. *v.* O'Brien, 107 Mass. 208. And consult Crim. Law and Crim. Pro.

[6] Crim. Pro. I. §§ 1412–1417.

[7] Davis *v.* American Society, etc., 75 N. Y. 362, affirming 16 Abb. Pr. (N. S.) 73.

CHAPTER LXII.

OTHER STATUTORY OFFENSES.

§ 1123. Introduction.
1124–1127. Adulterated milk.
1128–1132. Protection of fish.
1133–1135. Protection of game.
1136–1139. Cattle at large.

§ 1123. What for chapter and how divided.—Having considered most of those offenses which are exclusively or essentially statutory, we shall briefly call to mind the leading doctrines pertaining to, I. The selling of adulterated milk; II. Statutes for the protection of fish; III. Statutes for the preservation of game; IV. Cattle at large.

I. The Selling of Adulterated Milk.

§ 1124. In general.— The putting off, upon the community, of unwholesome food is indictable at the common law.[1] But, without reference to the unwholesomeness, wherein the common-law offense consists, statutes, in some of our states, have made it punishable to sell any sort of adulterated milk.[2] And these statutes are within the legislative power.[3] Their terms differ; but,—

§ 1125. Knowledge of adulteration.— In the absence of special words in the statute it is not an affirmative element in the offense that the seller knew of the adulteration, and it need not be alleged or proved against him.[4] But some of the statutes re-

[1] Crim. Law, I, §§ 484, 491, 558.

[2] Com. *v.* Smith, 103 Mass. 444; Com. *v.* Flannelly, 15 Gray. 195; Phillips *v.* Meade, 75 Ill. 334; Bainbridge *v.* S., 30 Ohio St. 264; [Com. *v.* Rennerson, 143 Mass. 418, 9 N. E. R. 761; Com. *v.* Gordon, 158 Mass. 8, 33 N. E. R. 709; Shivers *v.* Newton, 45 N. J. L. 469; P. *v.* Harris, 123 N. Y. 70, 23 N. E. R. 317; S. *v.* Smyth, 14 R. I. 100, 51 Am. R. 344.]

[3] Com. *v.* Waite, 11 Allen, 264, [87 Am. D. 711.]

Municipal by-laws — sometimes accomplish the same object. P. *v.* Mulholland, 82 N. Y. 324, [37 Am. R. 568.] And see Chicago *v.* Bartee, 100 Ill. 57; [Shivers *v.* Newton, *supra;* P. *v.* Cipperly, 37 Hun, 319, reversed in 101 N. Y. 634, 4 N. E. R. 107.]

[4] Com. *v.* Nichols, 10 Allen, 199; Com. *v.* Farren, 9 Allen, 489; Com. *v.*

quire such knowledge, and the indictment under them must aver and the evidence prove it.[1] Beyond this,—

§ 1126. Mistake of the fact.— One or two of our courts have holden that, where the statute is silent concerning the seller's knowledge, if, however honestly and after whatever precautions, he is misled to believe the milk to be pure, he is punishable should it turn out to be adulterated. Yet, by the just doctrine, an unavoidable mistake of the fact, by one whose purpose it is to obey the law, relieves him from legal guilt, the same as from moral, precisely as in other ciminal cases.[2] The question is sufficiently examined in other connections.[3]

§ 1127. Indictment and evidence.— Some questions have arisen relating to the indictment and evidence; as to which, a mere reference to these cases will suffice.[4]

Smith, 103 Mass. 444; S. *v.* Smith, 10 R. I. 258. This is probably the correct doctrine; though, in analogous cases, various statutes which are silent as to the criminal intent are construed to require it as an affirmative element in the offense; when, of course, it must be alleged and proved. Crim. Pro., I, § 522.

Thus, **Alum in bread.**— Almost precisely in accordance with the forms of our leading statutes against selling adulterated milk, the English statute of 6 & 7 Will. 4, ch. 37, made it an offense for a "baker or other person" making "bread for sale," to "use any mixture," etc., and provided for the publication of the names of convicted offenders. And it was held that on a simple allegation, in the terms of the statute, of mixing alum in bread, and proof of the fact and no affirmative evidence of guilty knowledge, a conviction could not be sustained. Said Hannan, J.: "The provisions of the act cast great responsibility on a master baker; but I cannot think it to have been the intention of the legislature that he should be liable to a penalty for anything that occurs by accident. If this were so, the master might be punished when some foreign ingredient had fallen into the flour without the knowledge of either himself or his servant; and I am the more inclined to think that the legislature had not this intention, because the name of the master who has been convicted under the act is to be made public in order that persons may be warned against dealing at a shop where something wrong has been done, either by the servant or his employer." Gore *v.* James, Law R. 7 Q. B. 135, 138. Yet the just doctrine as to mistaking the fact, explained in the next section of the text, would seem to satisfy this reasoning.

[1] Com. *v.* Smith (the Mass. case), *supra;* Bainbridge *v.* S., 30 Ohio St. 264; Phillips *v.* Meade, 75 Ill. 334; Com. *v.* Flannelly, 15 Gray, 195; [Com. *v.* Evans, 132 Mass. 11; Com. *v.* Warren, 160 Mass. 533, 36 N. E. R. 308; P. *v.* Schaeffer, 41 Hun, 23; P. *v.* Cipperly, *supra;* P. *v.* West, 106 N. Y. 293, 12 N. E. R. 610; P. *v.* Kibler, 106 N. Y. 321, 12 N. E. R. 795; P. *v.* Eddy, 59 Hun, 615, 12 N. Y. Supp. 628.]

[2] Crim. Law, I, § 303*a*, note, par. 22.

[3] Ib., §§ 301–310 and the long note at § 303*a;* *ante*, §§ 596*a*, 596*b*, 631*a*–632*a*, 663–665, 729, 819, 825, 1022.

[4] Com. *v.* Luscomb, 130 Mass. 42;

II. Statutes for the Protection of Fish.

§ 1128. Common-law right of fishing.— A full explanation of the common-law right of fishing in the waters would occupy considerable space. But for the purposes of the present discussion it is sufficient to say that, in the absence of anything to the contrary, the owners of the soil along unnavigable streams are exclusively entitled to fish therein; and, where there are different owners of the opposite banks, the right of each extends to the center of the stream.[1] And in navigable waters, whether sea or river, the right of fishing is *prima facie* common to all the people.[2] But,—

Dilley *v.* P., 4 Bradw. 52; Lammond *v.* Volans, 14 Hun, 263; Com. *v.* O'Donnell, 1 Allen, 583; Com. *v.* Nichols, 10 Allen, 199; Com. *v.* Flannelly, 15 Gray, 195; Stearns *v.* Ingraham, 1 Thomp. & C. 218; Com. *v.* Farren, 9 Allen, 489; [Sanchez *v.* S., 27 Tex. Ap. 14, 10 S. W. R. 756; Cantee *v.* S., 27 Tex. Ap. 10, 10 S. W. R. 757. Cases cited: Com. *v.* Keenan, 139 Mass. 193; Com. *v.* Bowers, 140 Mass. 483, 5 N. E. R. 469; Com. *v.* Tobias, 141 Mass. 129, 6 N. E. R. 217; Com. *v.* Smith, 143 Mass. 169, 9 N. E. R. 631; Com. *v.* Spear, 143 Mass. 172, 9 N. E. R. 632; Com. *v.* Lockhardt, 144 Mass. 132, 10 N. E. R. 511; Com. *v.* Holt, 146 Mass. 38, 14 N. E. R. 930; Com. *v.* Coleman, 157 Mass. 460, 32 N. E. R. 662; Com. *v.* Proctor, 165 Mass. 38, 42 N. E. R. 335; S. *v.* Campbell, 64 N. H. 402, 13 Atl. R. 585; S. *v.* Newton, 45 N. J. L. 469; P. *v.* Bischoff, 14 N. Y. S. R. 581; P. *v.* Bivins, 53 Hun, 274, 7 N. Y. Crim. R. 92, 6 N. Y. Sup. 611; S. *v.* Groves, 15 R. I. 208, 2 Atl. R. 384; Com. *v.* Rowell, 146 Mass. 128, 15 N. E. R. 154.]

[1] 3 Kent, Com. 411, 412, 418; Ingram *v.* Threadgill, 3 Dev. 59; Carter *v.* Murcot, 4 Bur. 2162, 2164; Adams *v.* Pease, 2 Conn. 481; Waters *v.* Lilley, 4 Pick. 145, [16 Am. D. 333;] Hooker *v.* Cummings, 20 Johns. 90, [11 Am. D. 249;] Fitzwalter's Case, 1 Mod. 105; Marsh *v.* Colby, 39 Mich. 626, [33 Am. R. 439.]

On lakes.— The rule of the river is not applicable to our large lakes. Sloan v. Biemiller, 34 Ohio St. 492; [Turner *v.* Hebron, 61 Conn. 175, 22 Atl. R. 951; Lincoln *v.* Davis, 53 Mich. 375, 51 Am. R. 116; Hill *v.* Bishop, 63 Hun, 624, 17 N. Y. Supp. 297; New Eng. Trout Club *v.* Mather, 68 Vt. 338.]

[2] 3 Kent, Com. 413, 418; Bagott *v.* Orr, 2 B. & P. 472; Carter *v.* Murcot, *supra;* Fitzwalter's Case, *supra;* Malcomson *v.* O'Dea, 10 H. L. Cas. 593; Parker *v.* Cutler Mill Dam Co., 20 Me. 353, [37 Am. D. 56;] Preble *v.* Brown, 47 Me. 284; Coolidge *v.* Williams, 4 Mass. 140, 144; Freary *v.* Cooke, 14 Mass. 488; Com. *v.* Chapin, 5 Pick. 199, [16 Am. D. 386;] Yard *v.* Carman, 2 Penning. 936; Collins *v.* Benbury, 5 Ire. 118, [42 Am. D. 155;] S. *v.* Glen, 7 Jones (N. C.), 321; Warren *v.* Mathews, 6 Mod. 73; Paul *v.* Hazleton, 8 Vroom, 106; Skinner *v.* Hettrick, 73 N. C. 53; Lay *v.* King, 5 Day, 72; Chalker *v.* Dickinson, 1 Conn. 382, [6 Am. D. 250;] Trustees of Brooknaven *v.* Strong, 60 N. Y. 56; [Shively *v.* Bowlby, 152 U. S. 1; Manchester *v.* Massachusetts, 139 U. S. 240; Pearson *v.* Clark, 76 Me. 476; Sollers *v.* Sollers, 77 Md. 148, 39 Am. St. R. 404; Polhemus *v.* Bateman, 47 Hun (N. Y.),

§ 1129. Obstructing passage — (When indictable).— As, in the rivers not navigable, each owner of the soil is entitled to fish, it results, at least as a question of principle, and it is believed also as of authority, that no owner can, without subjecting himself to a civil suit by the others, erect any permanent obstruction — certainly without some special occasion — to the passage of the fish.[1] Yet such erection, not being an injury to all the people, is not at the common law an indictable nuisance.[2] But in a navigable river, where the public rights of fishing attach, it is indictable at the common law.[3] Now,—

§ 1130. Statutory regulations — (Constitutional).— Since it is constitutionally competent for our legislatures to regulate the exercise of even private rights and the use of private property,[4] they may provide rules for the taking of fish and their protection in private or non-navigable rivers; and, for special and obvious reasons, proceed therein further than would be justifiable in respect of most other private interests.[5] Palpably, the private fisheries in streams not navigable, where each proprietor's rights are connected with those of every other, and the stream itself flows into navigable waters, are, though not public, semi-public. *A fortiori*, legislation may properly regulate fishing in the navigable waters.[6]

366; Rea *v.* Hampton, 101 N. C. 51, 9 Am. St. R. 21; Chambers *v.* Church, 14 R. I. 378, 51 Am. R. 410; Allen *v.* Allen, 19 R. I. 114; Morris *v.* Graham, 16 Wash. 343.]

[1] Woolever *v.* Stewart, 36 Ohio St. 146, [38 Am. R. 569,] and the authorities cited; Stoughton *v.* Baker, 4 Mass. 522, [3 Am. D. 236;] Leconfield *v.* Lonsdale, Law R. 5 C. P. 657, 725; Weld *v.* Hornby, 7 East, 195; [Parker *v.* P., 111 Ill. 581.]

[2] P. *v.* Platt, 17 Johns. 195, [8 Am. D. 382;] Leconfield *v.* Lonsdale, *supra*.

[3] Weld *v.* Hornby, 7 East, 195, 199; S. *v.* Franklin Falls Co., 49 N. H. 240, [6 Am. R. 513.]

[4] *Ante*, § 995, and places there referred to.

[5] Com. *v.* Look, 108 Mass. 452; Stuttsman *v.* S., 57 Ind. 119; S. *v.* Boone, 30 Ind. 225; S. *v.* Snover, 13 Vroom, 341; Doughty *v.* Converse, 13 Vroom, 193; Tinicum Fishing Co. *v.* Carter, 90 Pa. St. 85, [35 Am. R. 632;] Blydenburgh *v.* Miles, 39 Conn. 484; Maney *v.* S., 6 Lea, 218; Com. *v.* Weatherhead, 110 Mass. 175; Lunt *v.* Hunter, 16 Me. 9; Peables *v.* Hannaford, 18 Me. 106; Vinton *v.* Welsh, 9 Pick. 87; [Heckman *v.* Swett, 107 Cal. 276, 40 Pac. R. 420; P. *v.* Bridges, 142 Ill. 30, 31 N. E. R. 115; S. *v.* Lewis, 134 Ind. 250, 33 N. E. R. 1024; Cole *v.* Eastham, 133 Mass. 65; P. *v.* Collison, 85 Mich. 105, 48 N. W. R. 292; P. *v.* Doxtader, 75 Hun (N. Y.), 472; Peters *v.* S., 96 Tenn. 682; Money *v.* S., 6 Lea (Tenn.), 218; Bittenhaus *v.* Johnston, 92 Wis. 588.]

[6] Paul *v.* Hazleton, 8 Vroom, 106; Moulton *v.* Libbey, 37 Me. 472, [59 Am. D. 57;] Com. *v.* Bailey, 13 Allen, 541; P. *v.* Reed, 47 Barb. 235.

§ 1131. State and United States jurisdiction.— Upon this subject, differing from commerce and some others, the jurisdiction of the states, to the exclusion of the United States, even over the navigable waters within their territorial limits,[1] is complete. So ample is this doctrine, that a state may limit to its own citizens the right of fishing in its navigable waters; in subjection, however, to the superior rights[2] of navigation.[3]

§ 1132. Concerning the statutes.— In pursuance of these principles, various and diverse statutes concerning fish and fisheries have been enacted in the several states, making violations of their regulations penal. But into their particulars it is deemed best not to enter. Some of the cases are cited in the note.[4]

III. Statutes for the Protection of Game.

§ 1133. Wild animals and birds,— in their unreclaimed state, belong to no one; but they, or their carcasses or hides, will be the property of him who kills or otherwise sufficiently

[1] Crim. Law, I, § 145 *et seq.*; [Lowndes *v.* Huntingdon, 153 U. S. 1; Heckman *v.* Swett, *supra;* Sollers *v.* Sollers, *supra;* P. *v.* Lowndes, 130 N. Y. 455.]

[2] As to the limit whereof see Cobb *v.* Bennett, 75 Pa. St. 326, [15 Am. R. 752;] Lewis *v.* Keeling, 1 Jones (N. C.), 299, [62 Am. D. 168.]

[3] McCready *v.* Virginia, 94 U. S. 391; McCready *v.* Com., 27 Grat. 985; Haney *v.* Compton, 7 Vroom, 507; Corfield *v.* Coryell, 4 Wash. C. C. 371; Dunham *v.* Lamphere, 3 Gray, 268; [Manchester *v.* Massachusetts, *supra*; Com. *v.* Manchester, 152 Mass. 230, 25 N. E. R. 113; Shively *v.* Bowlby, 152 U. S. 1.]

[4] Com. *v.* Perley, 130 Mass. 469; Com. *v.* Tiffany, 119 Mass. 300; Com. *v.* Ruggles, 10 Mass. 391; Com. *v.* Weatherhead, 110 Mass. 175; Maney *v.* S., 6 Lea, 218; McCready *v.* Com., 27 Grat. 985; Power *v.* Tazewells, 25 Grat. 786; Morgan *v.* Com., 26 Grat. 992; Com. *v.* Bailey, 13 Allen, 541; Stuttsman *v.* S., 57 Ind. 119; S. *v.* Snover, 13 Vroom, 341; Com. *v.* Look, 108 Mass. 452; Werfel *v.* Com., 5 Binn. 65; Smith *v.* Look, 108 Mass. 139; S. *v.* Thompson, 70 Me. 196; Com. *v.* Vincent, 108 Mass. 441; S. *v.* Skolfield, 63 Me. 266; S. *v.* Cottle, 70 Me. 198; Willing *v.* Bozman, 52 Md. 44; S. *v.* Decker, 46 Conn. 241; S. *v.* Hooffman, 9 Md. 28; Lawton *v.* Steele, 152 U. S. 133; S. *v.* Nash, 62 Conn. 47, 25 Atl. R. 451; Summers *v.* P., 29 Ill. Ap. 170; Smith *v.* P., 46 Ill. Ap. 130; S. *v.* Haug, 95 Iowa, 413; S. *v.* Beal, 75 Me. 289; S. *v.* Adams, 78 Me. 486, 7 Atl. R. 267; S. *v.* Towle, 80 Me. 349; 14 Atl. R. 195; S. *v.* Dunning, 83 Md. 178, 22 Atl. R. 109; Hughes *v.* S., 87 Md. 298; Com. *v.* Manimon, 136 Mass. 456; Com. *v.* Follett, 164 Mass. 477; P. *v.* Kirsch, 67 Mich. 539, 35 N. W. R. 157; P. *v.* Miller, 88 Mich. 383, 50 N. W. R. 296; P. *v.* Deverno, 106 Mich. 621; *In re* Zele, 107 Mich. 228; Osborn *v.* Judge, etc., 114 Mich. 655; S. *v.* Mrozinski, 59 Minn. 465, 61 N. W. R. 560; S. *v.* Blount, 85 Mo. 543; West Pt. etc. Co. *v.* S., 49 Neb. 218; P. *v.* Gillette, 58 Hun, 602, 11 N. Y. Sup. 461; P. *v.* Fish, 89 Hun, 163; [Lawton *v.* Steele, 119 N. Y. 226; P. *v.* Tanner, 128 N. Y. 416; Hettrick *v.* Page, 82 N. C. 65; S. *v.* Conner, 107

reclaims and possesses them.[1] Under some circumstances, the owner of the soil whereon an animal lives, though wild, has a sort of ownership therein before it is reclaimed,[2] — a question which, with various others, is not within the present subject. Now, —

§ 1134. Legislation concerning. — These creatures, while wild and unreclaimed, sustain important relations to the human population; and their protection or destruction is, according to their natures and numbers, matter of public concern. Hence there has been, in our states, various legislation on the subject; and, as its importance becomes better understood, the statutes increase. Some of the adjudications are referred to in a note;[3] but the topic will not be further pursued, except as to the —

§ 1135. United States constitution. — It has been deemed, in a state court, not to be competent for state legislation to prohibit the transportation of particular animals and birds out of the state; the question being one of interstate commerce,[4]

N. C. 931, 11 S. E. R. 992; S. *v.* Sturges, 9 Oreg. 537; S. *v.* McGuire, 24 Oreg. 366, 33 Pac. R. 666; S. *v.* Tayler, 13 R. I. 541; S. *v.* Stevens, 69 Vt. 411; S. *v.* Tabell, 10 Wash. 498, 39 Pac. R. 101; S. *v.* Crawford, 13 Wash. 633.]

[1] Crim. Law, II, §§ 771–779; 2 Kent, Com. 348; Buster *v.* Newkirk, 20 Johns. 75; Pierson *v.* Post, 3 Caines, 175, [2 Am. D. 264;] Amory *v.* Flyn, 10 Johns. 102, [6 Am. D. 316;] Woolf *v.* Chalker, 31 Conn. 21, [81 Am. D. 175;] Parker *v.* Mise, 27 Ala. 480, [62 Am. D. 776.] See Case of Swans, 7 Co. 15*b*; [James *v.* Wood, 82 Me. 176, 19 Atl. R. 160; S. *v.* Parker, 89 Me. 81.]

[2] Goff *v.* Kilts, 15 Wend. 550; Gillet *v.* Mason, 7 Johns. 16; Ferguson *v.* Miller, 1 Cow. 243, [13 Am. D. 519;] Wallis *v.* Mease, 3 Binn. 546; Churchward *v.* Studdy, 14 East, 249; Sutton *v.* Moody, 5 Mod. 375, 2 Salk. 556, 1 Ld. Raym. 250; Deane *v.* Clayton, 7 Taunt. 489; Blades *v.* Higgs, 12 C. B. (N. S.) 501; [Kellogg *v.* Cain, 114 Cal. 378; Garcia *v.* Gunn, 119 Cal. 315.]

[3] S. *v.* Shannon, 36 Ohio St. 423, [38 Am. R. 599;] Bellows *v.* Elmendorf, 7 Lans. 462; Aldrich *v.* Wright, 53 N. H. 398, [16 Am. R. 339;] Com. *v.* Hall, 128 Mass. 410, [35 Am. R. 387;] Underwood *v.* S., 19 Ala. 532; Magner *v.* P., 97 Ill. 320; Phelps *v.* Racey, 60 N. Y. 10, [19 Am. R. 140;] Hart *v.* S., 29 Ohio St. 666; [*Ex parte* Peterson, 119 Cal. 578; Com. *v.* England (Ky.), 38 S. W. R. 492; Dickhaut *v.* S., 85 Md. 451, 60 Am. St. R. 332; S. *v.* Bucknam, 88 Me. 392, 51 Am. St. R. 406; S. *v.* Lynch, 89 Me. 209; P. *v.* O'Neil, 71 Mich. 331, 39 N. W. R. 1; S. *v.* Rodman, 58 Minn. 393, 59 N. W. R. 1098; S. *v.* Chapel, 64 Minn. 130, 58 Am. St. R. 524; Roth *v.* S., 51 Ohio St. 209, 46 Am. St. R. 566; P. *v.* Alden, 112 N. Y. 117, 19 N. E. R. 516; P. *v.* Fishbough, 134 N. Y. 393, 31 N. E. R. 983; Com. *v.* Wilkinson, 139 Pa. St. 298, 21 Atl. R. 14; Dickinson *v.* S. (Tex. Cr. R.), 41 S. W. R. 759.]

[4] Railroad *v.* Husen, 95 U. S. 465. [The case of S. *v.* Saunders, *supra*, and the later case of Terr. *v.* Evans, 2 Idaho, 634, are expressly disapproved in Geer *v.* Connecticut, 161 U. S. 534. See also *Ex parte* Maier, 103 Cal. 479, 42 Am. St. R. 129; Amer.

within the exclusive jurisdiction of congress.[1] But when they have been brought into the state from another state or country, and mingled with the general property, their sale, or the keeping of them for sale, may be prohibited the same as though captured or killed in the state.[2] The Massachusetts statute was, not as a question of constitutional restraint, but of interpretation, held not to apply to such import from another state.[3]

IV. Cattle at Large.

§ 1136. In general.— There are statutes forbidding, or limiting to particular times and places, the running of cattle at large.[4]

§ 1137. Meaning of "at large"— "Suffer."— They are not at large when the herder accidentally falls asleep.[5] And one does not "suffer" an animal to go at large, if, without his fault, it escapes.[6] But these enactments are hardly within the strict domain of the criminal law. Partly criminal may be deemed some of the —

§ 1138. Restraining municipal by-laws.— It is competent for the legislature to authorize cities and towns to restrict the running at large of animals within their respective localities. And this is not unfrequently done.[7] Within these by-laws,—

§ 1139. Dog "at large."— A dog, playing with its owner's son on the owner's premises, is not "at large;"[8] but one is, while following its master through the public streets at such a distance as not to be within his control.[9]

Exp. Co. *v.* P., 133 Ill. 649, 23 Am. St. R. 641, and P. *v.* O'Neil, 110 Mich. 324.]

[1] S. *v.* Saunders, 19 Kan. 127, [27 Am. R. 98.]

[2] Magner *v.* P., 97 Ill. 320; Phelps *v.* Racey, 60 N. Y. 10, [19 Am. R. 140;] S. *v.* Randolph, 1 Mo. Ap. 15; S. *v.* Judy, 7 Mo. Ap. 524; [Merritt *v.* P., 169 Ill. 221; S. *v.* Farrell, 23 Mo. Ap. 176.]

[3] Com. *v.* Hall, 128 Mass. 410, [35 Am. R. 387.]

[4] Weir *v.* Cram, 37 Iowa, 649; Marietta, etc. R. R. Co. *v.* Stephenson, 24 Ohio St. 48.

[5] Thompson *v.* Corpstein, 52 Cal. 658. Compare with Com. *v.* Dow, 10 Met. 382; McAneany *v.* Jewett, 10 Allen, 151; Marietta, etc. R. R. Co. *v.* Stephenson, *supra*.

[6] Montgomery *v.* Breed, 34 Wis. 649.

[7] Dillard *v.* Webb, 55 Ala. 468; Fritz *v.* First Division, etc. R. R. Co., 22 Minn. 404; Oil *v.* Rowley, 69 Ill. 469; Grover *v.* Huckins, 26 Mich. 476; Higley *v.* Bunce, 10 Conn. 436, 567; Com. *v.* Leavitt, 12 Allen, 179; Spect *v.* Arnold, 52 Cal. 455; [Brophy *v.* Hyatt, 10 Colo. 223, 15 Pac. R. 399; Slessman *v.* Crozier, 80 Ind. 487; Julienne *v.* City, etc., 67 Miss. 34, 10 S. R. 43.]

[8] McAneany *v.* Jewett, 10 Allen, 151; [Nehr *v.* S., 35 Neb. 638, 53 N. W. R. 589, 17 L. R. A. 771.]

[9] Com. *v.* Dow, 10 Met. 382.

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Note.—Where the plaintiff is the king or queen (Rex or Reg.), the State, Commonwealth, People, United States (abbreviated S., Com., P., U. S.), or the like, the defendant's name is put first. The plaintiff's is first in the other cases.

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