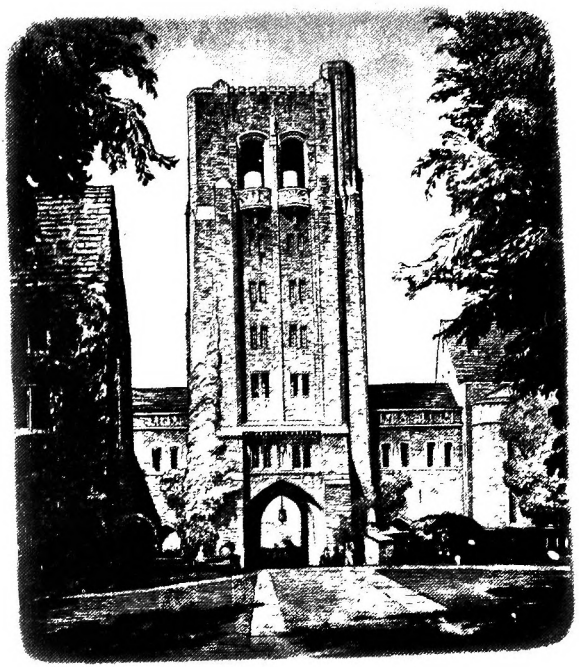


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COMMENTARIES

ON THE LAW OF

STATUTORY CRIMES.

EMBRACING

THE GENERAL PRINCIPLES OF INTERPRETATION OF STATUTES;
PARTICULAR PRINCIPLES APPLICABLE IN CRIMINAL CASES;
LEADING DOCTRINES OF THE COMMON LAW OF CRIMES,

AND DISCUSSIONS OF

THE SPECIFIC STATUTORY OFFENCES,

AS TO BOTH LAW AND PROCEDURE.

BY

JOEL PRENTISS BISHOP.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1873.

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PREFACE.

This work has some features in a measure peculiar to itself.

It presents, in a compact form, the various elementary principles of statutory interpretation, pertaining both to the civil and criminal departments of the law. From this starting point it proceeds more minutely to explain the doctrines which control the interpretation of criminal statutes in particular; and to illustrate them by numerous examples in which individual words, phrases, and larger provisions are given, with the constructions put upon them by the courts. Thus it goes on step by step with practical applications of doctrines, showing how the common law and the statutes are woven together in the administration of the law of Statutory Crimes. As the work progresses toward the middle and the end, it descends more and more into detail; and the result is, that nearly all the particular statutory offences, known in our States, are treated of more or less at large, as respects the law, the indictment, and the evidence, and one or more brief forms of the indictment are given for nearly every offence. The old and standard statutory crimes, which, in their nature, are mere expansions of the common law, and are treated of in the author's works on "Criminal Law" and "Criminal Procedure,"

are here touched but lightly; while the offences which are more purely statutory, especially those of the minor sort, are discussed in full.

Such is the direct and obvious scope of the work; but, in executing the plan thus drawn out, it was found to be practical and best to accomplish the following *indirect purposes:* —

First. As the rules of statutory interpretation are in the main alike in civil and criminal cases, and as in discussing the latter it became necessary to explain at what points differences exist, this volume consequently contains a compendium of rules for use in the civil department.

Secondly. As, in interpreting every statute, it becomes necessary to know what the law was before the statute was made, this volume consequently contains, interspersed with its other matter, a condensed view of the common law pertaining to crimes.

Thirdly. In like manner, as it became necessary to discuss many and varying forms of the indictment, the leading elementary principles of criminal pleading are here, in brief, and condensed, brought to view, in connection with illustrations of their application.

Fourthly. A considerable variety of other incidental things likewise appear in the volume, not necessary here to be mentioned.

With what ability and care the work is executed, it is not for me to say. I have endeavored to render it not inferior to my other works. But, in laying the plan for the accomplishment of the several direct and indirect objects above set forth, I took pains that it should include such a selection of material from the immense

mass before me as would enable me to render each paragraph new, not in form only, but in essence; thus essentially avoiding repetitions even of principles. A few exceptions have occurred, where a principle appeared to be particularly vital, or specially liable to be overlooked; in such a case, I deemed it necessary to bring it forward a second or third time, with fresh illustrations. The consequence is, that those who would be most benefited by the work should read it in course. And if a reader should fail to find some statute specifically explained, the instances will be few in which he will not discover the principle governing its interpretation, and the rule by which to conduct the practice upon it.

In the fifth edition of my work on the Criminal Law, I explained (Vol. I. § 92), that this volume is in part composed of matter which had appeared in earlier editions of that work and the first edition of the work on Criminal Procedure. Such matter, however, is, for the most part, as it appears here, greatly changed in form, enlarged, and presented in new relations; while the rest of the work is entirely new.

A work embracing the subject of this one is, beyond question, greatly needed. The field is entirely new; being occupied by no preceding endeavor, English or American. There is not a day in the professional life of any lawyer, whether his practice is at chambers or in court, and even if it is exclusively in the civil department, when he has not occasion to use more or less of the learning attempted to be conveyed in this volume. In its plan it meets, also, the wants of such students in the law as desire to learn something of the elementary

principles of the Criminal Law, while they will not peruse, as they ought, the fuller discussions in the author's other works. In like manner, it meets the wants of those lawyers whose practice is exclusively in the civil department; for, while it affords them a needed insight into the criminal law, it furnishes them at the same time with material for use in their own department. And it is adapted to be used by non-professional magistrates in connection with their hand-books of practice. The chapters, especially, on "Selling Intoxicating Liquor," on "Gaming," and on "Cruelty to Animals," with some others, supply a constant want of this class of persons. If, therefore, the work is found not to be useful, it will be owing to some defect in the manner of its execution.

J. P. B.

CAMBRIDGE, Jan. 1873.

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STATUTORY CRIMES.

STATUTORY CRIMES.

BOOK I.

THE INTERPRETATION OF CRIMINAL STATUTES.

CHAPTER I.

STATUTORY INTERPRETATION IN GENERAL.

§ 1. **Object of this Chapter.** — This chapter, which is to be written without reference to specific authorities, is intended as a guide, to the reflections of the reader, to such primary truths as will prepare him to read intelligently the discussions which follow, based on adjudication.

§ 2. **Statutes Written Instruments.** — It should be remembered, at the outset, that a statute is a writing; consequently that, to a certain extent at least, the rules which determine the construction of other written instruments should determine also the interpretations of the statutes. And we shall find, as we proceed with our subsequent discussions, that this is established doctrine.

§ 3. **Distinction between Oral Words and Writings.** — All language is in the first instance created by the organs of speech. Its primary use is in oral utterances. Writing, however, which comes after speech, is used for the primary purpose of perpetuating what else would float away. Now, out of this distinction comes the rule, that, when any thing is reduced to writing, the writing cannot be qualified by speech. Hence we shall see that the meaning of a statute cannot be fixed, qualified, or

changed by any words which the law-makers uttered before, at the time, or after the making of the law. To allow such a thing to be done would be to subvert the very purpose of putting the law into writing. It must be understood to be all written, else the writing is of no use whatever; it might even better be all left in parol.

§ 4. **Law before Legislation — Before Writing — Before Speech.** — As oral speech existed before writing, so law existed before oral speech and before legislation. There can be no created existence without law, and especially no association of men without it.[1] Law does not, as is sometimes inconsiderately said, originate in legislation, or in judicial decision. It existed before either. Without it, man could not exist.

§ 5. **The Consequence — Nature of a Statute.** — Hence every statute operates to modify or to change or to 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. A particular thing is to-day either lawful or unlawful. It can fill no middle space — no blank — between the two. Suppose it to be lawful; then a statute may make it unlawful generally, or unlawful under particular circumstances which it points out; or the statute may come to confirm a real or supposed doubt, and settle the question of its lawfulness. In any case, the statute is a thread of warp woven into a woof which before existed. It is never to be contemplated as a thing standing alone, but as a minute part of a great and harmonious whole.

§ 6. **Knowledge of Prior Law essential to Understanding of Statute.** — Now, whatever may be the rules of interpretation, it is obvious that no statute can be understood except by him who understands the prior law. It is not, therefore, to theorize, but to get practical help, that those who are in search for the meaning of statutes constantly go back to see what is the unwritten law. Without it, all search after the meaning of the statute is vain. Without it, the search is like that of a man after the meaning of a writing in an unknown language, whose grammatical construction and the signification of whose

[1] Bishop First Book, § 43, 45.

words he should refuse to make himself acquainted with. The first step, in all legal acquirements, is to learn the unwritten law.

§ 7. **Statute limited by Prior Law.** — If a statute provides, "that he who steals another's watch shall be imprisoned in the penitentiary five years," let us see the difference between interpreting this statute without, and with, making reference to the prior law. A babe of two years gets hold of the watch and throws it into the fire. Is this babe to be sent to the penitentiary five years? Yes; if we do not interpret the statute by the prior law he is. The statute is general; it excepts no age and no condition. But if we refer to the prior law, we find it to be fundamental doctrine that a human being of such immature years is incapable of committing any crime. And it cannot be supposed that the legislature, in making a provision to protect people in the enjoyment of their watches, meant to overthrow a broad and established principle of fundamental law and justice. Therefore, referring to the prior law, we by construction engraft upon the statute an exception. But suppose an insane person does the same to the watch as the babe, — is he to be punished? The same course of reasoning applies now as before; if we refuse to aid the interpretation by the unwritten law he is, but if we let this law work with the statute we come to the conclusion that he is not. Then, again, what is meant by stealing? If a person of mature years and well-balanced judgment does this thing to another's watch, does he thereby steal it? The answer to this question turns on the meaning of the verb "to steal." This is a word of ancient and common use in indictments for larceny at the common law. Now, as the statute is a law, we know, in reason, that its language is legal language, and this word "steal" has here the same meaning as in indictments for larceny at the common law. If the statute were, instead of being a law, a "stump speech," we should endeavor to find the meaning of the word "steal" in the slang of political whippers-in; or, if it were a part of a sermon, we should look through the Bible and the various standard works on theology. Looking, then, into the common law of larceny for the meaning of the word "steal," we find ourselves — not sitting as judges,

but as students of the law — at a loss to determine whether the man has subjected himself to imprisonment or not. The question is a mooted one; it may be plain that some courts would decide it one way and some others the other way; but, on the whole, we cannot tell. The man should secure good counsel, and be more careful of his conduct the next time.

§ 8. **Difficulties of Statutory Interpretation.** — We have thus seen, that, without a knowledge of the unwritten law, we can do nothing in the interpretation of the written. We have also seen, that, even with this knowledge, we may encounter difficulties. The difficulty mentioned in the last section arose from an uncertainty in the common law itself. But the common law may be plain; yet, at a point where, like the one which occurred in the cases of the babe and of the insane person, it and the statute conflict, it may be uncertain which is to give way and which to stand. It cannot be a rule that the common law is never to give way to the statute; for the very object of the statute may be to change the common law; while, on the other hand, we have seen that the common law sometimes overrides the statute.[1] 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 every thing of this sort under all circumstances.

§ 9. **Other Difficulties.** — Then, again, the terms of a statute may be such as have not yet acquired an exact legal meaning; and, when they are, their meaning will not unfrequently be in doubt. Or the arrangement of the sentences may be such as to leave in uncertainty some question concerning what was intended. In circumstances like these, rules may be of some help, but not much.

§ 10. **Statute modifying Statute.** — Heretofore we have contemplated the prior law as though it were all 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

[1] See Bishop First Book, § 482.

from year to year, — and, while the later law plainly repeals in part the prior by construction, it as plainly does not repeal the whole; yet where the repeal begins and where ends it is difficult to tell. 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 LAW STATED AND DISTINGUISHED.

§ 11. **Added to the Unwritten — Enumerated.** — From what was said in the last chapter, it appears that no written law, whatever be its nature, comes to fill a vacuum; but every such law is an addition made to a mass of pre-existing, unwritten law, which filled, so to speak, all the space where law could be. In the United States we have the following written laws, added to the pre-existing mass of the unwritten: 1. The Constitution of the United States, with the several amendments which have been made thereto; 2. Treaties with foreign nations and with our own Indian tribes; 3. Statutes enacted by Congress; 4. The constitutions of the several States; 5. Statutes of the State legislatures; 6. By-laws of municipal and other corporations. Let us look at them severally, and we shall see that, within their respective spheres, they have precedence, the one over the other, in the order thus set down. Observe, — *within their respective spheres;* for the Constitution of the United States gives to the general government but limited authority within State boundaries; and, beyond the scope of its jurisdiction, neither this supreme instrument nor any act of the general government can have force. Here, therefore, it is not superior to a State constitution or State statute. And the by-law of a corporation has only a limited

scope, even where it does not come in conflict with a superior law.[1]

§ 12. **Constitution of United States.** — 1. It is not necessary to discuss, in this place, the constitutionality of statutes as respects this supreme law. In various connections in the present volume this will be done with respect to particular enactments brought under review. And the general doctrine will appear, that, whenever a court sees that a statute, State or national, or a State constitution, or a by-law, relied on in a cause in adjudication, is repugnant to the national Constitution, the tribunal is therefore bound to pronounce this inferior provision of written law to be void.

§ 13. **Treaties.** — 2. The Constitution of the United States provides, that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and 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 shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding."[2] Now, this clause makes it plain that a treaty is superior to a State statute or State constitution.[3] It is gen-

[1] 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.

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

[3] Gordon *v.* Kerr, 1 Wash. C. C. 322. And see the cases cited to the next section. I cannot doubt the correctness of the proposition in the text; though, I am aware, there is, at least in political circles, some controversy repecting it. In support of another view, I cannot do better than cite a *brochure*, recently made public, and kindly furnished me by the learned author, on the "Disabilities of American Married Women abroad," otherwise entitled "Foreign Treaties of the United States, in Conflict with State Laws relative to the Transmission of Real Estate to Aliens." It is by William Beach Lawrence, published at New York by Baker, Voorhis, & Company, 1871. Its principal part consists of a letter to Governor Hoffman of New York, representing the necessity of amendments of the laws of the State. Of course, if any thing is to be done by treaty we must be prepared to offer what we ask; and, as I understand the learned writer, he deems it to be the better doctrine in principle, while in

erally supposed to be superior to an act of Congress; yet, if it is, the ground of its superiority must be found elsewhere

point of authority the question is uncertain, that a treaty cannot affect, in a State, those property rights which are beyond the legislative jurisdiction of Congress. Among other things he says: "Indeed, 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 levelled to the ground despite the States' (Fairfax *v.* Hunter, 7 Cranch, 627), yet, in the case of Frederickson *v.* The State (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." p. 45–47. There is more on this subject in the same connection. And, if I understand the doctrine maintained, it is, that the things thus mentioned are among what are sometimes called the reserved powers of the States; consequently no power of the United States, like, for example, the treaty-making power, can affect them. But the learned author does not quote or even refer to any particular clause of the Constitution. I protest against this sort of reasoning, which is not peculiar to him, but is common especially in constitutional arguments of a semi-political nature. I submit that one who writes on constitutional law, or, indeed, on the interpretation of statutes, or of any other written instruments, *should produce the words which he is interpreting*, and then show what they mean. In the present instance, we have three clauses, two of which are mentioned in the text; but, brought together, they are as follows: 1. "No State shall enter into any treaty," &c. 2. "The President" "shall have power, by and with the advice and consent of the Senate, to make treaties," &c. 3. "All treaties . . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding." Now, here are words plain, direct, and conclusive, unless there is something in some other part of the Constitution to qualify them. And it devolves on him who claims that there is such qualifying matter to point out the words. For myself, I know of nothing and have never read of any thing in particular. Of course, it is not competent for a treaty to do every thing. At the time when the Constitution was made, the law of nations was well defined, and it was especially known what a treaty might do and what it might not. If a treaty should undertake to provide something concerning the internal affairs of a State, having no connection with or relation to the foreign power whatever, it might well be objected that this is not what was meant by the word "treaty" in the Constitution. But, when a foreign power deals with the treaty-making power of our government, it knows nothing of our internal affairs; and, if it is not competent for the general government to do by treaty whatever it is competent for the treaty-making power as defined in the law of nations to do, then, as the States have no authority to act by treaty, we present to the world only the fragment of a nation, instead of being a nation in full proportions. True, if this is so by our Constitution, then it is; but it devolves on him who claims that it is so, to point to the particular provision or provisions by which this result is wrought out.

than in this clause. And it is found elsewhere. Another clause of this instrument provides, that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur."[1] If, therefore, a treaty is made by the President, and thus ratified, it has become, in the words of the Constitution, "the supreme law of the land." This is a part of the "supreme law" which did not proceed from legislation, any more than did the Constitution itself. An act of Congress could not add force to it, any more than it could to a clause of the Constitution. It could do no more to abrogate it than it could to abrogate a clause of the Constitution. A treaty is not a legislative product, it is an executive one, made so by the express terms of the Constitution; in other words, it is a thing entirely outside the jurisdiction of the legislative department. An act forbidding and an act annulling a treaty would be alike inoperative and void, as being a thing not within the legislative authority as defined by the Constitution. Consequently it is, in the manner thus pointed out, superior to an act of Congress, and standing next to the Constitution of the United States, whence all authority in the general government proceeds, in point of supremacy. This is plainly enough, in reason, the doctrine of our Constitution; though there has always been much confusion on the subject in the minds of legal persons and of legislators.

§ 14. **Continued.** — A treaty may, like a clause of the Constitution, be of a sort not practically cognizable by the judicial department of the government until a legislative act has been passed to carry out its provisions. On the other hand, it may, like a clause of the Constitution, be of a sort to execute itself, and require no legislation to give it judicial effect. It is difficult to distinguish, *a priori*, the one class of treaties from the other, so as to lay down a rule; though, when a case presents itself, it may not be difficult to ascertain the true law. In general terms, the courts take judicial notice of a treaty, and give it effect, precisely as they do of the Constitution and the acts of Congress;[2] and, in like manner, and to the like

[1] Const. U. S. art. 2, § 2.

[2] Martin *v.* Hunter, 1 Wheat. 304; Doe *v.* Braden, 16 How. U. S. 635.

extent, it annuls a State law which may be found to be in conflict with it.[1] And if a treaty provides, for example, that the subjects of the foreign power shall be entitled to hold or inherit lands in our States, the same as though they were citizens of the United States, it, without legislative action superadded, operates according to its terms, and such subjects can so hold or inherit, notwithstanding any State law to the contrary.[2] In the nature of things, no act of Congress is required to give effect to such a treaty. But if the treaty provides, that certain classes of criminals against the foreign government, when found in the United States, shall be surrendered to the foreign power, yet is silent as to the manner of the surrender, this perhaps does not, without legislation, confer a jurisdiction upon any particular officers to act in the premises; consequently an act of Congress is required to carry such a treaty into effect.[3] On this subject, however, there are distinctions not best to be entered into here.[4] Marshall, C. J. sitting in the Supreme Court of the United States, once expressed the distinction thus: "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 permission. 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."[5] It is not wise to discuss, in this place, the question in full; but the following is evidently the true view of it in matter of principle. Where a treaty is such, in its nature, that legislative power

[1] Fisher *v.* Harnden, 1 Paine C. C. 55.

[2] Chirac *v.* Chirac, 2 Wheat. 259; Orr *v.* Hodgson, 4 Wheat. 453; Hughes *v.* Edwards, 9 Wheat. 489; Carneal *v.* Banks, 10 Wheat. 181; People *v.* Clark, 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. Atty. Gen. 411.

[3] 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.

[4] Consult British Prisoners, 1 Woodb. & M. 66; Ex parte Metzger, 5 N. Y. Leg. Obs. 83; Ex parte Kaine, 10 N. Y. Leg. Obs. 257.

[5] Foster *v.* Neilson, 2 Pet. 253, 314. And see Taylor *v.* Morton, 2 Curt. C. C. 454; Jones *v.* Walker, 2 Paine C. C. 688.

is required to give it effect, the courts cannot give effect to it. This is but a truism. It is precisely so of a like clause of the Constitution. But should the legislature attempt to annul even such a treaty, the courts — speaking now from the reason of the thing, though perhaps in opposition to some of the authorities — would be bound to hold the act void, precisely as they would an act of Congress attempting to annul a clause of the Constitution of the like kind. To give a treaty any force against an act of Congress, or even an act of a State legislature, it must be such a treaty as comes within the treaty-making power according to the law of nations as it stood at the time when our national Constitution was adopted. In those cases in which a valid treaty requires an act of Congress to execute it, the national faith is still bound by it as much as in the other class of cases; it is still "the supreme law of the land," standing practically in abeyance, waiting for a tribunal to execute it; and the oath of members of Congress binds them to furnish the means to give the treaty effect.[1]

[1] I have before me an "Argument of Hon. William Lawrence before the Secretary of the Interior and Assistant Attorney-General of the United States, Washington City, Dec., 1871, on behalf of citizens of Kansas, against the claims of the Missouri, Kansas, and Texas Railroad Company, and the Leavenworth, Lawrence, and Galveston Railroad Company, to any part of the Osage lands in Kansas, and in favor of the claims of settlers thereon:" also his "Reply" to arguments of opposing counsel. Mr. Lawrence is widely known as a very intelligent and industrious lawyer; he had before this time served six years in Congress, where he gave special attention to questions of a legal sort; and we may be quite sure that his investigations cover as nearly the whole of any legal subject he examines as could be expected from any man. In his "Argument," p. 34, 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." It is seen that here is doctrine directly opposed to my text; it is contained in a mere legal argument, and so we are not enlightened by it as to what are the real views of the learned author. I cite his words for the sake of adding his authorities; for I am always especially anxious to present to my readers whatever is to be found opposed to me on any proposition of law which I lay down, being less solicitous about the authorities in my favor. He refers to "Act July 17, 1798, 1 Stat. 578; 2 Curt. C. C. 460; 3 Opin. Atty. Gen. 737; act March 26, 1804; Foster *v.* Neilson, 2 Pet. 303, 307; joint resolution, April 10, 1869, 16 Stat. 55; Osage Treaty, 1865, 14 Stat. 687; act July 15, 1870, § 12, 17 Stat. 362; same treaty, art. 1, 2, and 17; act Feb. 21, 1863, 12

§ 15. **Statutes enacted by Congress.** — 3. We have thus seen, that statutes enacted by Congress are subordinate, not only

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; [United States *v.* Lynde], 11 Wal. 632; Taylor *v.* Morton, 2 Curt. C. C. 458; The Clinton Bridge, 1 Woolworth, 155; Mitchell *v.* United States, 9 Pet. 712; act June 30, 1834, 4 Stat. 729; act March 30, 1802, 2 Stat. 114." In other parts of these pamphlets there are some cases which he would probably deem to have some bearing on the question; but these references are doubtless the principal ones, and they will suffice. It is truly observed, in the course of this discussion, that, while the Constitution in terms makes treaties and acts of Congress supreme law, it does not say to which precedence shall be given. Now, there may be a difference between treaties with Indian tribes, and with foreign nations. I do not say that there is, or that there is not. My text refers to treaties with foreign nations. If a foreign nation enters into a treaty with us, it, by the law of nations, becomes a compact which neither party can, especially without cause shown, abrogate at will; and it matters not what the subject of the compact is, provided it is a treaty according to the law of nations. To make such a treaty, full authority is given to the President, in concurrence with two thirds of the Senate. The foreign power knows nothing of our internal affairs; and, while our President acts under our Constitution, such power acts under the law of nations. But our Constitution, which in its provisions for treaties and elsewhere recognizes the law of nations, must contemplate that the two contracting parties, in the case of a treaty, stand on equal ground. Now, a treaty is not a treaty unless it binds according to its stipulations and the law of nations. Contemplate, then, the condition of our country, should we enter into a treaty stipulation with the combined powers of Europe, and then, after its due ratification and its performance on the part of these foreign powers, *Congress repeals it!* It is not contended that there are any words in our Constitution *expressly* authorizing Congress to do such a thing. The power comes, if at all, from clauses giving Congress authority to *legislate* on certain subjects. But, suppose a treaty does concern a subject on which Congress has power to make laws; still, if we are to follow the usages of nations, or even of England in particular, it is *not a legislative province to make or unmake a treaty.* A power granted to Congress to legislate on a subject does not, directly or indirectly, by express words or by implication, negative the power of the executive department of the government to make a treaty on the same subject. If, on such subject, or any other, the legislation comes in conflict with the Constitution, it is, by all opinions, void; and, according to the opinion expressed in my text and this note, it is likewise void if it comes in conflict with a treaty. Besides, treaties everywhere spring from international law, and legislation from local; and in no well regulated government are local laws permitted to override international law. Our Constitution was made by men who understood both sorts of law, and they must have contemplated that its provisions would operate together in the way thus pointed out. In other words, according to the nature of this sort of thing, and according to the necessary working together of the treaty-making and legislative powers, under our Constitution, and in the family of nations, the result must be and is, that a treaty between our government and a foreign power, when limited to what it is competent for treaties to do under the law of nations, cannot be made, ordered, directed, controlled, or annulled by any mere legislative act. Under various circumstances Congress may refuse to furnish the means to carry it out; yet the effect of such refusal is, not to abrogate the

to the national Constitution, but to treaties. Yet, by the express words of the Constitution of the United States, they are,

treaty, but to break the faith of the nation. Whether it was wise to make our Constitution so, is a question often discussed with the one as to how it is in fact; but I do not deem such a question to be within the province of a mere legal treatise. The duty of the author of such a treatise is ended when he has pointed out to his readers what the law actually is. On looking over what I have thus written, upon a subject of some doubt, not falling within the scope of this work to discuss in full, I am apprehensive that the view which I present as the true one will be misunderstood unless I add a further explanation. For example, in the above cited case of The Clinton Bridge, Miller, J., one of the judges of the Supreme Court of the United States, observed: "Courts possess no power to declare a statute passed by Congress and approved by the President void, because it may violate" the obligation of a treaty. (p. 156.) And the reason assigned was, that questions of this sort are international ones, to be decided, therefore, by the political department of our government — which makes war and declares peace — and not by the courts. Now, it perfectly accords with the foregoing views to hold this to be so to a certain extent. I cannot better illustrate my meaning than by referring to two clauses to be found in the same section of our Constitution; namely, art. 1, § 8. It is there provided that Congress shall have power, among other things, "to establish an uniform rule of naturalization." Now, here is a clause giving Congress legislative jurisdiction over the whole subject. Under some circumstances, however, this subject is also within the jurisdiction of the treaty-making department of the government. Suppose, therefore, new territory is added to the Union by treaty with a foreign government, and the treaty declares that the inhabitants of the territory shall be citizens of the United States; in this case, it would but illustrate the foregoing views to hold, that no mere legislative act, whether before or after the treaty, could override the provisions of the treaty and make such inhabitants aliens. If such a thing were to be attempted by Congress, the courts, in reason, ought to hold the statute void as being in conflict with the treaty. But another clause of the same article provides, that Congress may "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." Now, if Congress declares war, the courts must take cognizance of the act, and of its consequences. One of these consequences may be to abrogate a treaty. Thus far, it seems to me, the doctrine is plain. And there are other acts which Congress may do, within this clause, short of actually declaring war, the effect of which, on a treaty, will be the same. So, also, it may be true, certainly it is a doctrine to which I for one should most readily assent, that if for any or no cause the political department of the government holds an executory treaty to be abrogated or otherwise void, the judicial department must follow it in this. Indeed, it is the sanction of the political department of the government to a treaty which enables the judicial department to take cognizance of it in the first place. And thus we draw the limits of the doctrine. I repeat, then, that the collateral effect of an act of Congress may be, in special circumstances, to abrogate a treaty. So, if what is termed the political department of the government (represented, if I understand the meaning of the phrase, either by the President alone, or by the President and one or both of the two houses of Congress, as the particular case may require) disowns a treaty, in some circumstances it cannot be recognized by the courts. But this does not change the general doctrine, that, among the various recognized written laws, treaties have the precedence over acts of Congress.

within their sphere, supreme over the State constitutions, as well as the statutes of the States.[1] Over some of the subjects which fall within the range of national legislation, the States have no jurisdiction; and, the authority of the nation being exclusive, any State legislation upon these subjects is void, as conflicting with the Constitution of the United States, whether Congress has legislated on them or not. Over other subjects the national and State legislatures have a sort of concurrent jurisdiction, and a State law is valid until it comes in conflict with an act of Congress. This is not the place to discuss this question in full, but it has several branches. Within one branch fall, for example, bankrupt acts. By the Constitution of the United States, Congress is authorized to provide "uniform laws on the subject of bankruptcies;"[2] and the result is, that, while Congress has no laws on the subject, enactments by the States are valid, as though the jurisdiction were wholly State; but, when Congress acts on the subject, its legislation wholly supersedes the legislation of the States.[3]

§ 16. **State Constitutions.** — 4. It is familiar doctrine that the constitution of a State is of superior authority to an act of the State legislature. But the foregoing sections have likewise disclosed to us, that, on the other hand, within the sphere of the Constitution, of treaties, and of the statutory laws of the United States, it is inferior to them, and must give way to them, the same as does a statute of the State.

§ 17. **State Statutes.** — 5. The status of the statutes of the States appears also in the foregoing discussions. They are, in the manner already explained, inferior both to the United States laws and to the constitution of the State. Yet, in the practical workings of legal affairs, they are really in most things superior; because most things are outside the jurisdiction of those laws, which, in a case of conflict, are superior to them.

§ 18. **By-laws — City Ordinances.** — 6. The by-laws which principally concern us in the present work are those of municipal corporations. Such as are made for the government of cities

[1] Ante, § 13.
[2] Const. U. S. art. 1, § 8.
[3] Sturges *v.* Crowninshield, 4 Wheat. 193; United States *v.* New Bedford Bridge, 1 Woodb. & M. 401.

are, in some localities, termed city ordinances; and are even popularly so termed where the more appropriate legal word is by-law. Municipal corporations, as cities and towns, are created, in England, either by act of Parliament or by the king's charter; usually by the latter.[1] In this country they exist only by statute. The legislature can amend or repeal an act of incorporation at pleasure;[2] or can force such act on the corporators against their will.[3] Incident to these corporations, and proceeding from the law, where the act of incorporation is silent, is the power to make by-laws.[4]

§ 19. **Extent of Power to make By-laws.** — It would not be possible to state, in terms which should be of practical avail, what, in the United States, is the precise power of making by-laws, where an act of incorporation is silent. Neither is it of practical importance that this should be done; since the limit is usually drawn in the act of incorporation itself, or in general statutes. An English writer has said, "that neither a power conferred by charter [to make by-laws generally], nor 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."[5] But, of course, this observation can extend in meaning only to cases of charters or prescriptions in general terms. In England there are prescriptive corporations, having local customs,[6] among which are rights founded on ancient and long usage, to establish by-laws not within the general authority; these, however, do not exist in the United States.[7] "The term by-laws," said a learned American judge, "has a peculiar and limited signification; being used to designate the orders and regulations which a corporation, as one of its legal incidents, has power to make, and which is usually exercised to regulate its own actions and

[1] Willcock Corp. 25.

[2] Sloan *v.* The State, 8 Blackf. 361; The State *v.* Branin, 3 Zab. 484.

[3] Paterson *v.* Society, 4 Zab. 385.

[4] Willcock Corp. 99, 100; Rex *v.* Westwood, 2 Dow & Cl. 21, 4 Bligh, N. S. 213, 7 Bing. 1, 4 B. & C. 781; Commonwealth *v.* Stodder, 2 Cush. 562, 569; Angell & Ames Corp. § 110, 325. Of course, a statute authorizing a municipal corporation to establish by-laws is not necessarily unconstitutional. The State *v.* Noyes, 10 Fost. N. H. 279; The State *v.* Simonds, 3 Misso. 414.

[5] Willcock Corp. 159.

[6] Willcock Corp. 74.

[7] Commonwealth *v.* Stodder, 2 Cush. 562, 569.

concerns, and the rights and duties of its members among themselves. This has been somewhat extended in the case of municipal and other *quasi* corporations; but a broad distinction has always been made between the authority of a corporation to make by-laws and the general power of making laws."[1] Said a learned judge in another case: "The mere creation of a corporation carries with it the power to make all by-laws, which are reasonable, and not contrary to the general laws of the State."[2]

§ 20. **Continued.** — It is obvious that, where a statute — as, for example, a city charter — authorizes the making of by-laws, the question whether or not a particular by-law is within the authority, must depend in a great measure upon the words of the statute. And, as these statutes vary in their terms, it will not be well to examine the question very minutely in the present connection. In a sort of general way, it may be said that such by-laws are allowed to cover questions of internal police, but not to extend much further. Of the permissible sort, is a by-law forbidding any unlicensed person from removing house dirt and offal from the city;[3] or regulating the speed with which vehicles may be driven through the streets of the city;[4] or providing for a city market, and forbidding persons to occupy stands in certain streets brought within its limits, there to vend such things as are sold in the market.[5] By-laws of cities adjoining navigable waters may make reasonable regulations concerning quarantine and wharves within city limits.[6] But a by-law of a town, prohibiting all persons, except its own inhabitants, from taking shell-fish in a navigable river within the limits of such town, is void, being in contravention of a common right.[7] Yet, on the other hand, if the inhabitants of a town have the exclusive right of fishing in waters within its boundaries, such a by-law is within its power.[8] A city corporation cannot make a by-law which shall permit one person to

[1] Shaw, C. J. in Commonwealth *v.* Turner, 1 Cush. 493.

[2] Ormond, J. in Mobile *v.* Yuille, 3 Ala. 137, 143.

[3] Vandine, petitioner, 6 Pick. 187.

[4] Commonwealth *v.* Worcester, 3 Pick. 462.

[5] Nightingale, petitioner, 11 Pick. 168; Commonwealth *v.* Rice, 9 Met. 253; Buffalo *v.* Webster, 10 Wend. 99.

[6] Dubois *v.* Augusta, Dudley, Ga. 30; St. Louis *v.* McCoy, 18 Misso. 238.

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

[8] Rogers *v.* Jones, 1 Wend. 237.

carry on a dangerous business, and prohibit another person, who has an equal right, from carrying on the same business. So it has been adjudged;[1] and in a sort of general way the doctrine is undoubtedly sound.

§ 21. **Continued — Bawdy-House — Penalties.** — If a city charter authorizes the corporation to make by-laws relating to nuisances, it has been held that an ordinance is within the authority which subjects the owner of any house, used, with his knowledge, as a house of ill-fame, or to his knowledge reputed to be such, to the penalty of fifty dollars.[2] It is but the common case that the by-law imposes a penalty. A law, with no penalty or burden of any sort to be borne for its violation, is no law. Law and punishment must go together, and neither can exist without the other.

§ 22. **Continued.** — By-laws must be consistent with the act or charter of incorporation, not conflicting with it either in letter or manifest intention.[3] They must also be harmonious with the general statutory and common law of the country,[4] which they cannot, without express authority in the act of incorporation, supersede;[5] reasonable and bene-

[1] Hudson *v.* Thorne, 7 Paige, 261. According to this case, also, the charter of the city of Hudson does not empower the city corporation to restrict the erection of wooden buildings within the city, or to limit the size of buildings which any person may erect upon his own land; and a city ordinance prohibiting the erection of a hay-press within certain limits is void. But it is known that generally, within our cities, such things may be more or less regulated by by-laws.

[2] McAlister *v.* Clark, 33 Conn. 91.

[3] Hoblyn *v.* Rex, 2 Bro. P. C. 329; Rex *v.* Cutbush, 4 Bur. 2204; Rex *v.* Cambridge, 2 Selw. N. P. 11th ed. 1176; Reg. *v.* Darlington School, 6 Q. B. 682; Commonwealth *v.* Fahey, 5 Cush. 408; Rochester *v.* Collins, 12 Barb. 559; Trustees of Clintonville *v.* Keeting, 4 Denio, 341; Indianapolis *v.* Fairchild, 1 Ind. 315, Smith Ind. 122; The State *v.* Beaufort, 2 Rich. 496; The State *v.* Hay, 29 Maine, 457; Morris *v.* Rome, 10 Ga. 532; Cincinnati *v.* Gwynne, 10 Ohio, 192; Cincinnati *v.* Buckingham, 10 Ohio, 257; Angell & Ames Corp. § 343–346.

[4] Robinson *v.* Mayor, 1 Humph. 156; Chapman *v.* Miller, 2 Speers, 769; The State *v.* Savannah, T. U. P. Charl. 235; Welch *v.* Stowell, 2 Doug. Mich. 382; Angell & Ames Corp. § 332–334; Cincinnati *v.* Rice, 15 Ohio, 225; Louisville *v.* Roupe, 6 B. Monr. 591; Markle *v.* Akron, 14 Ohio, 586; Reg. *v.* Edmonds, 4 Ellis & B. 993, 24 Law J. N. S. M. C. 124, 1 Jur. N. S. 727, 30 Eng. L. & Eq. 379; Thompson *v.* Mt. Vernon, 11 Ohio State, 688; Seneca County Bank *v.* Lamb, 26 Barb. 595. But a by-law may sometimes punish the same offence which is indictable under a general law of the State. The State *v.* Plunkett, 3 Harrison, 5. See post, § 23.

[5] March *v.* Commonwealth, 12 B. Monr. 25; Commonwealth *v.* Turner, 1 Cush. 493. And see Aberdeen *v.*

ficial;[1] not retrospective;[2] not creating forfeitures;[3] not restraining trade,[4] though a by-law merely in regulation of trade is good.[5] Persons not members of a corporation are not properly amenable to its by-laws. But strangers, while within the limits of a city or town, are as much bound by these local regulations as the citizens.[6]

§ 23. **By-law on Same Subject with Statute — Second Jeopardy.** — We have thus seen that a by-law must not be repugnant to a statute. But when it is so, and therefore void, may under some circumstances be a question of difficulty. It seems, that a by-law imposing a penalty for a particular act is not void simply because the act is made penal also under a general law of the State.[7] But, if this is so, what is the consequence as to

Saunderson, 8 Sm. & M. 663; Cincinnati *v.* Bryson, 15 Ohio, 625; Angell & Ames Corp. § 333.

[1] Scriveners' Company *v.* Brooking, 2 Gale & D. 419, 6 Jur. 835; Rex *v.* York, 3 B. & Ad. 770; Elwood *v.* Bullock, 6 Q. B. 383; Commonwealth *v.* Robertson, 5 Cush. 438; Commonwealth *v.* Worcester, 3 Pick. 462, 473; Kennebec and Portland Railroad *v.* Kendall, 31 Maine, 470; Williams *v.* Augusta, 4 Ga. 509; Commonwealth *v.* Pittsburgh, 2 Harris, Pa. 177; Mayor and Alderman *v.* Maberry, 6 Humph. 368; Boston *v.* Shaw, 1 Met. 130; Austin *v.* Murray, 16 Pick. 121, 125; Angell & Ames Corp. § 347–351.

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

[3] Kirk *v.* Nowill, 1 T. R. 118; Donovan *v.* Vicksburg, 29 Missis. 247; Angell & Ames Corp. § 340.

[4] Hesketh *v.* Braddock, 3 Bur. 1847; Harrison *v.* Godman, 1 Bur. 12; Clark *v.* Le Cren, 9 B. & C. 52.

[5] Pierce *v.* Bartrum, Cowp. 269; Commonwealth *v.* Worcester, 3 Pick. 462, 473; Vandine, petitioner, 6 Pick. 187; City Council *v.* Athrens, 4 Strob. 241; Morris *v.* Rome, 10 Ga. 532; Angell & Ames Corp. § 335.

[6] Pierce *v.* Bartrum, Cowp. 269; 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 McMullan, 323. Commonwealth *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, Commonwealth *v.* Stodder, 2 Cush. 562, and Commonwealth *v.* Chase, 6 Cush. 248. Some by-laws were made, pursuant to a statute, "to prevent negroes from hiring their time;" and the court observed: "These laws have no obligatory force beyond the boundary of the corporation; and, if the owner of a slave, not residing in Nashville, permit his slave to go at large in Nashville, the only method by which the corporation could protect itself would be to take hold of the slave, and indemnify itself either by his labor for its use, as the State law prescribes, or by its retaining him in custody until the master shall choose to discharge him by the payment of the fine imposed, as the ordinance in this case prescribes." Hoggatt *v.* Bigley, 6 Humph. 236. See also, on this point, Horney *v.* Sloan, supra. The subject of by-laws is fully and ably discussed in the excellent work of Angell & Ames on Corporations, to which the reader is referred.

[7] Rogers *v.* Jones, 1 Wend. 237.

the effect of the by-law on the State law, and the liability of offenders under both? It was thought, in Maryland, that the imposition of a fine, by the mayor of a city, in the exercise of his police powers, will not relieve the offender from liability to the State.[1] And in Arkansas the provision of the statute that the city authorities of Little Rock shall have the exclusive power to license the retail sale of spirituous liquors within the city, is held not to exempt the inhabitants from the operation of the general law prohibiting the desecration of the Sabbath.[2] In undoubted harmony with this Arkansas decision it has been held in Missouri, that, when a properly constituted court, acting under the authority of an ordinance of a municipal corporation, punishes a person for a violation of the ordinance, he cannot be again punished for the same offence under the general laws of the State.[3] Still, on the whole, there seems to be some confusion on the subject. To the writer, the true doctrine appears to stand thus: if the statute so authorizes, it is not apparent why a city corporation may not impose a special penalty for an act done against it, while the State imposes also a penalty for the same act done against the State. It is so where an act is in violation of the laws both of the United States and of a State, — a doctrine which may now be deemed to be established, though heretofore there has been some doubt upon it.[4] But unless the statute leading to this result was clear, the act on general principles would be punishable only once, — either by the State, or by the city corporation. Now, if the effect of the by-law is to prevent the act from being punished under a State statute, so as practically to abrogate the statute, plainly, it seems to the writer, such by-law conflicts with the statute, and it should be adjudged to be void.

§ 24. **By-law void as contrary to a Statute, continued.** — A statute of Maine having the provision, that, if an officer "shall detain any offender, without warrant, longer than such time as

[1] Shafer *v.* Mumma, 17 Md. 331.

[2] Lewis *v.* The State, 21 Ark. 209.

[3] The State *v.* Thornton, 37 Misso. 360. A provision of the charter of Bellville of 1859, giving the city power to provide a punishment for gaming, does not repeal the general law in regard to gaming, and a person may be convicted under the latter for gaming in Bellville, although that city has passed an ordinance imposing a penalty for the offence. Berry *v.* People, 36 Ill. 423.

[4] Crim. Law, 4th ed. I. § 145, 146, 835–837; II. § 271–274.

is necessary to procure a legal warrant," he shall, &c., — the courts hold a town by-law, giving the officer power to detain forty-eight hours without warrant, repugnant to the statute and void.[1] And in Georgia it was laid down by the majority of the court, that, under a charter empowering the officers of a city "to make, ordain, and establish such by-laws, rules, regulations, and ordinances as shall appear to them requisite and necessary for the security, welfare, and convenience of the said city, and for preserving health, peace, and good government therein," it is not competent for a by-law to be made, covering what is already fully provided against by State law.[2]

§ 25. **Construction of the Power to make By-laws.** — A statute authorizing the making of by-laws will be construed in harmony with the general doctrines relating to things of the sort. Thus, in Alabama, a city corporation was authorized by statute "to license bakers, and regulate the weight and price of bread, and prohibit the baking for sale except by those licensed." And it was held that the corporation might, pursuant to this enactment, make a by-law with a reasonable penalty. But, to be reasonable, the penalty must be certain. Therefore where the penalty was, that the offender should pay a fine not exceeding fifty dollars, to be recovered before the mayor, the by-law was adjudged void.[3] Now, let us change the position of things a little, and suppose that such a statute and such a by-law

[1] Burke *v.* Bell, 36 Maine, 317.

[2] Savannah *v.* Hussey, 21 Ga. 80. It was admitted, however, that there are authorities the other way. And see Adams *v.* Albany, 29 Ga. 56.

[3] Mobile *v.* Yuille, 3 Ala. 137. Ormond, J. observed: "What would be a reasonable penalty cannot, from the nature of things, admit of a general rule applicable to all cases, but must in every case be determined by the nature of the offence 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 offence. 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 twenty dollars 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.

existed in a State where all penalties for crimes were provided for in the same way; namely, the statute fixes a maximum punishment, and the judge in pronouncing sentence has power to make it less, down even to the infliction of a fine of one cent. Suppose, also, that the judge, to execute this by-law, should be appointed, commissioned, and his salary regulated by the authorities of the State, and he should sit free of all control by the corporation. It is plain that this collection of facts would present a different case from the one thus decided by the Alabama court; and we need not speculate upon what the decision should be. Plainly, on the other hand, according to doctrines prevailing everywhere, a legislative authority to impose forfeitures does not give to the corporation power to declare the forfeiture without notice to the party.[1]

§ 26. **Holding By-law void.** — Whenever a corporation undertakes to establish an unauthorized by-law, the courts hold it to be void.[2] But a by-law may be good in part, and void as to the rest.[3] We have seen,[4] 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.[5]

CHAPTER III.

WHEN AND HOW FAR A STATUTE TAKES EFFECT.

27. Introduction.
28–32. Being no Obstruction, when takes Effect.
33–37. Obstruction of Constitutional Law.
38–41. Other Obstructions.

§ 27. **Introduction.** — The subject of this chapter divides itself as follows: I. When, supposing no Impediment to exist,

[1] Rosebaugh *v.* Saffin, 10 Ohio, 31. And see Columbus *v.* Arnold, 30 Ga. 517; Lesterjelle *v.* Columbus, 30 Ga. 936.

[2] Commonwealth *v.* Robertson, 5 Cush. 438; Austin *v.* Murray, 16 Pick. 121, 127.

[3] Rogers *v.* Jones, 1 Wend. 237, 260.

[4] Ante, § 22.

[5] Commonwealth *v.* Worcester, 3 Pick. 462, 473.

a Statute takes Effect; II. Obstructions of Constitutional Law; III. Other Obstructions.

I. *When, supposing no Impediment to exist, a Statute takes Effect.*

§ 28. **When, as respects Day of Enactment.** — In England, anciently, the rolls of Parliament were made up by the judges after its adjournment; no specific dates were attached to the several acts, but, as Dwarris says, they were "strung together" into one statute, with usually only mention of the time and place of the meeting of Parliament, and the occasion of its meeting.[1] They were all, therefore, holden to take effect from the first day of the session.[2] There are, in our States, some decisions following the letter of this rule of the common law;[3] but, in reason, the rule in its true spirit would seem to be, that the statute takes effect from the earliest period at which a date can by the record be determined, but not before. If the date or even the exact moment of the passage of an act appears in the record, it would seem to be within the rule thus furnished by the English law that this date or moment of time shall be judicially recognized as that at which the statute begins to operate. Now, our American statutes generally bear

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

[2] The Ann, 1 Gallis. 62.

[3] Thus, in an early North Carolina case, it was held, by the majority of the court, that the acts of Assembly of this State take effect from the first day of the session. Smith *v.* Smith, Mart. N. C. 26. And the courts have since carried this doctrine so far as to hold, that, if by the terms of an act of the General Assembly it is to be in force from and after its passage, it still takes effect from the first day of the session. Hamlet *v.* Taylor, 5 Jones, N. C. 36. And in Tennessee, "it is," said Turley, J. "provided by the eighteenth section of the 11th 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 bearing date, 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.* The State, 1 Meigs, 237, 255.

an exact date as to day, but are silent as to the hour of their approval; and the rule is, that no divisions of a day are allowable, and they go into operation from the first moment of the day on which they receive the executive sanction.[1]

§ 29. **Fractions of a Day — Ex post facto Laws.** — The doctrine of the last section has thus been deduced from reason and authority without a particular inquiry into a sort of general rule of the law, which is, that no fractions of a day are in legal things to be made.[2] Still, where the question of priority between different acts done is involved, the courts inquire which was the first done.[3] Indeed it has been laid down in general terms, that the rule is not to be applied to cases in which it becomes essential for the purposes of justice to ascertain the exact hour or minute when a particular act was performed. Thus, for further example, 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 to him, and two hours later in the same day an execution was levied on the property conveyed by the deed, it was held that the hour at which the deed was delivered to the register for registration might be proved by parol evidence, so as to give it priority over the levy under the execution.[4] And there are other illustrations of the like doctrine. Now, it is plain in reason, that, if a man does a thing at five o'clock in the morning of a particular day, and it is then lawful, it cannot be punished under a statute passed at five o'clock in the evening of the same day, without violating the constitutional provision forbidding *ex post facto* laws. 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

[1] Matter of Welman, 20 Vt. 653; United States *v.* Williams, 1 Paine, 261; Matter of Howes, 6 Law Reporter, 297; 1 Kent Com. 454, 455; Matthews *v.* Zane, 7 Wheat. 164, 211; Heard *v.* Heard, 8 Ga. 380; The State *v.* Click, 2 Ala. 26; Smets *v.* Wetherbee, R. M. Charl. 537; Rathbone *v.* Bradford, 1 Ala. 312; Goodsell *v.* Boynton, 1 Scam. 555; Temple *v.* Hays, Morris, 9; Taylor *v.* The State, 31 Ala. 383; The State *v.* Bank of S. Car. 12 Rich. 609. Contra, Matter of Richardson, 6 Law Reporter, 392. 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.

[2] Portland Bank *v.* Maine Bank, 11 Mass. 204; Reg. *v.* Edwards, 9 Exch. 32, 23 Law J. N. S. Exch. 42.

[3] Lang *v.* Phillips, 27 Ala. 311.

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

not be applied to the transaction of the evening before; while still it is not easy to see how the one case could differ from the other in legal principle. In accordance with this view, it was held by Story, J. that, even in a civil case, a statute of the United States shall be deemed to have taken effect at the moment when it was approved by the President, and it is to have no retrospective operation. The doctrine that there can be no divisions of a day he considered to be a legal fiction, to be followed only when it will promote right and justice.[1] Consequently, 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," this learned judge held that the proceeding could go on to its conclusion.[2] True, it has been adjudged, in a general way, that the time when an act which is approved and signed by the President takes effect, must appear, and can properly appear only, from the act itself;[3] but, in reason, a rule of this sort, however convenient in practice, cannot operate to overturn a principle of natural justice, and especially it cannot control a provision in the Constitution of the United States. In accordance with this view it has been held by the Supreme Court of the United States, that a court of law is not precluded from informing itself of the real date when the approval of an act was given by the President. Therefore, where his approval was simply dated "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.[4]

[1] And see Johnson *v.* Pennington, 3 Green, N. J. 188.

[2] Matter of Richardson, 2 Story, 571. And see, to the like effect, 3 Opin. Att. Gen. 82.

[3] Matter of Welman, 20 Vt. 653. And see United States *v.* Williams, 1 Paine, 261. In People *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 United States *v.* Arnold, 1 Gallis. 348; Lang *v.* Phillips, 27 Ala. 311; Kimm *v.* Osgood, 19 Misso. 60.

[4] Gardner *v.* The Collector, 6 Wal. 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.* The State, 11 Ind. 424; Southwark Bank *v.* Commonwealth, 2 Casey, 446; post, § 37. If we carefully examine the above case of Gardner *v.* The Collector, and the reasoning of Miller, J. who delivered the opinion of the court upon it, we shall

§ 30. **Where Existence of Statute could not be known.** — It is impossible that the existence of a statute should be known everywhere the moment it becomes a law; in fact, it requires a perceptible period for the news of its enactment to travel anywhere. Yet there is no practical method by which the courts can, in ordinary cases, determine whether the law might have been known or might not. If the thing done were *malum in se*, a defendant could not well complain though he were punished for doing what he knew to be wrong, while yet he did not know of the existence of the law. And the general doctrine of the courts is, that all persons are conclusively presumed to know the law from the moment of its coming into effect, even though, from remoteness or other cause, it was plainly impossible they should have known it in fact. This subject is considered, with the authorities, in the work on the Criminal Law.[1]

§ 31. **Fixing Time by Statute — Consequences.** — It is evident, however, that these rules sometimes work practical hardships; therefore, by special provisions of law in some of the States, statutes do not take effect until a certain time after their passage,[2] or until their publication.[3] Of course the act itself

find it substantially to sustain the following propositions of reason; 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 take also judicial notice of the date of their enactment. 2. In ascertaining, therefore, the date, the judges should look at whatever appears to be adapted to inform their own minds. The date attached to the President's signature, if full, will ordinarily be sufficient. If it is not full, resort may be had to the journals, the time of the publication of the statute, and other sources, to fill the blank. If the ends of justice require the precise moment to be ascertained, this may be done if in any way the minds of the judges can be reasonably satisfied. 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, Pangborn *v.* Young, 3 Vroom, 29.

[1] Crim. Law, 4th ed. I. § 377.

[2] Cooper *v.* Curtis, 30 Maine, 488; Chapman *v.* The State, 2 Head, 36; West Feliciana Railroad *v.* Johnson, 5 How. Missis. 273.

[3] Tredway *v.* Gapin, 1 Blackf. 299; The State *v.* Donehey, 8 Iowa, 396; Calkin *v.* The State, 1 Greene, Iowa, 68; The State *v.* Stevenson, 2 Pike, 260; Smith *v.* Hoyt, 14 Wis. 252.

may, as it often does, fix a time different from the general rule, when no constitutional inhibition stands in the way. But when the intent is to fix a different time, the words showing it must be direct and unequivocal.[1] A statute never binds future legislation, however it may attempt to do so;[2] therefore, if the statutory laws provide that statutes shall not take effect until a specified number of days after their publication or enactment, then, if an act is passed itself declaring that it shall take effect immediately from the time of its publication, this last expression of the legislative will prevails, and the act goes into operation accordingly.[3] If a statute is to become law at a future day, it is a nullity in the mean time, not even operating by way of notice to persons to be affected by it.[4] If, for further example, such a statute contains a clause repealing former statutes on the same subject, the repealing clause has no operation until the time arrives for the statute to become law.[5] Of course, one cannot be punished as for an offence committed against a statute between the time of its passage and its going into operation.[6]

§ 32. **Treaties.** — A treaty, executed by plenipotentiaries, takes effect from the time of the signing of it, unless itself otherwise provides; and its ratification relates back to this time. And the rule is the same, though the treaty concerns the cession of territory. "It is true," said Wayne, J. "that, in a treaty for the cession of territory, 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*."[7]

[1] Wheeler *v.* Chubbuck, 16 Ill. 361.

[2] The State *v.* Oskins, 28 Ind. 364.

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

[4] Price *v.* Hopkins, 13 Mich. 318.

[5] McArthur *v.* Franklin, 16 Ohio State, 193.

[6] The State *v.* Bond, 4 Jones, N. C. 9.

[7] Davis *v.* Concordia, 9 How. U. S. 280, 289; United States *v.* Reynes, 9 How. U. S. 127, 148.

II. *Obstructions of Constitutional Law.*

§ 33. **General Doctrine.** — It is the theory of our State and national governments, that sovereignty originates in the people, from whom alone our legislative bodies derive their authority. So the people, instead of giving to their lawmakers complete legislative power, have established for them, in the written constitutions of the several States and of the United States, limits beyond which they cannot go. These constitutions are the supreme law; and all legislative acts conflicting with any of their provisions are nullities, having no effect, direct or collateral, for any purpose whatever.[1] Not even, like an erroneous judgment rendered by a competent tribunal on a valid law,[2] will they protect an officer in performing any of their requirements, or obeying process founded upon them.[3] In England, no superior law of the realm exists to override an act of Parliament.[4] What is called constitutional law there is declared by the Parliament itself.

§ 34. **Unconstitutional in Part.** — A statute, however, may be in conflict with the constitution in part, and the rest of it be free from objection. The general rule in such a case is, that the courts will sustain the sound part, and reject the unsound.[5] Yet this rule must, in the nature of things, have its exceptions; for, in many circumstances, if the unconstitutional provision were struck out, the residue would be plainly something very different from what the legislature intended. Thus, therefore, when the several sections of a statute constitute one system,

[1] 1 Kent Com. 448–455; Marbury *v.* Madison, 1 Cranch, 137; The State *v.* Fleming, 7 Humph. 152; Bliss *v.* Commonwealth, 2 Litt. 90; Bank of St. Mary's *v.* The State, 12 Ga. 475; Haley *v.* Clark, 26 Ala. 439; Strong *v.* Daniel, 5 Ind. 348; Railroad *v.* Clinton, 1 Ohio State, 77.

[2] The State *v.* Weed, 1 Fost. N. H. 262; Rex *v.* Dyer, 6 Mod. 41.

[3] Astrom *v.* Hammond, 3 McLean, 107; Fisher *v.* McGirr, 1 Gray, 1.

[4] Dwar. Stat. 2d ed. 523.

[5] Bank of Hamilton *v.* Dudley, 2 Pet. 492, 526; Clark *v.* Ellis, 2 Blackf. 8; Fisher *v.* McGirr, 1 Gray, 1; Steele *v.* The State, 5 Blackf. 110; McCulloch *v.* The State, 11 Ind. 424; The State *v.* Allen, 2 McCord, 55; Yarmouth *v.* North Yarmouth, 34 Maine, 411. "A by-law 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." Lord Kenyon, C. J. in Rex *v.* Faversham, 8 T. R. 352, 356. See also Commonwealth *v.* Dow, 10 Met. 382; Austin *v.* Murray, 16 Pick. 121, 126; Fitzacherly *v.* Wiltshire, 11 Mod. 352, 354, 1 Stra. 462, 469; Lee *v.* Wallis, 1 Keny. 292, 295; Cincinnati *v.* Rice, 15 Ohio, 225; The State *v.* Snow, 3 R. I. 64; The State *v.* Copeland, 3 R. I. 33.

and each section is dependent on the rest, if one falls, the rest should be permitted to go with it.[1] And the doctrine has been in general terms laid down, and it seems to be just, that, if the parts are so mutually connected and dependent as to make it evident the legislature intended them to constitute one whole, and so, if all could not be carried into effect, none of them would have received the legislative sanction, the case comes within the rule thus stated.[2] But if the provisions are entirely independent, then it is plain that the failure of one as unconstitutional should not affect the others.[3] And there may doubtless be cases in which the provisions are not thus entirely independent, when still they will fall within the same rule.[4] An act embodying affirmative provisions, together with a clause expressly repealing other acts, may be pronounced unconstitutional as to the main part, while yet the repealing clause will be permitted to stand.[5] In principle it may be doubted whether this should be usually so; because, if, for example, a statute makes new provisions upon a subject legislated on before, and closes by repealing the previous acts, it may well be inferred that the legislature would not have repealed the old law except to give place to the new. It was once, however, even held, that, where the repealing clause was, "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed," the clause did repeal the provisions meant, though the rest of the statute was unconstitutional.[6] But not only the reason just suggested shows that this doctrine cannot be sound in principle; it is also unsound, and has been so held, 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."[7]

[1] Campau *v.* Detroit, 14 Mich. 276; Reed *v.* Omnibus Railroad, 33 Cal. 212; The State *v.* Perry, 5 Ohio State, 497, 506.

[2] Warren *v.* Charlestown, 2 Gray, 84; Commonwealth *v.* Clapp, 5 Gray, 97; Commonwealth *v.* Hitchings, 5 Gray, 482; Commonwealth *v.* Pomeroy, 5 Gray, 486, note.

[3] Lathrop *v.* Mills, 19 Cal. 513; Maize *v.* The State, 4 Ind. 342; Santo *v.* The State, 2 Iowa, 165; Mobile and Ohio Railroad *v.* The State, 29 Ala. 573.

[4] And see People *v.* Hill, 7 Cal. 97.

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

[6] Meshmeier *v.* The State, 11 Ind. 482.

[7] Tims *v.* The State, 26 Ala. 165; People *v.* Tiphaine, 3 Parker C. C. 241; The State *v.* La Crosse, 11 Wis. 50; Shepardson *v.* Milwaukee, &c., Railroad, 6 Wis. 605.

§ 35. **Nature of the Obstacle of Unconstitutionality.** — Some confusion is manifest in the popular mind, and is not quite absent from judicial decision, relating to the nature of the power of the courts to pronounce acts of the legislature unconstitutional. The courts do not do this by virtue of having been constituted special guardians of the constitution, or having been invested with a particular jurisdiction under this head. It is simply because, when a dispute arises, the question is litigated before the courts; and, if either party relies upon a statute, the court cannot decide the question without passing on the constitutionality of the statute. But clearly every other branch of the government is just as much bound to interpret for itself the constitution as the judicial.[1] Indeed there doubtless are cases in which the judicial department would feel obliged to place reliance upon, and give effect to, an interpretation by another branch of the government.[2] And the only reason why our judges are deemed, in the high sense, the expounders of the constitution, is that, in most cases of litigated right, there is no appeal from their decision. There are many constitutional questions of such a nature that they can never come under judicial review.

§ 36. **Different Departments of Government — Submitting Statutes to the People.** — The division of power in our State governments is such, that ordinarily what belongs to one department cannot be performed by another.[3] And even the people cannot exercise an authority which they have given to another body of persons, until they withdraw the authority. On this latter ground, the question has arisen, whether the legislature can

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

[2] We are perhaps wanting in authority on this precise point; but, in United States *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.

[3] See 1 Bishop Mar. & Div. 4th ed. § 680 et seq.

establish an act to take effect on its being approved by the people. A municipal corporation may be created, or any other like thing may be done, in this way; but, when the statute is one of ordinary legislation, difficulties arise quite embarrassing. The question has been variously adjudicated; and we cannot properly deem that any particular opinions on the subject are American law, yet probably a majority of the cases in number would, on a count, be found to be against the validity of such statutes.[1] In Rhode Island, where this sort of legislation is deemed to be unconstitutional, the courts have still sustained an act with the provision, that the people shall vote on its repeal, and, if a majority are in favor of such 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] In a Michigan act, provision was made, as observed in the report, "for submitting the act to the people for its approval or disapproval"; and it declared "that, if upon a canvass of the votes to be cast thereon, it should appear that a majority had voted for its adoption, it should become a law of the State from and after the first day of December, 1853; but, if a majority should be found to have voted against its adoption, it should take effect and become a law from and after the first day of March, 1870"; and the court was equally divided upon the question whether this was a valid enactment or not, though all were of opinion that the power of making general laws cannot be cast by the legislature on the people.[3] At the same time it is not disputed that an act may be made

[1] Barto *v.* Himrod, 4 Seld. 483; Thorne *v.* Cramer, 15 Barb. 112; The State *v.* Parker, 26 Vt. 357; People *v.* Collins, 3 Mich. 343; The State *v.* Copeland, 3 R. I. 33; Parker *v.* Commonwealth, 6 Barr, 507; The State *v.* Scott, 17 Misso. 521; The State *v.* Field, 17 Misso. 529; Louisville *v.* Baird, 15 B. Monr. 246; Paterson *v.* Society, 4 Zab. 385; Maize *v.* The State, 4 Ind. 342; Meshmeier *v.* The State, 11 Ind. 482; Santo *v.* The State, 2 Iowa, 165; The State *v.* Swisher, 17 Texas, 441; Grant *v.* Couster, 24 Barb. 232; Clarke *v.* Rochester, 24 Barb. 446; People *v.* Stout, 23 Barb. 349; Louisville and Nashville Railroad *v.* Davidson, 1 Sneed, Tenn. 637; Morford *v.* Unger, 8 Iowa, 82; Geebrick *v.* The State, 5 Iowa, 491; Bank of Rome *v.* Rome, 18 N. Y. 38; Peck *v.* Weddell, 17 Ohio State, 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; People *v.* Salomon, 46 Ill. 415.

[2] The State *v.* Copeland, 3 R. I. 33. And see Williams *v.* Cammack, 27 Missis. 209.

[3] People *v.* Collins, 3 Mich. 343. And see Blanding *v.* Burr, 13 Cal. 343.

to depend upon a contingency; and that, for example, it may be revived on the happening of an event to be made known by proclamation.[1] Those who hold the sort of statutes we are considering in this section to be void, look upon the act of the people in voting upon them as an attempt to legislate by a body having no legislative authority; those who adopt the opposite conclusion deem the popular act as a mere contingent event, upon the happening of which the statute goes into effect, in pursuance, not properly of the will of the people voting, but of the legislature. Now, confessedly, the event of the popular vote is a contingency, — is it any the less such because the act of voting is an intelligent one? And from the proposition, however correct, that the act of voting is, as attempted legislation, void, does it follow that it is void as a contingent event? It is one of the common things in the law that an act should be looked upon as good for one purpose and ill for another; and, if it stands as to the one, an attempt to make it stand as to the other is a mere nullity, doing neither good nor harm. Assuming, then, that the vote of the people is an attempt at legislation (and we may doubt whether it can be properly so regarded), and admitting, therefore, that, as such, it is void, still, according to the opinions of some very respectable courts, it is a contingent event, upon the happening of which the statute may go into effect in pursuance of the legislative will.

§ 37. **Looking into the Records.** — Concerning the enactment of laws, the courts do not undertake to follow the legislature in every step of its procedure to see whether it has complied

[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." The State *v.* Swisher, 17 Texas, 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.

with all constitutional forms: here the legislature itself judges.[1] But the doctrine is laid down, that they may look beyond the printed statute-books into the engrossed bills and journals of the legislative assemblies, to learn whether an act received the constitutional majority,[2] and otherwise conformed to requirements which were vital, and not merely directory.[3] So the court will inform itself, and take cognizance of the true reading of a statute, by referring to the original act on file in the office of the Secretary of State.[4]

III. *Other Obstructions.*

§ 38. **Motives of the Legislature — Fraud practised on Legislators.** — The court should never impute evil motives to the legislative body. Therefore the validity of a statute cannot be called in question on the ground that it was enacted from motives of hostility to the public good.[5] Probably, though the point is not clear, no legislative act will be held void for fraud practised on the legislature in procuring its passage.[6] If this is so, we have doubtless here the only exception to the rule, that fraud vitiates the transactions into which it enters.

§ 39. **Mistake.** — In Illinois, an act was signed by the Governor by mistake, and a message was delivered to the House of Representatives by his private secretary, announcing his approval. This was done, not by the special direction of the Governor, but according to the usual routine of business, and because the secretary had found it on the Governor's table with his signature attached. The Governor, within thirty minutes of the message, sent a notice of these facts to the Speaker of the House, which he read aloud. The act was returned by

[1] Miller *v.* The State, 3 Ohio State, 475; The State *v.* Septon, 3 R. I. 119; Erie and N. East Railroad *v.* Casey, 2 Casey, 287; McCulloch *v.* The State, 11 Ind. 424; People *v.* Devlin, 33 N. Y. 269.

[2] Sedgwick on Statutes, 68, 69, referring to Purdy *v.* People, 4 Hill, N. Y. 384; De Bow *v.* People, 1 Denio, 9; Commercial Bank *v.* Sparrow, 2 Denio, 97.

[3] Supervisors *v.* Heenan, 2 Minn. 330; Dew *v.* Cunningham, 28 Ala. 466; The State *v.* McBride, 4 Misso. 303.

[4] Clare *v.* The State, 5 Iowa, 509. And see ante, § 29.

[5] People *v.* Shepard, 36 N. Y. 285, 289. And see the State *v.* King, 12 La. An. 593.

[6] Broom Leg. Max. 2d ed. 42, referring to Steed *v.* Carey, 1 C. B. 496, 516, 522; 1 Bishop Mar. & Div. 4th ed. § 687, 690–692. See Charles River Bridge *v.* Warren Bridge, 7 Pick. 344.

the Governor to the proper branch of the legislature with his signature erased, and with his objections thereto, it never having been out of his possession. Thereupon it was held that this act did not become a law. The court considered, that, as the bill had not passed out of the Governor's 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."[1]

§ 40. **Statutes against Fundamental Justice.** — Whether statutes can be declared void as being in violation of fundamental justice is a question which the author has discussed elsewhere.[2] The conclusion in general terms is, that they may be inoperative because of being in conflict with the laws of natural justice, but courts will seldom feel at liberty to overrule the legislative judgment on this subject. Indeed, many courts deny that they have any right so to do, even in the most extreme case.

§ 41. **Ambiguity — Inaccuracy — Repugnance.** —The terms of a statute may be so ambiguous or confused that the courts cannot discern its meaning with reasonable certainty; and then they will pronounce it void for this cause.[3] Yet they will not do so on account of any slight inaccuracy of expression.[4] So the several parts may be so repugnant to one another or so absurd as to render it, on a like principle, wholly or partially void.[5]

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

[2] Bishop First Book, § 88–91.

[3] The State *v.* Boon, 1 Taylor, 246; Cheezem *v.* The State, 2 Ind. 149; King *v.* The State, 2 Ind. 523. See Huntsville *v.* Phelps, 27 Ala. 55; Sullivan *v.* Adams, 3 Gray, 476.

[4] Evans *v.* Commonwealth, 3 Met. 453; Haynes *v.* The State, 5 Humph. 120; The State *v.* Cooper, 5 Day, 250.

[5] United States *v.* Cantril, 4 Cranch, 167; Gillespie *v.* The State, 9 Ind. 380. And see Scrinegrour *v.* The State, 1 Chand. 48.

CHAPTER IV.

THE SEVERAL PARTS OF A STATUTE CONSIDERED.

42, 43. Introduction.
44–47. The Title.
48–51. The Preamble.
52–61. The Purview.
62–67. Whether Provisions have Precedence.

§ 42. **Looseness of Expression.** — The writer has heretofore[1] had occasion to deprecate a certain looseness of expression sometimes met with in our books of the law, when they undertake to designate, by words, the particular parts of a statute. And on the previous occasion he attempted something, but it was necessarily imperfect, in the way of definition. Let us, in this connection, look at some particular parts of statutes, not so much to ascertain by what words they are to be described, as to determine their legal effect and relative importance.

§ 43. **Order of the Chapter.** — We shall look at, I. The Title; II. The Preamble; III. The Purview; and then we shall consider, IV. Whether Precedence is to be given Provisions in the Purview according to their Locality.

I. *The Title.*

§ 44. **Distinctions. — Different Methods of enacting Laws.** — The methods by which a bill, to be enacted into a statute, becomes entitled have differed somewhat in different localities and times. And this difference may not improperly be taken into consideration when we look for the effect of the title on the construction of the statute. In early times, in England, the method of enacting laws differed greatly from what it is at present, and it seems to have varied at different dates, while it was not perhaps at any one date exactly uniform.[2] A common method in the early times is described in Bacon's Abridgment, where it is said, that "formerly the bill was in the

[1] Crim. Proced. 2d ed. I. § 634.

[2] See Pref. to Ruffhead's Statutes.

nature of a petition [from the Commons to the King], and 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 the 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." [1] If, in such a case, the act had a title, it was framed and put upon the Statute Roll by the judges, and not by Parliament.[2] And though after the statutes, perhaps during the reign of Hen. VII.,[3] came to be drawn up in due form before being enacted, they had titles, the titles did not receive the same consideration as the rest. "The title does 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;" and the title, originally attached to the bill, is amended or changed if the members choose.[4] Now, in the United States, it is well known, the general practice is to draw the title with the original bill, and to pass upon it in connection with the rest; so that it receives the same consideration, and is passed with the same formalities, as the other parts of the enactment. These distinctions should be borne in mind, though possibly no serious consequences will be found to flow from them.

§ 45. **No Part of Act.** — The doctrine, derived from the English courts, therefore, is, that the title is regarded as strictly not a part of the act, being likened to the title of a book, which is not a part of the book;[5] occupying, indeed, a position

[1] Bac. Abr. Court of Parl. E.

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

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

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

[5] 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

not unlike that of the caption of an indictment, considered in another connection.[1] Yet plainly there is a sense in which it is, with us, a part of the act; while still, in another sense, it is, like the title of a book, no part of it.

§ 46. **Weight to be given Title.** — Perhaps, in England, where the title "is usually framed only by the clerk of the house in which the bill first passes, and is seldom read more than once,"[2] and the other peculiarities already 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.[3] Yet according to the better opinion there, certainly here, it may be referred to as shedding some light upon the legislative intent;[4] and, as the general intent when clear controls particular words, so the title may thus restrain the purview of the act itself.[5] Cases, however, in which it so operates are exceptional; the general rule being, that the title cannot be used to extend or to restrain any of the provisions contained in the body of an act.[6] For, further than as manifesting the legislative intent, it can have no force; therefore ordinarily, within the rule just stated, if the words of the enacting clause are larger in meaning than those of the title, they will prevail, even in a penal statute.[7] Where there is no ambiguity in the statute itself, the title is not to be regarded.[8]

§ 47. **Constitutional Provision.** — In some of our States there is a constitutional provision giving special importance to the title. Thus, in Maryland, "every law enacted by the legisla-

Paine, 584; The State *v.* Welsh, 3 Hawks, 403; Cohen *v.* Barrett, 5 Cal. 195.

[1] Crim. Proced. 2d ed. I. § 653 et seq.

[2] Dwar. Stat. 2d ed. 501.

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

[4] Rex *v.* Cartwright, 4 T. R. 490; Stradling *v.* Morgan, Plow. 199, 203; Rex *v.* Gwenop, 3 T. R. 133, 137; Dwar. Stat. 2d ed. 501, 502; The State *v.* Stephenson, 2 Bailey, 334; Burgett *v.* Burgett, 1 Ohio, 469; Chesapeake and Ohio Canal *v.* Baltimore and Ohio Railroad, 4 Gill & J. 1, 90, 91; United States *v.* Fisher, 2 Cranch, 358, 386; The State *v.* Fields, 2 Bailey, 554; The State *v.* Smith, Cheves, 157; Bradford *v.* Jones, 1 Md. 351; Ogden *v.* Strong, 2 Paine, 584; Cohen *v.* Barrett, 5 Cal. 195.

[5] United States *v.* Palmer, 3 Wheat. 610, 631; The State *v.* Stephenson, 2 Bailey, 334.

[6] Hadden *v.* The Collector, 5 Wal. 107.

[7] United States *v.* Briggs, 9 How. U. S. 351; Bartlett *v.* Morris, 9 Port. 266; Blue *v.* McDuffie, Busbee, 131.

[8] Eastman *v.* McAlpin, 1 Kelly, 157.

ture shall embrace but one subject, and that shall be described in the title." [1] A reasonable view of such a provision is, that it is merely directory to the legislature, binding the consciences and honor of the members who act under an oath of office, and that a statute passed in disregard of the direction is still valid. By some courts it is so held, as, for example, in Ohio, where J. R. Swan, J. observed: "This provision being intended to operate upon bills in their progress through the General Assembly, it must be held to be directory only. It relates to bills and not to acts." [2] Still, not all, or even most courts, have taken this view; hence complications and difficulties, as to whether the whole of a statute, or a part, or what part, is constitutional, arise.[3]

II. *The Preamble.*

§ 48. **General Doctrine.** — The preamble too, like the title, is properly not a part of the statute, though enacted with the rest; [4] yet it may show the motives and inducements for its enactment; and thus, in a doubtful case, have decisive weight.[5] But where the body of the act is clear, this, though more extensive than the preamble, will prevail over it, instead of being restrained by it.[6]

§ 49. **Indicates Legislative Intent — Whether restrain Enacting Clause.** — The same doctrine applies to the preamble as to the title: we look to such introductory matter for the general intent of the legislature; that is, the reasons and principles on which the law proceeds.[7] It has been said that the preamble cannot

[1] Parkinson *v.* The State, 14 Md. 184.

[2] Pim *v.* Nicholson, 6 Ohio State, 176, 180; Washington *v.* Page, 4 Cal. 388; Cooley Const. Lim. 81, 82, 150.

[3] Gifford *v.* New Jersey Railroad, 2 Stockton, 171; Parkinson *v.* The State, supra; Hill *v.* Decatur, 22 Ga. 203; Phillips *v.* New York, 1 Hilton, 483; Madison, &c., Railroad *v.* Whiteneck, 8 Ind. 217; Bright *v.* McCullough, 27 Ind. 223; Keller *v.* The State, 11 Md. 525; Cooley Const. Lim. 141 et seq.

[4] Mills *v.* Wilkins, 6 Mod. 62.

[5] 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; Fellowes *v.* Clay, 4 Q. B. 313, 339.

[6] Pattison *v.* Bankes, Cowp. 540, 543; Lees *v.* Summersgill, 17 Ves. 508; Mace *v.* Cammel, Lofft, 782; The State *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; The State *v.* Findley, 1 Brev. 107; Blue *v.* McDuffie, Busbee, 131.

[7] United States *v.* Webster, Daveis, D. C. 38; Fowler *v.* The State, 5 Day,

extend the enacting clause,[1] but may in a doubtful case restrain it,[2] — propositions which we should be cautious about accepting in a sense too unqualified.[3] For a minute examination of them would lead us into many distinctions; involving the inquiry, how far particular words may be extended or restricted by the general intent, a question reserved for a chapter further on.

§ 50. **Recitations of Facts.** — A preamble usually contains recitations of facts. Now, in the interpreting of a statute, knowledge of surrounding facts may be important. And these recitations of them must be accepted by the courts as, at least, *prima facie* correct, and perhaps conclusively so.[4] In reason, such recitations should be accepted as absolutely true when viewed as a key to the interpretation of the statute; because, whether they are in reality true or not, they give us the point of view from which the legislature looked at the statute at the time of passing it, and this is what, and all, the interpreter is to gain by looking at such facts in any case. 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. **Further Views.** — The preamble is evidently of more weight than the title; and here the American and English doctrine is in principle the same. In Dwarris on Statutes,[5] it

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.

[1] Dwar. Stat. 2d ed. 660.

[2] Dwar. Stat. 2d ed. 661; Ryall *v.* Rolle, 1 Atk. 165, 174, 182. Contra, Copeman *v.* Gallant, 1 P. Wms. 314, 320.

[3] In Rex *v.* Pierce, 3 M. & S. 62, 66, Ellenborough, C. J. said: "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 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." And see Trueman *v.* Lambert, 4 M. & S. 234, 239.

[4] Sedgw. Stat. Law, 56; Rex *v.* Sutton, 4 M. & S. 532; Elmondorff *v.* Carmichael, 3 Litt. 472. As to resolutions of the legislature, see Commissioners *v.* The State, 9 Gill, 379. The recitals in the preamble of a private statute are evidence of the facts recited as between the State and the party for whose benefit the act is passed, but they are not conclusive. The State *v.* Beard, 1 Smith, 276, 1 Ind. 460.

[5] Dwar. Stat. 2d ed. 504.

is observed: "In the laws of England, in doubtful cases recourse may be had to the preamble, to discover the inducements the legislature had to the making of the statute; but, where the terms of the enacting clause are clear and positive, the preamble cannot be resorted to. Lord Coke considered the rehearsal, or preamble, a key to open the understanding of the statute; and it is properly considered[1] 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 statute; how rarely 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 proœmium*), 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.'[2] '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 offences 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 restricting the common import of the words used.' 'Sometimes' — it is well expressed in another report[3] — '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.'"

[1] 4 Inst. 330.

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

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

III. *The Purview.*

§ 52. **Meaning of the Term.** — The purview is "that part of an act of the legislature which begins with the words 'Be it enacted,' &c., and ends with the repealing clause." [1] This is the broad meaning of the term, and the meaning which it has in the present connection. But it is sometimes employed in a narrower sense, as excluding provisos, exceptions, and the like. Thus Dwarris says: "The parts of a statute are — in a popular, though not legal, sense — the title, the preamble, the purview or body of the act, clauses, provisos, exceptions." [2] Let us call to mind the leading terms used in the books to denote particular parts of the purview.

§ 53. **Clause.** — In another connection [3] we saw how uncertain in meaning this word is. It signifies less than the word "purview," yet not necessarily less than a sentence viewed grammatically. It is believed, however, that, as in grammar the word "clause" signifies a part of a sentence, and qualifying words are required to show the particular part, and how much, in a given instance; so, in legal language, it signifies a part of a statutory provision, the particular part, and how much, to be shown by other words used in connection with this one. And though the word "clause" is almost always used to denote some part of the purview, no reason appears why it may not refer also to a member of the preamble.

§ 54. **Interpretation Clause.** — All statutes do not have an interpretation clause. But of late such a clause has become very common, especially in England. It usually occupies one section, and sometimes more; in some statutes it is placed at the beginning, and in others at the end, of the principal provisions. The effect of such a clause may be to require a different interpretation of the statute from what it would otherwise receive,[4] or even to impart a novel signification to particular words; [5] and whatever in this respect it provides, the courts, as a general proposition, to which there are possibly exceptions, are bound to accept.

[1] Bouv. Law Dict. tit. Purview, referring to Cooke, Tenn. 330; 3 Bibb, Ky. 181. And see Crim. Proced. 2d ed. I. § 634.

[2] Dwar. Stat. 2d ed. 500.

[3] Crim. Proced. 2d ed. I. § 634.

[4] Smith *v.* The State, 28 Ind. 321.

[5] Crim. Proced. 2d ed. I. § 358.

§ 55. **Continued — Gaming.** — It is not clear, that, carried as far as they often are, these interpretation clauses are productive of certainty in the meaning of the law; for, in the first place, they must themselves be interpreted; and, in the second place, the difficulty of interpreting the main provisions is often even greater with the rule furnished by the clause than without it.[1] It appears to be a sort of general doctrine that interpretation clauses are to be construed strictly;[2] though, on the other hand, it is said that they are not always to be so.[3] To give them a strict construction accords with the general rule that statutes in derogation of the common law are to be construed strictly. Thus, while it is the general doctrine that criminal statutes shall be subjected to a strict interpretation, it is provided in Tennessee,[4] Mississippi,[5] Virginia,[6] and probably in some other States, that enactments against gaming be remedially construed. But the acts requiring this unusual interpretation appear themselves to be taken strictly; for they are not applied to subsequent statutes making certain kinds of gaming felony, all kinds having before been misdemeanors;[7] nor to acts for the suppression of the sale of lottery tickets.[8]

§ 56. **Enacting Clause.** — The words "enacting clause" are often found in law-books, especially in connection with discussions as to the proper form of an indictment or declaration upon a statute. There is some ambiguity respecting their meaning; but they are most frequently employed to refer to the main body of some one provision in a statute, excluding its provisos, though they may or may not embrace an exception.[9] These words are not often employed in discussions upon the interpretation of the statute.

§ 57. **Proviso.** — "A proviso[10] is something engrafted upon a

[1] And see Dwar. Stat. 2d ed. 509; Denman, C. J. in Reg. *v.* Cambridgeshire, 7 A. & E. 480.

[2] Sedgw. Stat. Law, 59.

[3] Dwar. Stat. 2d ed. 509.

[4] McGowan *v.* The State, 9 Yerg. 184, 197; Howlett *v.* The State, 5 Yerg. 144, 152.

[5] Cain *v.* The State, 13 Sm. & M. 456; Seal *v.* The State, 13 Sm. & M. 286.

[6] Commonwealth *v.* Chubb, 5 Rand. 715.

[7] McGowan *v.* The State, 9 Yerg. 184.

[8] Commonwealth *v.* Chubb, 5 Rand. 715, 722. See Cain *v.* The State, supra; Seal *v.* The State, supra.

[9] Crim. Proced. 2d ed. I. § 633–639.

[10] Dwar. Stat. 2d ed. 514.

preceding enactment," [1] generally introduced by the word " provided." It " is legitimately used for the purpose of taking special cases out of the general enactments, and providing specially for them. In its abuse, it contains all unconnected matters, and disposes of whatever is incapable of combination with the rest of any clause." [2] There are special rules of pleading which relate to the proviso,[3] and a particular consideration of this part of the statute may become important in determining some question of its interpretation.

§ 58. **Exception.** — An exception is ordinarily introduced by the word " except." [4] It may be found either in the enacting clause, or in a proviso. And the rule of pleading the statute is not the same when it is in the one as when it is in the other.[5] " An exception can only operate where, but for the exception, that which is excepted would have been included in the prior enactment." [6]

§ 59. **Saving Clause.** — " A saving in a statute is only an exemption of a special thing out of the general things mentioned." [7] There is, of course, no particular rule as to its location or precise terms; but it is generally found near or at the end, and commences, " Nothing in this act shall," &c. Nice questions of interpretation sometimes grow out of this clause,[8] but in pleading it is seldom or never regarded.

§ 60. **Other Clauses.** — It is not necessary separately to consider every possible clause. Something has already been said concerning the repealing clause.[9] The clauses vary in the different statutes. Besides those already specified have been mentioned " 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." [10]

[1] Gregory's Case, 6 Co. 19 *b*; Foster's Case, 11 Co. 56 *b*.

[2] And see Crim. Proced. 2d ed. I. § 634.

[3] Crim. Proced. 2d ed. I. § 631–641.

[4] Ib. § 634.

[5] Ib. § 631–641.

[6] Dwar. Stat. 2d ed. 516, referring to Zouch *v.* Moor, 2 Rolle, 280; 14 Vin. Abr. Grants, H. 13, pl. 61. Denied by Campbell, A. G. arguendo, 8 B. & A. 641.

[7] Dwar. Stat. 2d ed. 513, referring to Halliswell *v.* Bridgewater, 2 Anderson, 190, 192.

[8] See People *v.* Gill, 7 Cal. 356; Cochran *v.* Taylor, 13 Ohio State, 382.

[9] Ante, § 34.

[10] Dwar. Stat. 2d ed. 511.

§ 61. **Sections.** — The division of modern statutes into sections is a thing familiar to the reader. And there are some apparent, though perhaps not real distinctions, to be noted under the next sub-title, growing out of such division.

IV. *Whether Precedence is to be given Provisions in the Purview, according to their Locality.*

§ 62. **General Views.** — We now come to the most important part of the present chapter; and, indeed, one of the most important of the discussions connected with this whole subject of statutory interpretation. The books are in great confusion and contradiction concerning this question, in point of authority; and, in point of principle, the question has not been much illumined by juridical reasoning.

§ 63. **How in Principle.** — The several parts of a statute are enacted together. If the last is read last, still it is enacted simultaneously with the first. We are now contemplating modern enactments. In early times, already spoken of,[1] when all the legislative doings of a particular Parliament appeared together, in one roll, the date of which was referred to the first day of the assembling of Parliament, it was known to be otherwise. Then, if two things were found to be in contradiction, the last might be presumed to have been enacted last. But now there can be no such presumption; and the rule now ought to be, that the location of a clause in an act is immaterial; and, if two clauses are found to be repugnant, the repugnancy may vitiate the whole act, or the part of the act to which the clauses relate,[2] or the one or the other may be made to give way, according to the nature of the case; but the particular locality of the one clause or the other should not be an element to be taken into the account. Let us, however, look a little at what has been laid down.

§ 64. **One Part controlled by Another.** — It is plain doctrine, about which there is no question, that all the parts of a statute are to be looked at together, for the purpose of interpretation, and one part may be controlled by another. Thus, where there are words expressive of a general intention, and then a par-

[1] Ante, § 44. And see ante, § 28.

[2] Ante, § 41.

ticular intention, incompatible with the general one, is expressed, the particular must be taken as an exception to the general, and so all the parts of the act will stand.[1] And, as a broad proposition, general words, in one clause of a statute, 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.

§ 65. **Irreconcilable Repugnance — Last Expression of the Legislative Will.** — It has been laid down, as applicable to cases of irreconcilable repugnance, that, if the different parts cannot stand together, the last shall prevail to nullify what goes before.[3] Therefore it has been held that a proviso, directly contrary to the purview, is good, and not the purview; "because it speaks the later intention of the legislature."[4] We have seen[5] that this reason, however good it may have been at one time in England, is not good now; consequently the result derived from it is not good. Generally a saving clause is, in the sense just mentioned, a later expression of the legislative will than the purview, for it generally comes after;[6] but it has been adjudged that, where such a clause and the purview are in irreconcilable conflict, the purview shall stand.[7] Chancellor 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 interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together, are to prevail."[8] Now, taking these views for our guide, and considering the distinctive natures of saving clauses and provisos, we shall practically find the following to be true. Since a saving clause "is only an exemption of a special thing out of the general things mentioned" in the pur-

[1] Stockett *v.* Bird, 18 Md. 484.

[2] Covington *v.* McNickle, 18 B. Monr. 262.

[3] Packer *v.* Sunbury and Erie Railroad, 7 Harris, Pa. 211, 219.

[4] Townsend *v.* Brown, 4 Zab. 80, 86; Attorney-General *v.* Chelsea Waterworks, Fitzg. 195.

[5] Ante, § 63.

[6] Ante, § 59.

[7] Washingham's Case, Plow. 565; Wood's Case, 1 Co. 40 *b*, 47 *a*.

[8] 1 Kent Com. 463 and note.

view,[1] if the saving clause stands, and the purview is rejected, the whole statute fails, not even the saving clause being of any effect. Thus the statute is destroyed, and not interpreted. Therefore ordinarily, to give the statute any effect, the saving clause must yield to the purview. But a proviso is somewhat different;[2] and, under various circumstances, it may stand, and the purview be rejected, without working the entire destruction of the statute. And when this is so, the question whether the one or the other shall give way cannot, in reason, be one of rule; it must depend upon the special considerations surrounding the particular case.

§ 66. **Effect of dividing a Statute into Sections.** — Some courts have drawn distinctions between things said in one section or in two separate sections. For example, the doctrine is by some courts maintained, that, if the same section of an act forbids a thing and also specifies the consequences of disobedience, the courts can prosecute the offence only under the statute; but, if the consequences are set down in a separate section, then either the common-law methods or the statutory ones may be pursued at discretion.[3] This subject will be further considered in another connection; but, in reason, and according to a respectable body of American authority, this cannot be so. And that it cannot be so follows from the views given in the foregoing sections of the present sub-title.

§ 67. **Continued — Indictments on Statutes.** — There are perhaps, in the cases, intimations to give color to the idea, that, under some circumstances, matter in a subsequent section to the one on which an indictment is drawn need not be negatived, where, if it were in the same section, it would require to be. Now, it is certain that the form of words in which a statute is drawn will not unfrequently determine whether a particular thing is to be negatived or not.[4] And often the words will be different where a matter stands in two sections from what they would be if it stood in one. But it is believed that the mere fact of dividing distinct sentences into dis-

[1] Ante, § 59.
[2] Ante, § 57.
[3] See Crim. Law, 4th ed. I. § 279.
[4] Crim. Proced. 2d ed. I. § 639 and note.

tinct sections, where the words are not changed, does not, especially according to the sounder opinions respecting the forms of statutory indictments, have any effect.

CHAPTER V.

LEADING PRINCIPLES OF STATUTORY INTERPRETATION STATED AND ILLUSTRATED.

68, 69. Introduction.
70–73. Objects to be accomplished by Interpretation.
74–77. Into what look besides Words of Statute.
78–117. By what Rules Meaning determined.
118–121. By what the Meaning contracted or expanded.

§ 68. **Scope of this Chapter.** — It is the purpose of this chapter to collect from the books and bring together the leading principles of statutory interpretation, and to show something of their application and force. It is true that our discussions in this volume relate to the criminal law, and not to the civil department. But, in the main, civil and criminal statutes are interpreted alike; except that the principle of strict interpretation, which is known as well in the civil department as in the criminal, is more often and more uniformly applied to criminal statutes than it is to civil ones.

§ 69. **How the Chapter divided.** — The chapter will treat of, I. The Objects to be accomplished by Interpretation; II. Into what, besides the particular Words, the Courts look to ascertain the Meaning of a Statute; III. By what Rules the Meaning is determined; IV. By what the Meaning is contracted or expanded.

I. *The Objects to be accomplished by Interpretation.*

§ 70. **Legislative Intent.** — The primary object of all rules for the interpretation of statutes is to ascertain the meaning of the legislature;[1] or, properly, the meaning which the subjects of

[1] Wilkinson *v.* Leland, 2 Pet. 627, 402; Winslow *v.* Kimball, 25 Maine, 662; Brown *v.* Thorndike, 15 Pick. 388, 493; Riddick *v.* The Governor, 1 Misso.

the government are authorized to understand that the legislature intended. And where the legislative meaning is satisfactorily ascertained by the judges, they are bound to carry it out, whatever may be their personal opinions of the policy of the law.[1]

§ 71. **Administer the Judicial Justice of the Country.** — Moreover, justice cannot be administered in the courts unless they expound the statutes. For, as observed by Lord Chief Justice Eyre: "There is nothing so clear as that, 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 offence in the statute is comprised in two or three words; the law may be clearer upon that account; but the rule of construction, 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."[2]

§ 72. **Scope for Interpretation.** — It is further to be observed, that, in order to carry out these objects, interpretation must be kept within its proper limits. If the reader will take into his hands any volume of legal reports, and turn to the cases in which statutes are construed, he will see that, in the majority of them, there was no scope for the application of any special rules of interpretation, but the judges were simply called upon to exercise their natural good sense in determining what the legislature meant. And, when the meaning of the legislature is plain, there is not only no occasion to call for rules to aid

147; Beall *v.* Harwood, 2 Har. & J. 167; The Sussex Peerage, 11 Cl. & F. 85; Bidwell *v.* Whitaker, 1 Mich. 469; Ogden *v.* Strong, 2 Paine, 584; Crocker *v.* Crane, 21 Wend. 211; Kilby Bank, Petitioners, 23 Pick. 93; Opinion of the Justices, 22 Pick. 571; Simonds *v.* Powers, 28 Vt. 354; McIntyre *v.* Ingraham, 35 Missis. 25; Riddick *v.* Walsh, 15 Misso. 519; Ingraham *v.* Speed, 30 Missis. 410; Dwar. Stat. 2d ed. 556.

[1] In Pray *v.* Edie, 1 T. R. 313, 114, 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."

[2] Horne Tooke's Case, 25 Howell St. Tr. 1, 726.

the interpretation, but it is contrary to the rules themselves to do so. The judges have simply to enforce the statute which they find.[1]

§ 73. **Continued — Rules of Interpretation.** — Yet there is a very large class of cases which cannot be passed upon intelligently by one not familiar with the rules of statutory interpretation which the wisdom of the common law has devised. Every statute is presumed to have been penned and enacted by persons who are familiar with those rules; hence it is impossible for one who does not understand them to ascertain, in all cases, the true legislative intent.

II. *Into what, besides the Particular Words, the Courts look to ascertain the Meaning of a Statute.*

§ 74. **Rules of Interpretation, continued.** — As already observed, the legislature is presumed to have understood the rules which the common law has devised for ascertaining the meaning of statutes; and, omitting to prescribe other rules, to have intended that the courts should follow them.[2] Therefore the first duty of him who would construe any statute is to look into these rules; and, though none of them should be called for in the particular instance, he should know what they are. And, as a practical question, the rules regulating the interpretation of statutes ought to be familiar to every gentleman engaged, in any way, in legal practice. No day of any active lawyer's life passes, in which he is not required to consider and advise upon the meaning of some statutory provision.

§ 75. **Stand where Legislator stood — Prior Law.** — As already observed,[3] he who would construe a legislative act should place himself, as far as may be, in the very shoes of him who enacted it. He will then be best able to see the reason and the scope of the provision. For example, no one who gives his vote upon a proposed enactment can be presumed to do so without having first considered the meaning of it. Consequently the legis-

[1] Bosley *v.* Mattingly, 14 B. Monr. 89; Ezekiel *v.* Dixon, 3 Kelly, 146; Farrell Foundry *v.* Dart, 26 Conn. 376; Swift *v.* Luce, 27 Maine, 285; United States *v.* Ragsdale, Hemp. 497.

[2] Commonwealth *v.* Churchill, 2 Met. 118, 124; The State *v.* Brooks, 4 Conn. 446.

[3] Ante, § 50.

lator must have had in his mind the prior law; and this, therefore, should be in the mind of him who construes the statute.[1]

§ 76. **Opinions of Individual Legislators — Subsequent Legislature.** — But it should be remembered that the enactment of a statute is the work of the whole legislative body, and not of a particular member. Therefore, although a judge is not forbidden to look, if he chooses, at what a member said at the time when the legislative act was under discussion, yet no expression of opinion contained in any such observations is to have special weight in the interpretation of the statute. The language of the books on this point may not be quite uniform; it being sometimes laid down that such opinions, and opinions of the draftsman of the bill, have nothing to do with the interpretation; and, at other times, that these opinions are of but little weight.[2] *A fortiori*, the opinion of a subsequent legislature is entitled to no more consideration than that of any other men of the same number and intelligence.[3]

§ 77. **Continued — Legislative Journals — History — Other Surrounding Circumstances — Judicial Cognizance.** — Looking at this class of questions in the light as well of principle as of adjudication, we have the following. We have already seen,[4] that the courts, being under obligation to take judicial cognizance of all public laws, do not require proof of a public statute, such as is to be addressed to a jury when a written contract between parties is to be set up. If a written contract is to be proved in a cause, evidence of parol declarations made by the parties at the time when it was entered into is not admissible.[5] But, as we have seen, when the judges find it necessary to determine the particular moment at which a statute was enacted, they, to assist them in the duty of taking cognizance of the time, look at whatever they deem adapted to enlighten their understandings. On a like principle, it is doubtless permissible for them to look, if they choose, at the reports of legislative doings, but

[1] Converse *v.* United States, 21 How. U. S. 463; Noble *v.* The State, 1 Greene, Iowa, 325.

[2] Keyport, &c., Steamboat Co. *v.* Farmers' Transportation Co., 3 C. E. Green, 13; Leese *v.* Clark, 20 Cal. 387. And see cases cited to the next section.

[3] Bingham *v.* Supervisors, 8 Minn. 441.

[4] Ante, § 29 and note.

[5] 1 Greenl. Ev. § 275.

not permissible to allow any thing which they there find to control their own judgments. In the same way they will look, for example, into the writings of a legal author, or even listen while an *amicus curiæ* presents his suggestions. But when we speak of what is to control the interpretation of a statute, then it is correct to say, that, for such a purpose, the courts are neither to inquire of the individual legislators what exposition they give to particular words, nor to consult the journals of the legislature, the reports of committees, or the speeches made at the time an act was passed ;[1] but to look solely at its language,[2] illumined by the light of all the circumstances then surrounding.[3] In looking at the surrounding circumstances, 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.[4]

III. *By what Rules the Meaning is determined.*

§ 78. **Punctuation.** — The punctuation of a statute is work done by the draftsman, the engrosser, or the printer. In the legislative body the bill is *read*, and so apprehended by the ear, and not by the eye, which alone takes cognizance of punctuation ; therefore the punctuation is not to be regarded in the interpretation of the enactment.[5]

§ 79. **Clerical Errors.** — The inspection of a statute may ex-

[1] Reg. *v.* Whittaker, 2 Car. & K. 636, 640 ; Bank of Pennsylvania *v.* Commonwealth, 7 Harris, Pa. 144 ; Southwark Bank *v.* Commonwealth, 2 Casey, 446 ; Aldridge *v.* Williams, 3 How. U. S. 9, 24 ; Ratcliff *v.* Ratcliff, 1 Swab. & T. 467, 470 ; Coleman *v.* Dobbins, 8 Ind. 156.

[2] "Intention of the legislature apparent upon its face," that is, face of the act. Wilkinson *v.* Leland, 2 Pet. 627, 662 ; People *v.* Utica Ins. Co. 15 Johns. 358, 380 ; Barnes *v.* The Mayor of Mobile, 19 Ala. 707 ; The Paulina *v.* United States, 7 Cranch, 52.

[3] Story Const. § 406.

[4] Rex *v.* Hodnett, 1 T. R. 96 ; Sibley *v.* Smith, 2 Mich. 486 ; Henry *v.* Tilston, 17 Vt. 479.

[5] Cushing *v.* Worrick, 9 Gray, 382, 385. And see the authorities there referred to ; also, Commonwealth *v.* Wright, 1 Cush. 46, where it was held that marks of quotation, used in setting out the copy of an instrument in an indictment, have no effect toward showing 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," &c. p. 65.

hibit clerical errors, the correction of which is obvious. We have seen[1] that such errors in an indictment, if they do not mislead, do not vitiate it. In like manner, where there are such errors in a statute, in cases where the true reading appears on the face of it, and the meaning is, notwithstanding the errors, certain, the statute stands, and is to be interpreted as though the errors were corrected.[2]

§ 80. **Statute to be read as enacted.** — But this is the limit of the doctrine. A decent regard must be paid to the language of the legislature, though it does not convey the idea we think it should. We cannot, to make it suit our views, import into it words not used by the law-makers;[3] we cannot control it, when unambiguous, though it does not accord with our opinions of what should be;[4] 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 this meaning will not bend.[5] The degree differs in different circumstances; and to ascertain the circumstances and the degree is one of the leading objects of our chapters on statutory interpretation.

§ 81. **Grammatical Construction — Inaccurate Expressions.** — It follows from the foregoing views that a statute will not be controlled by its grammatical construction in such a way as to defeat its obvious meaning, — the doctrine here being analogous to what, we have seen,[6] prevails as respects the indictment. For example, conjunctive sentences, describing different branches of the same offence, will be construed as conjunctive or disjunctive according as the sense and evident intention of the lawmakers may require.[7] And words and expressions

[1] Crim. Proced. 2d ed. I. § 357.

[2] See, and compare, Moody *v.* Stephenson, 1 Minn. 401; Stoneman *v.* Whaley, 9 Iowa, 390; Bostick *v.* The State, 34 Ala. 266; Gardner *v.* The State, 25 Md. 146; Nazro *v.* Merchants' Mutual Insurance Co. 14 Wis. 295.

[3] Dwar. Stat. 2d ed. 579; King *v.* Burrell, 12 A. & E. 460, 468; Lamond *v.* Fiffe, 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.

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

[5] 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 Damerel, 7 B. & C. 563; Dwar. Stat. 2d ed. 583 et seq. 595, 598; United States *v.* Warner, 4 McLean, 463.

[6] Crim. Proced. 2d ed. I. § 348–355.

[7] The State *v.* Myers, 10 Iowa, 448.

inaccurately used will receive the meaning intended, where it appears on the whole face of the act.[1] Indeed the clear intention of the legislature, as apparent on inspection of the statute itself, will prevail though in opposition to the strict letter.[2] But the reader should remember that 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.[3]

§ 82. **Intent to control — Grouping of Doctrines and Views.** — It being, therefore, the purpose of interpretation to ascertain the true legislative intent,[4] we should, if possible, so construe a statute that its several provisions will harmonize with its general intent;[5] that every word will have a meaning, leaving no useless words;[6] that no clause will be repugnant to another clause, but that the whole may stand;[7] that neither absurdity follow,[8] nor injustice,[9] nor even great inconvenience,[10] nor the exercise of a doubtful power,[11] nor other consequence which the legislature evidently did not intend;[12] that it do not open the door

[1] Rex *v.* Bullock, 1 Taunt. 71; Crocker *v.* Crane, 21 Wend. 211; Alexander *v.* Worthington, 5 Md. 471; Erwin *v.* Moore, 15 Ga. 361.

[2] Ingraham *v.* Speed, 30 Missis. 410.

[3] Ezekiel *v.* Dixon, 3 Kelly, 146; Swift *v.* Luce, 27 Maine, 285; Riddick *v.* Walsh, 15 Misso. 519.

[4] Mardre *v.* Felton, Phillips, N. C. 279.

[5] Dwar. Stat. 2d ed. 582, 597; Arthur *v.* Bokenham, 11 Mod. 148, 161; Mendon *v.* Worcester, 10 Pick. 235, 242; Commonwealth *v.* Cambridge, 20 Pick. 267, 271; United States *v.* Fisher, 2 Cranch, 358, 399; The State *v.* Stinson, 17 Maine, 154; Holbrook *v.* Holbrook, 1 Pick. 248; Livingston *v.* Indianapolis Insurance Co. 6 Blackf. 133; Jackson *v.* Collins, 3 Cow. 89, 96; The State *v.* Smith, Cheves, 157; Commonwealth *v.* Slack, 19 Pick. 304; Wilson *v.* Biscoe, 6 Eng. 44.

[6] Bac. Ab. Statute, I. 2; Powlter's Case, 11 Co. 29, 34 *a*; Rawson *v.* The State, 19 Conn. 292; Wilson *v.* Biscoe, 6 Eng. 44; United States *v.* Warner, 4 McLean, 463; Opinion of the Justices, 22 Pick. 571, 573; Attorney-General *v.* Detroit and Erin Plank Road, 2 Mich. 138; Den *v.* Dubois, 1 Harrison, 285; Hutchen *v.* Niblo, 4 Blackf. 148; Green *v.* Cheek, 5 Ind. 105.

[7] 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.

[8] 1 Bl. Com. 91; Dwar. Stat. 2d ed. 587; Rex *v.* Banbury, 1 A. & E. 136, 142; Commonwealth *v.* Loring, 8 Pick. 370; Mayor of Jeffersonville *v.* Weems, 5 Ind. 547; Henry *v.* Tilston, 17 Vt. 479; The State *v.* Clark, 5 Dutcher, 96.

[9] Magdalen College Case, 11 Co. 66, 73 *b*; Co. Lit. 360; Commonwealth *v.* Slack, 19 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 Texas, 382; The Ohio *v.* Stunt, 10 Ohio State, 582.

[10] United States *v.* Fisher, 2 Cranch, 358, 386; Hughes *v.* Hughes, Cart. 125, 136; Ayers *v.* Knox, 7 Mass. 306, 310; Putnam *v.* Longley, 11 Pick. 487, 490.

[11] Mardre *v.* Felton, Phillips, N. C. 279.

[12] Stowel *v.* Zouch, Plow. 353, 365; Arthur *v.* Bokenham, 11 Mod. 148, 161; McDermot *v.* Lorillard, 1 Edw. Ch.

for litigation;[1] that it be not retrospective;[2] and, on the other hand, that it be neither eluded[3] nor its purposes defeated.[4] All its parts,[5] and all acts, "though made at different times or even expired"[6] or repealed,[7] touching the same matter, must be taken together;[8] and, if one part standing by itself is obscure, it may be aided by another part which is clear.[9] We should, as already observed,[10] suppose ourselves standing where the lawgiver stood, fully endowed, we must also suppose, with

273, 276; Ayers *v.* Knox, 7 Mass. 306; Dwar. Stat. 2d ed. 593; The State *v.* Harkness, 1 Brev. 276.

[1] Gale *v.* Laurie, 5 B. & C. 156, 164.

[2] Thompson *v.* Lack, 3 C. B. 540, 551; 1 Bishop Mar. & Div. 4th ed. § 99–103; Moon *v.* Durden, 2 Exch. 22, 12 Jur. 138; Plumb *v.* Sawyer, 21 Conn 351; Hooker *v.* Hooker, 10 Sm. & M. 599; Bruce *v.* Schuyler, 4 Gilman, 221; Barnes *v.* Mayor of Mobile, 19 Ala. 707; Torrey *v.* Corliss, 33 Maine, 333; Murray *v.* Gibson, 15 How. U. S. 421, 423; Pritchard *v.* Spencer, 2 Cart. Ind. 486; Garrett *v.* Doe, 1 Scam. 335; Quackenbush *v.* Danks, 1 Denio, 128; Hastings *v.* Lane, 15 Maine, 134; Forsyth *v.* Marbury, R. M. Charl. 324; Guard *v.* Rowan, 2 Scam. 499; Dash *v.* Van Kleeck, 7 Johns. 477; Van Schmidt *v.* Huntington, 1 Cal. 55; Mason *v.* Finch, 2 Scam. 223; Alexander *v.* Worthington, 5 Md. 471; Belleville Railroad *v.* Gregory, 15 Ill. 20; Stewart *v.* The State, 13 Ark. 720.

[3] 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; Anonymous, 12 Co. 89.

[4] Thompson *v.* The State, 20 Ala. 54; Cook *v.* Commissioners, 6 McLean, 112.

[5] Bac. Ab. Statute, I. 2; Adams *v.* Woods, 2 Cranch, 336, 341; Commonwealth *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; Matter of Murphy, 3 Zab. 180. 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. Commonwealth *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.

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

[7] Church *v.* Crocker, 3 Mass. 17, 21.

[8] 1 Bac. Ab. 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; Wile *v.* Commonwealth, 2 Met. 408; Howlett *v.* The State, 5 Yerg. 144; Holland *v.* Makepeace, 8 Mass. 418, 423; Holbrook *v.* Holbrook, 1 Pick. 248, 254; The State *v.* Baldwin, 2 Bailey, 541; The State *v.* Fields, 2 Bailey, 554; Thayer *v.* Bond, 3 Mass. 296; White *v.* Johnson, 23 Missis. 68; Rex *v.* Morris, 1 B. & Ad. 441; The State *v.* Wilbor, 1 R. I. 199; De Ormas Case, 10 Mart. La. 158, 172; People *v.* Hart, 1 Mich. 467; The State *v.* Garthwaite, 3 Zab. 143; The Harriet, 1 Story, 251; Scott *v.* Searles, 1 Sm. & M. 590; The State *v.* Mister, 5 Md. 11; United States *v.* Freeman, 3 How. U. S. 556; Hayes *v.* Hanson, 12 N. H. 284. A statutory rule must be construed in harmony with the whole system of laws of which it forms a part. McDougald *v.* Dougherty, 14 Ga. 674.

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

[10] Ante, § 75.

knowledge and wisdom; then, after contemplating the words of the act itself, and of other acts connected with it as just mentioned, take into our view all those facts and circumstances which it thus appears would properly have influenced him in its passage. We must, for example, consider what was the law before,[1] which Lord Coke says is "the very lock and key to set open the windows of the statute";[2] the mischief against which the law did not provide; the nature of the remedy proposed; and the true reason of the remedy.[3] Great public interests will not needlessly be put at hazard by the interpretation given;[4] and even considerations of private hardship may be taken into the account.[5] For these several purposes, we may take into view, as already seen,[6] what is said in the title and preamble; and we may consult any other source[7] of a nature proper for the cognizance of the courts.[8] Thus 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."[9]

§ 83. **Observations on the Doctrines thus grouped — Course of the Further Discussion.** — Now, if the reader will note the language of these several doctrines, and compare the doctrines with one another and with the other discussions occupying the preceding pages of this volume, he will see, that, in their nature, and in the nature of the subject, they cannot all be carried out in full, and without qualification. And the art of statutory interpretation lies in seeing how the doctrines operate in connection with one another, how a particular doctrine is to be qualified in the particular instance; and, indeed, whether this or that should control the case in hand. Through the remainder of the present sub-title, it will be the purpose of the author to render some help in this art, while also he will bring to view

[1] Ante, § 6; Bac. Ab. Statutes, I. 4; Dwar. Stat. 2d ed. 563, 564.

[2] 2 Inst. 308.

[3] Heydon's Case, 3 Co. 7; Winslow *v.* Kimball, 25 Maine, 493; Pray *v.* Edie, 1 T. R. 313; Rex *v.* Hodnett, 1 T. R. 96, 100; 1 Bl. Com. 87; Jortin *v.* Southeastern Railway, 3 Eq. Rep. 281, 1 Jur. N. S. 813, 31 Eng. L. & Eq. 320.

[4] People *v.* Commissioners, 3 Scam. 153.

[5] Collins *v.* Carman, 5 Md. 503.

[6] Ante, § 44–51.

[7] United States *v.* Webster, Daveis, D. C. 38.

[8] 1 Greenl. Ev. § 4–6.

[9] Lyde *v.* Barnard, 1 M. & W. 101, 114. And see The State *v.* Smith, Cheves, 157.

a few other doctrines. And it should be observed, that any enumeration of doctrines is necessarily incomplete; it not being possible for any author, whatever space he may devote to the subject, to say that his collection embraces absolutely all the doctrines. In the present chapter, no attempt will be made at completeness, both because there are some rules which have no relation to the criminal law, and because there are many rules which will better appear in other connections.

§ 84. **Retrospective — Judicial Procedure — Divorce Laws.** — One obvious limitation of the general doctrines laid down in the section before the last is, that, though ordinarily a statute should not be construed as retrospective, unless its words are express to this effect, or this intention is manifest,[1] still some statutes are applied to past transactions, even where their words are not direct to this effect.[2] Thus, according to the better view as one of principle, perhaps not the better sustained by authority, divorce laws should be interpreted to include things done previous to their enactment; because the reasons for such laws apply equally to past transactions as to present and future.[3] And, generally, enactments concerning the procedure in courts are construed to embrace causes of action already in being.[4]

§ 85. **Retrospective, continued — Ex post facto — Unjust, &c.** — It thus appears that the question whether a statute shall have a retrospective operation or not depends in a great degree

[1] See the cases cited ante, § 82; 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; The State *v.* Bradford, 36 Ga. 422; Dewart *v.* Purdy, 5 Casey, 113; Hopkins *v.* Jones, 22 Ind. 310; Seamans *v.* Carter, 15 Wis. 548; People *v.* San Francisco, 21 Cal. 668; Jarvis *v.* Jarvis, 3 Edw. Ch. 462; Head *v.* Ward, 1 J. J. Mar. 280; United States *v.* Starr, Hemp. 469; Aurora and Laughery Turnpike *v.* Holthouse, 7 Ind. 59; The State *v.* Atwood, 11 Wis. 422; Reynolds *v.* The State, 1 Kelly, 222; People *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; The State *v.* Scudder, 3 Vroom, 203; Taylor *v.* Mitchell, 7 Smith, Pa. 209.

[2] See Watkins *v.* Haight, 18 Johns. 138; People *v.* Car al, 2 Seld. 463; People *v.* Clark, 3 Seld. 385; Van Schmidt *v.* Huntington, 1 Cal. 55.

[3] 1 Bishop Mar. & Div. 4th ed. § 99–103, 696–699.

[4] Mercer *v.* The State, 17 Ga. 146; Jacquins *v.* Commonwealth, 9 Cush. 279; Sampeyreac *v.* United States, 7 Pet. 222. And see note to the next section.

on the nature of the subject. A statute which is *ex post facto* is forbidden by two clauses of the United States Constitution, the one referring to the national and the other to the State legislative power.[1] Such a statute, therefore, cannot be enforced, however express may be its terms. But a statute may be retrospective without being *ex post facto;* and, when it is, it does not violate the Constitution of the United States; while in some of the State constitutions there are provisions forbidding it, and in others there are not.[2] Still, in most localities among us, there are circumstances in which a retrospective statute is not invalid,[3] and others in which it is invalid.[4] In the latter case, the statute cannot have a retrospective operation however express may be its terms. And in those circumstances in which a statute may be constitutionally retrospective, there are various classes of cases in which it would be unjust to give it such an operation. Therefore, within a rule already stated,[5] if such a statute is not express in its terms, it should be applied only to future cases.[6] Thus, no statute, however broad its words, will be construed to interfere with existing rights of action, unless this intent is expressly stated.[7] But, under other circumstances, it is required by the mere behests of justice to give the statute a retrospective operation; and thus, by construction, it will have such an operation if the words permit.[8] Of this sort, for example, is a statute regulating the qualifications of jurors; it is applied as well to past as to subsequent offences.[9]

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

[2] 1 Bishop Mar. & Div. 4th ed. § 670; The State *v.* Squires, 26 Iowa, 340.

[3] The State *v.* Newark, 3 Dutcher, 185; The State *v.* Scudder, 3 Vroom, 203; Hess *v.* Johnson, 3 W. Va. 645; Stine *v.* Bennett, 13 Minn. 153; United States *v.* Samperyac, Hemp. 118; Stokes *v.* Rodman, 5 R. I. 405.

[4] Bruce *v.* Schuyler, 4 Gilman, 221; Gordon *v.* Inghram, 1 Grant, 152; West Branch Boom Co. *v.* Dodge, 7 Casey, 285; Dillon *v.* Dougherty, 2 Grant, 99; The State *v.* Atwood, 11 Wis. 422; Kennett's petition, 4 Fost. N. H. 139.

[5] Ante, § 82.

[6] Statutes restrictive of suits on wagers are prospective only, and do not affect transactions which took place before their passage. Doolubdass *v.* Ramloll, 7 Moore P. C. 239, 15 Jur. 257, 3 Eng. Law & Eq. 39.

[7] Berley *v.* Rampacher, 5 Duer, 183; Rutherford *v.* Greene, 2 Wheat. 196.

[8] Miller *v.* Graham, 17 Ohio State, 1.

[9] Reid *v.* The State, 20 Ga. 681. But, according to a Missouri case, a statute providing that, if the jury fail to declare by whom the costs shall be paid in a prosecution of a county, the court

§ 86. **Construing Statutes together.** — The doctrine, that, in construing a particular provision of statutory law, the whole statute should be taken into consideration, and, in connection with it, all previous statutes on the same subject whether existing or repealed,[1] is, though sound, at the same time fragmentary; for the true view is, that the statute is to be looked at in connection with all the other laws, statutory and common; with which it is to be made, as far as possible, to harmonize. Still, the enunciation of the narrower doctrine is sometimes made in terms even narrower. Thus, it is sometimes said, that all the acts passed at the same session will be construed as one;[2] or that all passed on the same day will be;[3] 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 construed together;[4] or, that the original act and its amendments are to be construed as one, no portion of either being left inoperative, if effect can be given to the whole without doing

shall render judgment for them against the prosecutor, does not apply to a prosecution begun before the passage of the act. The State *v.* Berry, 25 Misso. 355. Where, after the commission of a felony, the jurisdiction to punish the offence is transferred from one court to another, and the prisoner is afterward arrested, he should be sent to the latter court to be tried. Ewing's Case, 5 Grat. 701. According to a South Carolina case, the clause of the act of 1794, which declares "that every surveyor who shall have wilfully and knowingly violated the instructions of the surveyor-general, in not making out the boundaries of all lands formerly granted, and which are within the survey by him or them made, shall be prosecuted," &c., is retrospective in its operations. The State *v.* Solomons, 3 Hill, S. C. 96.

[1] Ante, § 82; United States *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 Oregon, 31; Reg. *v.* St. Giles, 3 Ellis & E. 224; Mitchell *v.* Duncan, 7 Fla. 13; Bruce *v.* Schuyler, 4 Gilman, 221; Isham *v.* Bennington Iron Co. 19 Vt. 230. The true rule for the construction of a statute, it has been said, is to look to the whole and every part of it, and the apparent intention derived from the whole, to the subject-matter, to the effects and consequences, and to the reason and spirit of the law; and thus to ascertain the meaning of the legislature, though the meaning so ascertained conflicts with the literal sense of the words. Ryegate *v.* Wardsboro, 30 Vt. 746. Where there are two enactments on the same subject, they must be so construed as to maintain both, if it can be done without destroying the evident intent and meaning of the later one. Merrill *v.* Gorham, 6 Cal. 41.

[2] Cain *v.* The State, 20 Texas, 355; The State *v.* Rackley, 2 Blackf. 249. And see Attorney-General *v.* Brown, 1 Wis. 513.

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

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

violence to the words;[1] or, going beyond the above proposition, that a subsequent statute may be looked at, to aid in the discovery of the true intent of the former[2] (a doctrine which is sound only in a restricted sense); or, that it is always proper to consider the whole of a statute, with its preamble, in construing any part, even though the words of the part should not be ambiguous.[3] And these various other minor enunciations of doctrine are also sound, and not in conflict with the more enlarged doctrine.

§ 87. **Continued — Illustrations.** — Thus, where an act organizing a county specifies the term of office of the officers first elected, but is silent respecting the term of their successors, the duration of the latter is governed by the pre-existing general law.[4] And where an act confers powers recited in another act, the former is to be construed as though the latter were a part of it.[5] So where the manifest intention 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 diverted from their literal meanings in order to harmonize with more explicit portions; and they may be restrained, enlarged, or qualified, so as to give effect to the obvious intention of the legislature.[6] When one section of an act provides that a certain notice shall be published for ten days in succession, and another section that all notices under this act shall be published daily, Sundays excepted, these two sections must be read together, and mean that the Sundays shall be included for enumeration, but not for publication.[7] And so, as a general proposition, the several parts of a statute must be made to harmonize with one another, and with the object of the whole;[8] as, for example, particular provisions are not to be extended beyond the general scope of the enactment, unless

[1] Harrell *v.* Harrell, 8 Fla. 46. Where two statutes are *in pari materia*, and the later is in effect an amendment of the earlier, a word used in a certain sense in the original act will not be supposed to be used in a different sense in the subsequent one. Robbins *v.* Omnibus Railroad, 32 Cal. 472.

[2] McAfee *v.* Southern Railroad, 36 Missis. 669.

[3] Holbrook *v.* Holbrook, 1 Pick. 248.

[4] People *v.* Colton, 6 Cal. 84.

[5] Turney *v.* Wilton, 36 Ill. 385. And see Canastota, &c., Road *v.* Parkill, 50 Barb. 601.

[6] Noble *v.* The State, 1 Greene, Iowa, 325.

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

[8] Ellison *v.* Mobile and Ohio Railroad, 36 Missis. 572.

such extension was manifestly intended.[1] These are but examples illustrating a doctrine whose form is multitudinous.

§ 88. **Common Law with Statutes.** — But the common law is as much to be taken into the account in construing a statute as is a previous statutory enactment. Numerous illustrations of this doctrine will appear in other connections; let the following suffice for this place. By the English statute, 9 Geo. 4, c. 69, § 9, against night poaching, it is provided, "that, if any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or enclosed, for the purpose," &c. Now, it is a principle of the common law that, if one person does a criminal thing, and another is encouraging him, while sufficiently near to give actual help if required, both are regarded as doers of the act. Applying this principle to the statute it results, that, if one of a party of poachers is found actually within the particular grounds, and the rest are 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,"[2] — a result which, the reader perceives, could not be reached except by construing the common law and the statute together. And the doctrine is well illustrated in a California case, though the result arrived at may not accord with the statutory law in some other States; namely, that, by a principle of the common law, officers who exercise merely ministerial functions may act by deputy, therefore, in this State, constables may exercise their ministerial functions by deputy.[3]

§ 89. **Statutes with Constitution.** — Our written constitutions are, as we have already seen,[4] laws; and they are not the less so because they are 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.[5] We saw, in the work on Criminal Procedure, a forcible illustration of this doctrine in an adjudication by the Maine tribunal. The constitution of the State

[1] Ticknor's Estate, 13 Mich. 44.

[2] Rex *v.* Andrews, 2 Moody & R. 37, 38; Rex *v.* Lockett, 7 Car. & P. 300; Rex *v.* Passey, 7 Car. & P. 282.

[3] Jobson *v.* Fennell, 35 Cal. 711.

[4] Ante, § 11, 12, 16.

[5] Eskridge *v.* The State, 25 Ala. 30.

had secured the right of trial by jury. A statute gave jurisdiction over a case to a justice of the peace who sat without a jury. There was a general system of appeals from justices of the peace to a higher tribunal where causes were submitted to juries. And the court held, that, under these circumstances, the constitution, operating with the statute, gave the right of appeal, thus securing a jury trial.[1]

§ 90. **Continued.** — But the fact that the constitution is superior to the statute, which it controls in a case of conflict, gives also another and special operation to this sort of construction. When statute is to be construed with statute or with the common law, the one or the other must give way at any point where they cannot stand together, and the question which is to give way will often depend on a variety of considerations. But where a statute and the constitution are to be construed together, it is settled that the former must always yield to the latter. Therefore, if there are two possible constructions of the statute, and one of them is harmonious with the constitution and the other is opposed to it, the one which is harmonious must be adopted.[2] And, in general terms, courts will presume the legislature intended its acts to be reasonable, constitutional, and just; and, when possible, consistently with any fair interpretation of the words employed, will so construe them as not to infringe these principles.[3] While this rule will be carried as far as it can be consistently with the terms of a statute, it will not be permitted so to operate as to give the statute a meaning repugnant to its terms.[4]

§ 91. **Pronouncing Statute unconstitutional.** — We have already seen something under this head.[5] When a statute is void, as in conflict with a constitutional inhibition, the courts

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

[2] Duncombe *v.* Prindle, 12 Iowa, 1; Roosevelt *v.* Godard, 52 Barb. 533; Colwell *v.* Mary's Landing, &c., Co., 4 C. E. Green, 245.

[3] United States *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; Commonwealth *v.* Getchell, 16 Pick. 452; McMullen *v.* Hodge, 5 Texas, 34; Scott *v.* Smart, 1 Mich. 295; Commonwealth *v.* Edwards, 9 Dana, 447; Eason *v.* The State, 6 Eng. 481; Hogg *v.* Zanesville Canal and Manufacturing Co. 5 Ohio, 410, 417; Iowa Homestead Co. *v.* Webster, 21 Iowa, 221; Newland *v.* Marsh, 19 Ill. 376; Broom Leg. Max. 2d ed., 28.

[4] French *v.* Teschemaker, 24 Cal. 518.

[5] Ante, § 12, 16, 33–37.

should pronounce it so.[1] But not only will the courts give to the statute, as stated in the last section, a construction conforming to the constitution, if possible; yet, where apparently this cannot be done, they will be slow in so construing the constitution itself as to render the enactment void. Judges, however, differ somewhat on this point, some being inclined to pay little or no regard to the judgment of the law-makers. The true view in principle, and the one best supported by judicial authority is, that, since the legislators are themselves sworn to support the constitution, and they pass no act which they deem to be in violation of it, and since they are presumed to be men of learning and understanding, the decision which, in passing the act, they pronounce in favor of its constitutionality, prevails with the judges unless they affirmatively and distinctly see that the decision is wrong. If they do clearly and affirmatively see that the legislature was wrong, then, of course, there is no alternative for them but to decide accordingly. Their oath of office compels them to this course, while still, after all, they may be wrong and the legislature right. 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." [2]

[1] Fletcher *v.* Peck, 6 Cranch, 87; University *v.* Williams, 9 Gill & J. 365, 384; 1 Kent Com. 448; Bailey *v.* Philadelphia, &c., Railroad, 4 Harring. Del. 389.

[2] Cotten *v.* Leon, 6 Fla. 610, 613, opinion by Dupont, J.; Cutts *v.* Hardee, 38 Ga. 350; People *v.* San Francisco, &c., Railroad, 35 Cal. 606; Lafayette *v.* Jenners, 10 Ind. 70; Gillespie *v.* The State, 9 Ind. 380; The State *v.* Cooper, 5 Blackf. 258; Santo *v.* The State, 2 Iowa, 165; Baltimore *v.* The State, 15 Md. 376; Tyler *v.* People, 8 Mich. 320; Rich *v.* Flanders, 39 N. H. 304; Boston *v.* Cummins, 16 Ga. 102; Inkster *v.* Carver, 16 Mich. 484. 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." People *v.* Sassovich, 29 Cal. 480, 482. And in Indiana, Frazer, J. said: "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.

§ 92. **How Constitution interpreted.** — This is not the place to go minutely into the rules of constitutional interpretation. The general doctrine is, that constitutions are to be expounded in the same way, and according to the same rules, as the statutes; only, being popular instruments, a less technical sense is to be given to their words and phrases.[1] A difference is taken between the State and United States constitutions in this, that, in the former, where a power is not expressly or by implication denied, its existence is assumed; while, in the latter, no power is to be assumed except what is expressly or impliedly granted.[2] It is apprehended that this proposition is only in a general way correct. For example, if a power claimed to exist in a State constitution should be opposed to the Constitution of the United States, there would be no presumption in its favor; while, on the other hand, if a power claimed under the United States Constitution should relate to international intercourse, to jurisdiction on the high seas, or to any thing else of a national sort and beyond State cognizance, the implications, which would be against its existence in the State constitution, should favor its existence here.

§ 93. **Meaning of Words and Phrases — Literal or Liberal — Variety of Meanings.** — We should bear in mind, what has already been mentioned,[3] that, in interpreting statutes, we do not confine ourselves to the mere words. We are to penetrate through them to their true intent, even though, in some instances, it be found contrary to the letter;[4] for *Qui hæret in litera hæret in cortice*, if we adhere to the letter, we go only skin-deep into the meaning.[5] One form of this general doc-

[1] Manly *v.* The State, 7 Md. 135; Greencastle Township *v.* Blackf., 5 Ind. 557; The State *v.* Mace, 5 Md. 337.

[2] Page *v.* Allen, 8 Smith, Pa. 338; Bushnell *v.* Beloit, 10 Wis. 195.

[3] Ante, § 79–81.

[4] "The letter killeth, but the spirit giveth life." 2 Cor. 3: 6.

[5] Broom Leg. Max. 2d ed. 534; Jackson *v.* Collins, 3 Cow. 89, 96; People *v.* Ut ca Ins. Co. 15 Johns. 358; Minor *v.* Mechanics Bank, 1 Pet. 46, 64; Bac. Ab. Statute, I. 5, 6; 1 Bl. Com. 61; The State *v.* Savage, 32 Maine, 583; 1 Domat, Cush. Ed. p. 84; Eyston *v.* Studd, 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;"

trine is, that the intention of a statute, gathered from the whole of it, must prevail over the strict sense of its terms, when the latter construction will not operate unjustly or involve an absurdity.[1] Now, in consequence of the immense multitudes of the forms of thought, and the comparatively limited number of words, it becomes impossible to confine the several particular words to only one meaning.* Each individual word has a great variety of meanings and shades of meaning, to be determined, in each instance, by the subject to which it is applied, the connection in which it stands, and various other considerations. And, in a statute, the meaning of a word may be this, or that, according to the subject, context, and other particular circumstances.[2]

§ 94. **But One Meaning in the Particular Instance.** — In connection with what is thus said, let us call to mind some observations from a book not properly of the legal class. "No sentence or form of words," says the writer, "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 Sawle 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

Dwar. Stat. 2d ed. 552; Holbrook *v.* Holbrook, 1 Pick. 248, 254; Church *v.* Crocker, 3 Mass. 17, 21; The State *v.* Lane, 8 Ire. 256; New Orleans, &c., Railroad *v.* Hemphill, 35 Missis. 17.

[1] Ex parte Ellis, 11 Cal. 222.

[2] McIntyre *v.* Ingraham, 35 Missis. 25; Simonds *v.* Powers, 28 Vt. 354; Smith *v.* Randall, 6 Cal. 47; People *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; The State *v.* Judge of North District, 12 La. An. 777.

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." [1]

§ 95. **Continued.** — The doctrine in other language is, that a single form of words cannot be interpreted to convey a duplicate meaning. Thus, if one should say, 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. And if the legislature should direct the officers of a court to *sit or stand* in a particular emergency, the meaning could not be, that a part of them might sit while the rest stood, at the same time; because this interpretation would give a duplicate sense to the simple expression. Or if the provision were, that no fees be taken for *executing a mandamus or a capias*, the meaning could not be, that fees might be received for the one but not for the other; since here, also, a duplicate signification must be drawn from one compact form of language to produce this result. There can be no doubt of the soundness of this doctrine when applied to such a writing as a statute. But there are other writings of various classes useful among men, — as, for example, compositions, either in poetry or prose, intended to instruct or amuse by way of suggestion, rather than positive or exact delineation of doctrine or of precept, — the efficacy of which may consist in giving various and perhaps conflicting meanings to a single sentence, or even a single word, where the reader is expected to accept all the meanings, or as many of them as he has capacity for, or to choose between them.

§ 96. **Legal Meaning.** — Looking, then, for the one meaning, and considering that the subject of every statute is law,[2] if the word has a particular legal meaning, we give it, in the absence of other controlling circumstances,[3] this meaning.[4]

§ 97. **Words and Phrases, including Entire Statutes, previously**

[1] Lieber Legal and Political Hermeneutics, p. 86–88. And see The State *v.* Lyman, 8 Blackf. 330; Reg. *v.* Hamilton, 1 Car. & K. 212.

[2] Ante, § 7.

[3] Post, § 204.

[4] Apple *v.* Apple, 1 Head, 348.

adjudicated upon. — Constitution. — It therefore follows, that, if 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 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 is presumed to have adopted the meaning already given it by the courts.[2] And this doctrine is not limited in its application to what has been done in our own State; for, if a word or phrase, or statutory provision, is adopted from the laws of another State,[3] or from England,[4] or even from the civil law,[5] it will ordinarily be construed by us the same as in the law from which it was taken. But we are not in any absolute sense bound by the foreign exposition,[6] which is considered less controlling than the domestic.[7] It is the same with the constitution of a State. If it contains provisions borrowed from the constitutions of other States, and those provisions had already received judicial interpretation, the presumption is that the framers intended such interpretation should be followed.[8]

§ 98. **Revised Statutes.** — It is but a repetition of the doctrines of the last section to say, that, where the statutes of a State are "revised," after the manner generally pursued in our

[1] Whitcomb *v.* Rood, 20 Vt. 49; United States *v.* Wilson, Bald. 78, 95; Sheppard *v.* Gosnold, Vaugh. 159; McKee *v.* McKee, 17 Md. 352.

[2] Myrick *v.* Hasey, 27 Maine, 9; Ruckmaboye *v.* Mottichurd, 32 Eng. L. & Eq. 84; Mansell *v.* Reg. 8 Ellis & B. 54, 73; Bank of Mobile *v.* Meagher, 33 Ala. 622; La Selle *v.* Whitfield, 12 La. An. 81. 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.

[3] Rigg *v.* Wilton, 13 Ill. 15; The State *v.* Rowley, 12 Conn. 101; McKenzie *v.* The State, 6 Eng. 594; Campbell *v.* Quinlin, 3 Scam. 288; Draper *v.* Emerson, 22 Wis. 147; Drennan *v.* People, 10 Mich. 169; Bemis *v.* Becker, 1 Kansas, 226; The State *v.* Swope, 7 Ind. 91; The State *v.* Macon County Court, 41 Misso. 453.

[4] McCarter *v.* Orphan Asylum Society, 9 Cow. 437; Kennedy *v.* Kennedy, 2 Ala. 571; McKenzie *v.* The State, 6 Eng. 594; Commonwealth *v.* Hartnett, 3 Gray, 450; Pennock *v.* Dialogue, 2 Pet. 1; Tyler *v.* Tyler, 19 Ill. 151; Adams *v.* Field, 21 Vt. 256.

[5] United States *v.* Jones, 3 Wash. C. C. 209, 215.

[6] Snoddy *v.* Cage, 5 Texas, 106.

[7] Rigg *v.* Wilton, 13 Ill. 15; Ingraham *v.* Regan, 23 Missis. 213.

[8] People *v.* Culeman, 4 Cal. 46; Attorney-General *v.* Brunst, 3 Wis. 787.

States, the revised statutes receive the former interpretation, wherever a contrary intention does not affirmatively appear. Slight changes in language are not presumed to change the meaning, since it was one of the special objects of the revision to introduce an improved and more uniform phraseology. To produce a change of interpretation, the intent to change the law must affirmatively appear.[1] And where an act of the legislature is repealed and is re-enacted, with some changes made at the same time, both statutes may be taken into consideration in giving a construction to the later one; but the act repealed has force only so far as it is continued in force by saving clauses and exceptions.[2] There are circumstances in which, differing from those before contemplated in this section, the fact that the words of a statute differ from those of a prior statute on the same subject, implies an intent on the part of the legislature to make a corresponding difference in the interpretation of the provision itself.[3]

§ 99. **Technical Words which are not legal.** — A word may be technical while it is not of the particularly legal sort. And since we regard the subject of the statute, if it employs a word technical to its subject, we give to the word the technical sense, — not the general sense, not one technical to another subject, — unless indeed something appears indicating the contrary interpretation.[4] Thus, if the act relates to commerce, we follow the vocabulary of merchants, not of mechanics.[5] So words in revenue laws are to be construed according to the usages of trade;[6] as, if "bohea tea" is mentioned, it means

[1] Hughes *v.* Farrar, 45 Maine, 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 State, 1; People *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.* The State, 29 Ala. 27; Glass *v.* The State, 30 Ala. 529, 531; Fosdick *v.* Perrysburg, 14 Ohio State, 472; Croswell *v.* Crane, 7 Barb. 191; Dominick *v.* Michael, 4 Sandf. 374. The law, for example, will be presumed to be changed by the revised statute, if no effect can otherwise be given to the new language. Burnham *v.* Stevens, 33 N. H. 247. And see The Magellan Pirates, 18 Jur. 13, 25 Eng. L. & Eq. 595.

[2] Coffin *v.* Rich, 45 Maine, 507.

[3] Rich *v.* Keyser, 4 Smith, Pa. 86.

[4] The State *v.* Smith, 5 Humph. 394.

[5] United States *v.* Sarchet, Gilpin, 273.

[6] Elliott *v.* Swartwout, 10 Pet. 137, 151; Lee *v.* Lincoln, 1 Story, 610; United States *v.* One Hundred and Twelve Casks of Sugar, 8 Pet. 277; Bacon *v.* Bancroft, 1 Story, 341; Law-

the article known in trade as such, not in science;[1] and "loaf sugar" in these laws signifies sugar in loaves, not crushed sugar; such being the use of these words in trade and commerce.[2] But this doctrine is merely a judicial recognition of the fact, that every man using human speech necessarily uses each particular word as it arises in his mind connected with the particular subject he is unfolding.

§ 100. **Continued — Exceptions — Purpose of the Statute, &c. — "Student."** — Since the rule requiring the technical meaning to be given to technical words and phrases is but an evolution from other rules for ascertaining the true legislative intent, it cannot prevail where it would defeat the purpose of the statute, or violate its obvious signification. Thus when a Connecticut act forbade the giving of credit, except on certain conditions, to "any student of Yale College, being a minor," the word "student" was held to embrace one not matriculated, or admitted to regular membership; matriculation only taking place after a residence of six months, and evidence of unblemished moral character.[3] This case is evidently one in which the popular sense must have been meant; for persons giving credit could not be presumed to know the terms on which young men studying at the college were received by its officers. The English courts consider, that, where technical words are sought to be expanded into the larger popular meaning in a penal statute, this intent of the legislature must plainly appear.[4]

§ 101. **Words not Technical.** — If a word or phrase is neither legal nor otherwise technical to the subject of the statute, it is to be understood in its common, popular sense.[5] But regard

rence *v.* Allen, 7 How. U. S. 785; Curtis *v.* Martin, 3 How. U. S. 106.

[1] Two Hundred Chests of Tea, 9 Wheat. 430.

[2] United States *v.* Breed, 1 Sumner, 159. And see, as to the word "tenpins," The State *v.* Gupton, 8 Ire. 271.

[3] Morse *v.* The State, 6 Conn. 9. And see, as to the word "purporting," The State *v.* Harris, 5 Ire. 287. See also United States *v.* Gooding, 12 Wheat. 460, 467; United States *v.* Twenty-Four Casks, Bald. 502, 505. And see Jesson *v.* Wright, 2 Bligh, 1, 57; Winter *v.* Perratt, 6 Man. & Gr. 314, 379: Commonwealth *v.* Buzzell, 16 Pick. 153, 161; Waring *v.* Clarke, 5 How. U. S. 441.

[4] Stephenson *v.* Higginson, 3 H. L. Cas. 638, 18 Eng. L. & Eq. 50.

[5] Dwar. Stat. 2d ed. 573; The State *v.* Blythe, 3 McCord, 363; Macy *v.* Raymond, 9 Pick. 285; Allen *v.* Harford Insurance Co., 2 Md. 111; Rex *v.* Wooldridge, 1 Leach, 4th ed. 307; Barker *v.* The State, 12 Texas, 273; The State *v.* Clarksville and R. T. P. Co., 2 Sneed, 88; Favers *v.* Glass, 22 Ala.

should be had to the foregoing rules; especially should be considered the connection in which the words are used, and the subject to which they relate.[1] And the popular sense referred to must be the general one in distinction from a mere local usage.[2]

§ 102. **Specific Expressions interpreted as General — General Expressions contracted — How ordinarily.** — The foregoing principles of interpretation may be deemed perhaps the leading ones, except those which are to be brought under notice in future chapters, wherein we shall consider more particularly the principles which pertain specifically to the interpretation of the criminal laws. Still there are some others. Thus Chancellor Kent mentions, that, "where the expression in a statute is special or particular, but the reason is general, the expression should be deemed general."[3] But this is only one application of the doctrine, that the entire enactment must be examined, and the legislative intent drawn from the whole. On the other hand, the word "all" is often restrained in meaning by its context, or by the general object of the provision.[4] Butordinarily the language is to be understood according to its common signification; as, for instance, if general terms are employed, they are to receive their general, not restricted, sense.[5] And so a legislative power to purchase "any property" extends to real estate as well as personal.[6]

§ 103. **Bind the State, or not — Limitations.** — It is plain, in reason, that a statute which is made by the government for the subject, should be understood to bind the subject, and not to bind the government unless the intent to do so affirmatively appears. In accordance with this view, "in England," says Mr. Sedgwick, "it is held that words of a statute

621; Gross *v.* Fowler, 21 Cal. 392; Green *v.* Weller, 32 Missis. 650; Quigley *v.* Gorham, 5 Cal. 418; Wetumpka *v.* Winter, 29 Ala. 651; Schriefer *v.* Wood, 5 Blatch. 215; Philadelphia and Erie Railroad *v.* Catawissa Railroad, 3 Smith, Pa. 20; Enkeling *v.* Van Wamel, 26 Texas, 469.

[1] Ex parte Hall, 1 Pick. 261; Opinion of the Justices, 7 Mass. 523.

[2] Rex *v.* Hogg, 1 T. R. 721, 728.

[3] 1 Kent Com. 462, referring to Beawfage's Case, 10 Co. 99 *b*, 101 *b*. See also Williams *v.* McDonal, 4 Chand. 65.

[4] Phillips *v.* The State, 15 Ga. 518.

[5] Jones *v.* Jones, 18 Maine, 308. And see Alexander *v.* Worthington, 5 Md. 471; Bartlett *v.* Morris, 9 Port. 266.

[6] DeWitt *v.* San Francisco, 2 Cal. 289.

applying to private rights do not affect those of the Crown." [1] And in our States, 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.[2] Within this doctrine fall statutes of limitations; our courts hold that they do not run against the State or United States, unless by express words;[3] neither does lapse of time create the presumption of the payment of a debt due to the government.[4] And statutes allowing suits against the State, being in derogation of a sovereign right, are to be strictly construed.[5]

§ 104. **Contemporaneous Interpretations — Long Usage, &c.** — A construction given by the sages of the law when the act was passed, or soon after, carries much weight,[6] especially where rights of property have been acquired under it;[7] and so, on the like ground, does a legislative exposition.[8] Such exposition has no force of itself;[9] its only weight comes from the respect which the court may have for the opinions of members of the legislature, while, of course, it may operate as a grant of a new power. But if a contemporaneous construction by the legislature of the same words can be discovered, it is high evidence

[1] Sedgwick Stat. Law, 36. See Commonwealth *v.* Boston & Maine Railroad, 3 Cush. 25; United States *v.* Weise, 2 Wallace, Jr. 72.

[2] The State *v.* Kinne, 41 N. H. 238; Bennett *v.* McWhorter, 2 W. Va. 441. On perhaps a principle not foreign to this, a right of the State cannot be lost by the laches of its agents. Haehnlen *v.* Commonwealth, 1 Harris, Pa. 617. In Georgia it is laid down that the State, though not expressly named, is bound by public laws, for the promotion of learning, the advancement of religion, and the support of the poor. Gladney *v.* Deavors, 11 Ga. 79.

[3] United States *v.* Williams, 5 McLean, 133; The State *v.* Fleming, 19 Misso. 607; Brinsfield *v.* Carter, 2 Kelly, 143; McKeehan *v.* Commonwealth, 3 Barr, 151; United States *v.* Davis, 3 McLean, 483; United States *v.* Hoar, 2 Mason, 311; post, § 142, note.

[4] United States *v.* Williams, 5 McLean, 133.

[5] Rose *v.* The Governor, 24 Texas, 496.

[6] Sedgw. Stat. Law, 251; Reg. *v.* Cutbush, Law Rep. 2 Q. B. 379.

[7] 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, especially if great mischief would follow a contrary construction. Rogers *v.* Goodwin, 2 Mass. 475; Packard *v.* Richardson, 17 Mass. 122, 144; Opinion of the Justices, 3 Pick. 517. Where the construction is doubtful, one long acted upon by the inferior courts will be regarded by the superior. Plummer *v.* Plummer, 37 Missis. 185. But where the construction is not doubtful, it cannot be aided in this way. Bailey *v.* Rolfe, 16 N. H. 247.

[8] Sedgw. Stat. Law, 252.

[9] Aikin *v.* Western Railroad, 20 N. Y. 370; ante, § 76.

of the sense intended.[1] And long usage by the courts, even without an express adjudication, is to be regarded.[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] If there has been a single decision of the question, it must be followed unless clearly wrong. And a series of erroneous decisions may bind where a single wrong decision would not.[4] Doubtful words in a general statute may be expounded with reference to a general usage; and, when a statute is applicable to a particular place only, such words may be construed by usage at that place.[5] In accordance with the foregoing views, where for a long period a statute has been received and acted on by the courts as constitutional, a strong presumption in its favor arises from this fact.[6] Yet still, in such a case, the court may pronounce the statute to be unconstitutional.[7]

§ 105. **Computation of Time — "Month."** — The word "month," in a statute, means either a lunar month, which consists of twenty-eight days, or a calendar month, according to circumstances, or the opinions of the particular tribunal. By the old English law, settled at a time when the calendar was not settled as it is now, and computations were actually made among men by the lunar month, the term month, whether found in a statute or a contract, signified a period of four weeks or twenty-eight days.[8] Computations having been made more and more by calendar months, till at last those by lunar months are practically unknown among men, the rule of law has been gradually and in some particulars modified from time to time. But in England the courts have not deemed them-

[1] Philadelphia and Erie Railroad *v.* Catawissa Railroad, 3 Smith, Pa. 20.

[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.

[3] Leigh *v.* Kent, 3 T. R. 362, 364; see ante, § 91.

[4] Commonwealth *v.* Miller, 5 Dana, 320.

[5] Love *v.* Hinckley, 1 Abb. Adm. 436. See ante, § 101.

[6] The State *v.* Bosworth, 13 Vt. 402

[7] Baltimore *v.* The State, 15 Md. 376.

[8] Tomlins Law Dict. tit. Month; Chit. Con. 730; Bouv. Law Dict. tit. Month.

selves authorized to depart from the ancient precedents in interpreting the statutes. Said Lord Kenyon, C. J. in 1795: "I confess 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 a *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."[1] In the United States, this rule of the English law has been by some of the courts adopted;[2] though always with an inclination to depart from it and hold the month to be a calendar one whenever the special circumstances would permit.[3] Yet, where this is so at the common law, statutes have pretty generally interfered and made the month calendar. And, without the aid of a statute, it has been said that the "current of authority" in this country is to presume the month intended to be a calendar month,

[1] Lacon *v.* Hooper, 6 T. R. 224, 226. And see Ryalls *v.* Reg., 13 Jur. 259, 18 Law J. N. S. M. C. 69.

[2] Stackhouse *v.* Halsey, 3 Johns. Ch. 74; The State *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.

[3] 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 Vanderwell *v.* Commonwealth, 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 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 Wal. 177. 1 R S. 606, § 4 (NY)

contrary to the English rule.[1] At all events, in one way or another, it has come to be practically so almost uniformly with us at the present day.[2] 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. **Computation of Time, continued — "Year." —** When a year is mentioned in a legislative or judicial proceeding, the Christian calendar is presumed to have been used.[3] It embraces 365 days, or 366, according as the particular year in question happens to be leap year or not.[4]

§ 107. **Continued — A Given Number of Days, Weeks, Months, or Years. —** It is plain in reason, that, if a statute mentions 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, the statutory number. Thus, if a statute is passed on the fifth day of the month, and it is to take effect in ten days from the time of its passage, it will go into operation on the fifteenth day of the month, because the sum of five and ten is fifteen. In other words, of the two extreme days, the one shall be included and the other excluded in the reckoning. And, when we come to look at this question as one of authority, we find it to be so in a sort of general way. It was so held, for example, where the words were "ten days' notice."[5]

§ 108. **Continued — No Division of a Day. —** What is thus set down as the doctrine of reason, and the better, or *prima facie*,

[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; Commonwealth *v.* Chambre, 4 Dall. 143; Pyle *v.* Maulding, 7 J. J. Mar. 202; Kimball *v.* Lamson, 2 Vt. 138; Commonwealth *v.* Shortridge, 3 J. J. Mar. 638; Strong *v.* Birchard, 5 Conn. 357; Alston *v.* Alston, 3 Brev. 469; Churchill *v.* Merchants Bank, 19 Pick. 532; Gross *v.* Fowler, 21 Cal. 392; Sprague *v.* Norway, 31 Cal. 173.

[3] Engleman *v.* The State, 2 Ind. 91.

[4] Dwar. Stat. 2d ed. 693.

[5] Rex *v.* West Riding of Yorkshire, 4 B. & Ad. 685, 689. And see Reg. *v.* Shropshire, 8 A. & E. 173; Jackson *v.* Van Valkenburgh, 8 Cow. 260; Homan *v.* Liswell, 6 Cow. 659; Ex parte Dean, 2 Cow. 605; Bigelow *v.* Willson, 1 Pick. 485; Portland Bank *v.* Maine Bank, 11 Mass. 204; Presbrey *v.* Williams, 15 Mass. 193; Rex *v.* Moore, Jefferson, 8; White *v.* Crutcher, 1 Bush, 472; Bowman *v.* Wood, 41 Ill. 203.

doctrine in point of authority, has been greatly broken in upon in consequence of the other doctrine, already discussed,[1] that the law makes no divisions of a day, or in consequence of peculiar language employed, or of the special circumstances of the particular case. Thus, if, as in the instance specified in the last section, there is to be "ten days' notice," the doctrine set down in that section may be reduced into its constituent elements as follows: suppose the requirement is "one day's" notice, then, if the notice is given on the last moment of the fifth day of the month, it is out on the first moment of the sixth day, consequently the party has only two fractions of moments notice, while the statute says "one day." Or, if the notice is to be "ten days," and it is given at the last moment of the fifth day of the month, and it expires at the first moment of the fifteenth day, then the party has really but nine days and two fractions of moments notice, instead of the statutory ten days. And, if the reader will look through the reports of cases under this head, he will see, that, in various instances in which this result of the general doctrine has been pressed upon the attention of the tribunals, they have provided for the difficulty 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, then the court should hold it not to be out till the sixteenth day of the month. Let us look at some illustrations of this sort of computation.

§ 109. **Continued — "One Day previous" — "One Calendar Month's Notice."** — Thus, according to a Texas case, if it is required by the constitution that bills, in order to become laws, shall be presented to the Governor "one day previous to the adjournment of the legislature," this means not less than twenty-four hours.[2] And in England, where a statute directed

[1] Ante, § 29.

[2] Hyde *v.* White, 24 Texas, 137, 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.

"one calendar month's notice," it was held that, in like manner, the first and last days must be excluded; as, if the notice were given on the first day of the month, it would not expire until the second day of the next month.[1]

§ 110. **Continued — "Clear" — "At least," &c.** — So, in England, if the statute requires a given number of "*clear* days," — as, "ten clear days," — neither the first nor the last day is counted in the computation.[2] This is believed to be regarded as "clear" doctrine in England, on principle as well as authority; but the courts also hold, to regret, and still to adhere to the holding, that the words "at least" have the same effect as the word "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."[3] The Missouri court held the other way on the same words, in a case where a forfeiture was thus avoided, otherwise the decision would have conformed to the English doctrine.[4] In Texas, where the expression was "five days before the return day thereof," the five days were held to be "clear" days.[5]

§ 111. **Continued — Observations — Conclusion.** — Now, if we should go on with a consideration of the cases, having first made a full collection of them, we should find adjudication to conflict with adjudication, — some of the cases would appear clearly to be overruled, while it would be impossible to say how it is with certain others, — all sorts of exceptions and qualifications of the general doctrine would be set down, to be themselves overturned or questioned, — and thus page after page would be occupied, leaving the reader no wiser at the end than when he commenced. Let us do no such thing. All which can be said on authority is, that, as a general rule, either the first or the last day is to be excluded from the computation, yet not both; but the exception is to exclude both in cases where — well, no one can say in what cases. Regard is to be had to the subject, the particular words, the reason of the thing, and so on. In principle, the party interested ought to

[1] Young *v.* Higgon, 6 M. & W. 49.

[2] Rex *v.* Herefordshire, 3 B. & Ald. 581; Rex *v.* West Riding of Yorkshire, 4 B. & Ad. 685, 690.

[3] Zouch *v.* Empsey, 4 B. & Ald. 522; Reg. *v.* Shropshire, 8 A. & E. 173; Mitchell *v.* Foster, 12 A. & E. 472.

[4] The State *v.* Gasconade, 33 Misso. 102.

[5] O'Connor *v.* Towns, 1 Texas, 107.

be permitted to reduce the first and last day to hours, making fractions of a day whenever justice demands,[1] then there would be no difficulty in rendering the general rule nearly or quite universal. Short of this, we have in the law the unrest which always proceeds from wrong, — this doctrine being apparently laid down to-day and that to-morrow, — so that no one can say what the adjudged law really is.[2]

§ 112. **"May" — Statute against Polygamy, &c.** — The word "may" is often construed as imperative; and this appears to be its true interpretation "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."[3] So it has been said; yet clearly in all cases where individuals have rights, or the public has interests, which a court, for example, "may" enforce or protect, the word "may" is imperative; while in most, it is sometimes said in all, other cases, it is merely permissive.[4] 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

[1] And see ante, § 29.

[2] See 1 Bishop Mar. Women, § 861. On this subject of the computation of time, I will add the following references to authorities, which, in connection with the others already cited in this discussion, will enable the reader to *find* nearly every thing relating to the question. The State *v.* McLendon, 1 Stew. 195; Garner *v.* Johnson, 22 Ala. 494; Boyd *v.* Commonwealth, 1 Rob. Va. 691; Owen *v.* Slatter, 26 Ala. 547; The State *v.* Schnier, 5 Rich. 299; Barr *v.* Lewis, 6 Texas, 76; Commonwealth *v.* Jones, 2 Jones, Pa. 365; Abrahams *v.* Commonwealth, 1 Rob. Va. 675; Kimm *v.* Osgood, 19 Misso. 60; Peables *v.* Hannaford, 18 Maine, 106; The State *v.* Godfrey, 3 Fairf. 361; Pulling *v.* People, 8 Barb. 384.

[3] Minor *v.* Mechanics Bank, 1 Pet. 46, 64. And see Ex parte Simonton, 9 Port. 390; Newburg Turnpike *v.* Miller, 5 Johns. Ch. 101; Commonwealth *v.* Gable, 7 S. & R. 423; Rex *v.* Commissioners Flockwold Inclosure, 2 Chit. 251.

[4] Seiple *v.* Elizabeth, 3 Dutcher, 407; Mitchell *v.* Duncan, 7 Fla. 13; Schuyler *v.* Mercer, 4 Gilman, 20; Cutler *v.* Howard, 9 Wis. 309; Blake *v.* Portsmouth, &c., Railroad, 39 N. H. 435; Nave *v.* Nave, 7 Ind. 122; Bansemer *v.* Mace, 18 Ind. 27; Supervisors *v.* United States, 4 Wal. 435; Galena *v.* Amy, 5 Wal. 705.

persons."[1] Yet it is said that "may" is imperative only for sustaining or enforcing a right, not for creating one,[2] — a proposition the latter part of which requires, perhaps, some qualification. A case within the general doctrine embraced by the proposition occurred in England under Stat. 13 & 14 Vict. c. 61, § 13, which provides, that, in certain cases specified, the court or judge at chambers "*may* thereupon, by rule or order, direct that the plaintiff shall recover his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if this act had not been passed." And it was held, that the award of costs is permissive, not imperative.[3] The word, then, is often only permissive.[4] For example, again, the Maine statute against polygamy provides, that "the indictment for such offence *may* be found and tried in the county where the offender resides"; and this is held not to oust the common-law jurisdiction. Said Dickerson, J.: "This 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 offence is committed, but rather an enlargement of the jurisdiction of the court."[5]

§ 113. **Private Statutes.** — "Private statutes, made for the accommodation of particular citizens or corporations, ought not to affect the rights or privileges of others, unless such construction results from express words, or from necessary implication."[6] The leading English doctrine concerning these statutes is, that they are to be construed as contracts between the public and the individual.[7]

§ 114. **Ordinary Mode of Procedure — Common Law.** — Kent, C. J. once observed, that, "where a statute admits of two constructions, it is advisable to give it that which is consonant

[1] Mason *v.* Fearson, 9 How. U. S. 248, 259.

[2] The State *v.* Holt County Court, 39 Misso. 521; Ex parte Banks, 28 Ala. 28.

[3] Jones *v.* Harrison, 6 Exch. 328, 3 Eng. L. & Eq. 579.

[4] Ex parte Yeager, 11 Grat. 655. And see Leigh *v.* Westervelt, 2 Duer, 618; Bowers *v.* Sonoma, 32 Cal. 66; People *v.* Brooks, 1 Denio, 457.

[5] The State *v.* Sweetser, 53 Maine 438, 439.

[6] Parsons, C. J., in Coolidge *v.* Williams, 4 Mass. 140, 145; Wales *v.* Stetson, 2 Mass. 143; Hood *v.* Dighton Bridge, 3 Mass. 263; Perry *v.* Wilson, 7 Mass. 393; Sprague *v.* Birdsall, 2 Cow. 419.

[7] Dwar. Stat. 2d ed. 650, 651.

to the ordinary mode of proceeding"; and so, an act being defectively drawn, one part seeming to provide for a summary proceeding, and another for a proceeding in the ordinary way, he held the latter to be the authorized one.[1] This is a branch of the general doctrine, to be considered in other connections, that statutes are to be construed in harmony with the common law; which doctrine, with this, is but a part of the larger one, mentioned in this chapter, that all laws are to be construed together, in such a manner as to form, as far as the particular words of the several laws will permit, one harmonious system of jurisprudence.

§ 115. **Statutes Foreign to the Court.** — The Supreme Court of the United States, in construing the statutes of the States, is governed by the decisions of the State tribunals; except on the question of their being in conflict with the Constitution, laws, or treaties of the United States.[2] In like manner do the State tribunals follow the decisions of the State whose statutes they are construing.[3] And the statute-laws of a foreign country receive the meaning given them in that country.[4]

§ 116. **Ancient and Modern Interpretations compared — Modern Differences.** — There appears to be some difference, not only between the views of different contemporaneous judges, but between those of the judges of ancient and modern times, respecting the interpretation of statutes. Thus, in ancient times, the courts would seem to have taken greater liberties with the words of statutes than they take now, — a difference rather of practice than of theory; for the same doctrines which were then established prevail still. And the judges of the present day differ in their application of the rules to particular cases, while the rules themselves are held substantially alike in all our tribunals. This is unavoidable; because, in the latitude of meaning authorized by the structure of our language for each particular word and combination of words, there is room for differences of opinion, while the diversities in men's minds open

[1] Bennett *v.* Ward, 3 Caines, 259.

[2] De Wolf *v.* Rabaud, 1 Pet. 476; Bell *v.* Morrison, 1 Pet. 351; Gardiner *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.

[3] Carlton *v.* Felder, 6 Rich. Eq. 58; Hale *v.* Lawrence, 3 Zab. 590.

[4] Hoyt *v.* Thompson, 3 Sandf. 416; Bloodgood *v.* Grasey, 31 Ala. 575.

still further ground of difference, and the diversities of mental education still further. So the language slightly changes from age to age, presenting apparent changes of interpretation where none truly exist.

§ 117. **Conclusion — Other Rules.** — Other rules will be found in other connections. The collection given under the present sub-title embraces most of those which are common to the civil and criminal departments alike. And it is impossible that those which pertain to the criminal law can be correctly understood except by those who have first an understanding of them.

IV. *By what the Meaning is contracted or expanded.*

§ 118. **General View.** — From the foregoing discussions the reader can collect much which pertains also to the present sub-title. And much more will appear in subsequent chapters. The present purpose is to direct attention to the leading things of the sort indicated by the sub-title. Thus, the connection in which a word or phrase stands may contract or expand its meaning;[1] so may the subject to which it relates.[2] Most of the influences which contract or expand may be set down under the one or the other of these two heads; namely, the connection or the subject.

§ 119. **The Subject.** — A statute in derogation of common right is to be kept within the limit of its express provisions;[3] as, for example, a statute allowing the condemnation of private land for the public use.[4] And it is the same with all penal statutes;[5] so of a statute conferring new powers on a justice of the peace. "He must proceed in the mode prescribed by the statute."[6] And it is so with all statutes in derogation of the common law; they cannot be extended by construction to embrace cases not fairly within the scope of their language.[7] Of this sort, for example, is a statute which permits an aggrieved party to proceed against a public officer by motion on his offi-

[1] Ante, § 81, 82, 93.

[2] Ante, § 84, 85, 93, 96, 99.

[3] Indianapolis and Cincinnati Railroad *v.* Kinney, 8 Ind. 402.

[4] Gilmer *v.* Lime Point, 19 Cal. 47.

[5] Steel *v.* The State, 26 Ind. 82; The State *v.* Lovell, 23 Iowa, 304.

[6] O'Brian *v.* The State, 12 Ind. 369.

[7] Dwelley *v.* Dwelley, 46 Maine, 377; Burnside *v.* Whitney, 21 N. Y. 148.

cial bond.[1] And it is the same with statutes in restraint of trade, or of the alienation of property.[2] In like manner, the exclusion of one from giving evidence is somewhat opposed to natural right, consequently it ought not to be extended beyond the letter of the statute.[3] So, if a statute authorizes process to be served constructively instead of personally, upon one, it is in derogation of a natural right, and its terms should be strictly complied with.[4] In like manner, acts of incorporation and other statutes giving special privileges are not permitted to extend, by construction, beyond their unequivocal terms.[5] These are but illustrations of the broader doctrine, that whatever is against natural right, or the policy of the law, or the established course of legal and juridical things as favored by the law, — whatever comes to create a jar in the judicial system, or to deprive men either of their liberty or of any natural right, or to grant special privileges, — is not to be extended further than the words of the statute carry it. This is called strict interpretation.

§ 120. **Continued.** — On the other hand, statutes such as the following are to receive a liberal interpretation; though it is not easy to say how far this sort of interpretation permits us to bend their terms, or expand them beyond their strict sense, or draw within them cases which are covered merely by the equity of their provisions: those extending the right of appeal;[6] allowing redemption of real estate after a tax sale;[7] providing for the settlement of disputes by arbitration;[8] all other remedial statutes;[9] and statutes to promote the public convenience.[10] These are but illustrations of the statutes to which the liberal interpretation is to be applied.

§ 121. **The Connection.** — It is obvious that the connection in

[1] Hearn *v.* Ewin, 3 Caldwell, 399.

[2] Richardson *v.* Emswiler, 14 La. An. 658.

[3] Pelham *v.* Messenger, 16 La. An. 99; Esterley's Appeal, 4 Smith, Pa. 192; Sullivan *v.* La Crosse, &c., Packet Co., 10 Minn. 386.

[4] Stewart *v.* Stringer, 41 Misso. 400.

[5] Moran *v.* Miami, 2 Black, 722.

[6] Pearson *v.* Lovejoy, 53 Barb. 407; Converse *v.* Burrows, 2 Minn. 229.

[7] Jones *v.* Collins, 16 Wis. 594.

[8] Tuskaloosa Bridge *v.* Jennison, 33 Ala. 476

[9] Hudler *v.* Golden, 36 N. Y. 446; White *v.* Steam-Tug Mary Ann, 6 Cal. 462; Jackson *v.* Warren, 32 Ill. 331; Cullerton *v.* Mead, 22 Cal. 95.

[10] Marshall *v.* Vultee, 1 E. D. Smith, 294.

which a word or phrase stands has always a greater or less effect on its meaning. Sometimes it will change the meaning completely. Yet not much need be added here to what was said in previous sections.[1] It is plain that variations in the legislative intent are shown by variations in the connection in which particular words stand. And, as observed by Perkins, J. in an Indiana case, "It is a settled rule of interpretation of statutes, that 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."[2]

CHAPTER VI.

HOW THE COMMON AND SEVERAL STATUTORY LAWS OF CRIME OPERATE ON ONE ANOTHER.

§ 122. **Course of the Discussion.** — Thus far, in the present series of chapters, we have been occupied with collecting from the decisions on all sorts of subjects those general principles which govern the interpretation of statutes alike in the civil and criminal departments. We shall now, in the remaining chapters of the present series, direct our attention particularly to the criminal department; though, in doing so, we shall still draw some illustrations from what has been decided in civil causes. In the present chapter, the purpose of the author is to expand, and more exactly to illustrate and define, some of the doctrines which were stated in brief in the last chapter.

§ 123. **General Doctrine.** — In the next chapter we shall consider the subject of the repeal of the common law and of statutes by the operation of subsequent enactments. And we shall see that repeals are not favored; but, wherever the earlier and later provisions of law can stand together, they will be permitted to do so. In this chapter we are to contemplate the

[1] Ante, § 81, 82, 93, 118.

[2] Maxwell *v.* Collins, 8 Ind. 38.

effect of the several provisions on one another, when a repeal does not take place. And the doctrine is, that *all provisions of law, statutory and common, at whatever several dates established, are to be construed together, as contracting, expanding, enlarging, and attenuating one another into one harmonious system of jurisprudence.*[1]

§ 124. **Other Expressions of the Doctrine.** — In the books, we find this doctrine not often expressed in terms so broad. And the reason is, that judges in pronouncing opinions do not write treatises on the law; but their language is limited by the nature, facts, or needs of the particular case under adjudication. It is therefore variously expressed, in part by the proposition that all statutes *in pari materia* — that is, relating to the same subject — are to be construed together;[2] and in part by another proposition, namely, that we are to construe statutes according to the rules and reasons of the common law,[3] from which they are not suffered to depart, except as their express words require.[4] But these two propositions are plainly fragmentary;[5] and we need not inquire whether their combined result is sufficient to produce the more general doctrine enunciated above, since that doctrine is the clear deduction both of reason and of the collective authorities.

§ 125. **How the Doctrine made to appear.** — A legal doctrine is not often established by a particular adjudication; but it is usually made to appear only on comparison of decision with decision, just as a law of nature is manifest only in the operations of nature. And, in the present instance, the truth of the doctrine is established, and its limits are defined, by showing what, in connection with it, the courts have adjudged. Let us, therefore, pass under review several minor propositions, out of which the larger one is deducible.

§ 126. First. *One statutory provision is cut short by another:* —

General and Specific. — The proposition in other words is, that there are not unfrequently clauses in the same act, or in

[1] For another form of the expression, see Bishop First Book, § 483. See ante, § 5–8.

[2] Ante, § 82, 86–90.

[3] 2 Inst. 301; Harbert's Case, 3 Co. 11, 13 *b*; The William Gray, Paine, 16.

[4] Ante, § 119.

[5] See ante, § 86.

different acts, which may well stand together to a certain point; but, arrived there, one must give way. To determine which must give way is often a nice matter. The question is not dependent solely on the priority of the acts; though this consideration is sometimes important. One rule is, that the more specific provision controls the general one;[1] or, otherwise expressed, "a thing given in particular shall not be taken away by general words."[2] Thus a statute prescribing the time within which a class of offences must be prosecuted, or prescribing the place of the trial, controls a general one, even subsequent in date, creating an offence within the class, and providing for its punishment.[3] And a statute imposing a fine

[1] Dwar. Stat. 2d ed. 513, 668. See also Brown *v.* Commissioners, 9 Harris, Pa. 37, 43, in which the court held, that, though the provisions of two statutes are different, one of them, general in terms, but containing no negative words, will not repeal a prior one which is particular. S. P. Haywood *v.* Mayor, 12 Ga. 404; Conley *v.* Calhoun, 2 W. Va. 416; Beridon *v.* Barbin, 13 La. An. 458; Mobile and Ohio Railroad *v.* The State, 29 Ala. 573; McFarland *v.* State Bank, 4 Pike, 410; Ellis *v.* Batts, 26 Texas, 703; The State *v.* Macon County Court, 41 Misso. 453. In a Florida case, in which the court held the same 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 offence, yet the act which is claimed to be repealed by this implication is special and particular." Luke *v.* The State, 5 Fla. 185, 194. It has, however, been held, that, when an act limited to a single county prescribes the mode of punishing an offence within the county, and afterward an act is passed regulating the mode for the entire State, the latter repeals the former. Nusser *v.* Commonwealth, 1 Casey, 126. See also Blevings *v.* People, 1 Scam. 172. So where a statute permitted an appeal from a judgment of a justice of the peace, then a statute was passed allowing an appeal whenever the judgment exceeded five dollars, it was held that the former was repealed by implication. Curtis *v.* Gill, 34 Conn. 49. But in Maine it was held that the statute of 1823, saving the right of appeal in criminal cases from the sentence of the Common Pleas, without 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. The following illustrates the doctrine of the text: a special statute giving a bank a summary process for collection is not affected by a subsequent general law, unless such intention is clearly manifest on the face of the latter act. Pearce *v.* Bank of Mobile, 33 Ala. 693. See also Zachary *v.* Chambers, 1 Oregon, 321; The State *v.* Bilansky, 3 Minn. 246.

[2] 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.

[3] Johnson *v.* United States, 3 McLean, 89; United States *v.* Ballard, 3

for the sale of spirituous liquors within a particular town stands unaffected by a subsequent general one on the same subject.[1] So, when a general act gives to justices of the peace jurisdiction over offences punishable by fine not exceeding seven dollars; and another act confers on them jurisdiction over particular offences therein named, punishable by more than seven dollars fine; the latter act, being specific, governs the former.[2]

§ 127. **Other Cases.** — But the principle of general and specific is not applicable to all cases of conflicting provisions; and, where it is not, we may resort to any other appropriate doctrine of statutory construction to determine which shall give way.[3] And thus, for example, when a statute had provided a punishment for the larceny of goods exceeding fifty dollars in value, another statute, providing a heavier punishment for the larceny of goods exceeding two thousand dollars in value, and repealing inconsistent acts, was held to apply only to the heavier larcenies, while the former statute stood as to larcenies of sums between fifty and two thousand dollars.[4]

§ 128. Secondly. In like manner, *one statutory provision may be extended and enlarged by another statutory provision:* —

Forbidding Clergy. — Thus, if by one statute offences of a certain class are excluded from clergy, all offences created subsequently by statute within the class are excluded;[5] in other words, the earlier statute enlarges the later into the forbidding of clergy to the offender.

§ 129. **Perjury — Oath — Deputy-Collector.** — Again, the act of Congress of March 3, 1825, having defined the crime of perjury against the United States, it was held to apply to false swearing under the statute of bankruptcy, subsequently passed;[6] the two enactments thus operating upon, and enlarging each other. On the same principle, when the act of Con-

McLean, 469; Rex *v.* Wyndham, Russ. & Ry. 197, 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.

[1] McRae *v.* Wessell, 6 Ire. 153.

[2] Barnes *v.* The State, 19 Conn. 398.

[3] And see Cincinnati *v.* Rice, 15 Ohio, 225; Tuttle *v.* Jackson, 6 Wend. 213; Jackson *v.* Anderson, 4 Wend. 474; Reg. *v.* Thompson, 4 Eng. L. & Eq. 287.

[4] The State *v.* Grady, 34 Conn. 118.

[5] 1 East P. C. 136. And see 1 East P. C. 129.

[6] United States *v.* Nihols, 4 McLean, 23.

gress of March 3, 1817, had provided, that every collector of the customs "shall have 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 conferred on the collector, the same extended by necessary exposition to his deputy.[1]

§ 130. **Salaries.** — A case still further illustrating this doctrine occurred in Tennessee. A statute enlarged the duties and jurisdiction of a certain county court, and provided that "the judge of said court . . . shall have the same salary as the circuit judges of the State." Afterward the salaries of the circuit judges were increased by statute; and the court held, that the former-mentioned judge was entitled to the increased salary also.[2] An Alabama case is as follows: The pay of quartermaster-general having been fixed by statute at two hundred dollars a year, another statute, repealing this one, placed it at four dollars a day while he should be on duty. But the general appropriation act, afterward passed by the legislature during the same session, yet approved by the Governor the same day, appropriated to this officer two hundred dollars a year for two years; and the appropriation act was held to postpone the operation of the act fixing the pay at four dollars a day, until the two years should expire.[3]

§ 131. Thirdly. *The operation of statutes is cut short by the common law:* —

One Law gives Way — No Repeal — Infants — Insane — Married Women. — Sometimes a statutory provision and a provision of the common law, like two statutory ones,[4] may stand well together up to a given point, and there they come into conflict. The rule in this case is, that the prior law is not repealed; but at such point the one or the other simply gives

[1] United States *v.* Barton, Gilpin, 439. See also The State *v.* Raines, 3 McCord, 533; Doebler *v.* The State, 1 Swan, Tenn. 473; Campbell *v.* People, 8 Wend. 636.

[2] Crozier *v.* The State, 2 Sneed, 410.

[3] Riggs *v.* Pfister, 21 Ala. 469. And see further, concerning the doctrine of this section, Griswold *v.* Atlantic Dock, 21 Barb. 225.

[4] Ante, § 126.

way. For example, a statute general in its terms is always to be taken as subject to any exceptions which the common law requires.[1] Thus, if it creates an offence, it includes neither infants under the age of legal capacity;[2] nor insane persons;[3] nor ordinarily married women acting in the presence and by the command of their husbands.[4] If it creates a forfeiture, it does not apply to women under coverture.[5]

§ 132. **Evil Intent — Necessity — Mistake of Facts — Outlawry.** — Again, a statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurred with his act;[6] because the common law requires such concurrence to constitute a crime. A case of overwhelming necessity,[7] or of honest mistake of facts,[8] will thus be excepted out of a general statutory prohibition. So the defendant in an information *qui tam* may, under the English common law forbidding an outlawed person to maintain an action in court, show that the plaintiff is outlawed, and thereby defeat the proceeding, though the statute on which the information is founded allows "any person" to inform.[9]

§ 133. **General Doctrine — False Pretences.** — Almost all gen-

[1] See Wilbur *v.* Crane, 13 Pick. 284; United States *v.* Hart, Pet. C. C. 390; Commonwealth *v.* Knox, 6 Mass. 76; The State *v.* Martindale, 1 Bailey, 163.

[2] Crim. Law, ch. on Infancy; Rex *v.* Groombridge, 7 Car. & P. 582. And see Sydney *v.* The State, 3 Humph. 478.

[3] Crim. Law, ch. on Insanity.

[4] Crim. Law, ch. on Coverture. And see Commonwealth *v.* Hadley, 11 Met. 66.

[5] Martin *v.* Commonwealth, 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.

[6] The William Gray, 1 Paine, 16; Reg. *v.* Allday, 8 Car. & P. 136, 139; Anonymous, 2 East P. C. 765; Price *v.* Thornton, 10 Misso. 135; Commonwealth *v.* Stout, 7 B. Monr. 247; Duncan *v.* The State, 7 Humph. 148; Commonwealth *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; Commonwealth *v.* Fourteen Hogs, 10 S. & R. 393; Campbell *v.* Commonwealth, 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; The State *v.* Nicholas, 2 Strob. 278.

[7] The Gertrude, 3 Story, 68; The Josefa Segunda, 5 Wheat. 338; Stratton *v.* Hague, 4 Call, 564.

[8] Myers *v.* The State, 1 Conn. 502; Reg. *v.* Grasseley, 2 Dyer, 210, pl. 25; Preston *v.* Hunt, 7 Wend. 53; The Marianna Flora, 11 Wheat. 1; Etheridge *v.* Cromwell, 8 Wend. 629; United States *v.* Package of Wool, 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.

[9] Atkins *v.* Bayles, 2 Mod. 267.

eral statutes, especially criminal ones, are more or less cut short in their operation in this way.[1] Thus the statutes against cheating by false pretences are broad in their terms; but numerous limitations, drawn from the reasons of the common law, as well as from a consideration of their objects and purposes, encumber their practical application.[2]

§ 134. Fourthly. *A statute may likewise be extended by the common law:* —

Agency — False Pretences. — Thus: since by the common law an agent stands in the place of his principal, a false pretence made to a clerk or salesman, by whom it is communicated to the employer, is a false pretence to the employer.[3] And under the law of slavery, 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 here this doctrine 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.[4]

§ 135. **Principals of Second Degree — Malicious Shooting — Gaming.** — It is likewise a doctrine of the common law, that all persons present giving aid and comfort to another committing an offence, even a felony, are [redacted] considered as principals; that is, as in legal contemplation doing the deed; therefore, if a statute makes the doing of a thing criminal, it includes persons present lending their countenance and aid.[5] Thus the English statute 9 Geo. 1, c. 22, § 1, made it felony for one to "wilfully and maliciously shoot at any person;" and it was held that an individual present encouraging his companion who shoots, but using no fire-arms himself, is a principal offender.[6] Likewise, under the Tennessee act of 1820, not

[1] The reader will find matter bearing upon this subject in the chapter after the next.

[2] See the People *v.* Clough, 17 Wend. 351; Reg. *v.* Johnston, 2 Moody, 254; Commonwealth *v.* Drew, 19 Pick. 179.

[3] Commonwealth *v.* Harley, 7 Met. 462; Commonwealth *v.* Call, 21 Pick. 515.

[4] The State *v.* Chandler, 2 Strob. 266; see Reg. *v.* Nickless, 8 Car. & P. 757.

[5] United States *v.* Wilson, Bald. 78, 103; Rex *v.* Tattersal, 1 Russ. Crimes, Grea. ed. 27; Rex *v.* Manning, Comyns, 616; Reg. *v.* Simpson, Car. & M. 669; Rex *v.* Bear, 2 Salk. 417, 418.

[6] 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

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, is also guilty as a principal.[1]

§ 136. **Procurers in Misdemeanor — Rescue and Escape in Treason.** — And if the statute makes the thing done a misdemeanor, persons who procure it to be done, though not present, are considered as, in contemplation of law, actually doing it.[2] So in statutory treasons, says Mr. East, "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 a necessary construction of law upon the act itself."[3] The doctrine as to treason, however, may, at the particular point just mentioned, be different in this country.

§ 137. **Carries Collateral Rights, &c. — Punish Contempts — Issue Precept — Whatever Essential to Power granted — Witness before Grand Jury — (How in a Constitution, in the Note).** — And from the operation of various principles of the common law results the doctrine, that every statute carries with it so much of collateral right and remedy as will make its provisions effectual; or, as Lord Coke expresses it, "when the law granteth any thing to any one, that also is granted without which the thing itself cannot be."[4] Thus the authority to

Reg. *v.* Whittaker, 1 Den. C. C. 310; Rex *v.* Franklyn, 1 Leach, 4th ed. 255. And see Reg. *v.* Davis, 8 Car. & P. 759; Reg. *v.* Williams, Car. & M. 259.

[1] McGowan *v.* The State, 9 Yerg. 184.

[2] United States *v.* Morrow, 4 Wash. C. C. 733; The State *v.* Berham, 3 Hill, S. C. 90; Commonwealth *v.* Nichols, 10 Met. 259; Schmidt *v.* The State, 14 Misso. 137; The State *v.* Dow, 21 Vt. 484.

[3] 1 East P. C. 96.

[4] Oath before Justices, 12 Co. 130, 131. Fletcher, J., in the recent case of Heard *v.* Pierce, 8 Cush. 338, 345, stated the doctrine as follows: "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;" citing Foliamb's Case, 5 Co. 115 *b*; Miller *v.* Knox, 4 Bing. N. R. 574, 583; Overseers of Pittstown *v.* Overseers of Plattsburg, 18 Johns. 407, 418; Field *v.* People, 2 Scam. 79; Witherspoon *v.* Dunlap, 1 McCord, 546. See also Cookson *v.* Lee, 23 Eng. L. & Eq. 400; The Protector *v.* Ashfield, Hardr. 62; 2 Inst. 306; 1 Kent Com. 464; The State *v.* Hawthorn, 9 Misso. 385; Stief *v.* Hart, 1 Comst. 20; Lockwood *v.* The State, 1 Ind. 161; People *v.* Hicks, 15 Barb. 153; Dewitt *v.* San Francisco, 2 Cal. 289; Green *v.* New York, 2 Hilton, 203. In Illinois the like principle was applied to the construction of the State constitution. The doctrine laid down was, that, where

punish for contempt is necessarily implied in the establishment of a judicial tribunal.[1] And, 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.[2] A grand-jury, authorized by statute to make inquiry and presentment of offences, 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.[3]

§ 138. Fifthly. *The common law is both contracted and expanded by statutes : —*

Indictment at Common Law for Breach of Statutory Duty — Attempts. — This proposition is essentially the same in principle as the foregoing four combined. It may be illustrated thus: since the common law punishes every breach of public duty sufficient in magnitude for its notice, the consequence follows, that, if a statute newly creates a duty of a public nature, but prescribes no punishment for its violation, the party violating, while not indictable strictly under the statute, is so at the common law,[4] — a doctrine, however, which is

this instrument gives a general power, or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the performance of the other. But, on the other hand, if it gives also the means for the exercise of the power, those means, and no other, must be employed. Field *v.* People, 2 Scam. 79. The implied means, however, are never such as violate existing rights, or interfere with established relations. Commonwealth *v.* Downes, 24 Pick. 227. It has been held, that a power granted to a court by statute to refer a case to arbitrators, does not so descend to the arbitrators as to qualify them to administer an oath. Reg. *v.* Hallett, 2 Den. C. C. 237, 4 Eng. L. & Eq. 570.

[1] United States *v.* New Bedford Bridge, 1 Woodb. & M. 401; The State *v.* Johnson, 1 Brev. 155; Crim. Law, 4th ed. II. § 234.

[2] Oath before Justices, 12 Co. 130, 131; Dwar. Stat. 2d ed. 671.

[3] Heard *v.* Pierce, 8 Cush. 338. And see The State *v.* Blocker, 14 Ala. 450.

[4] Gearhart *v.* Dixon, 1 Barr, 224; Rex *v.* Wiggot, Comb. 205, 372; Rex *v.* Robinson, 2 Bur. 799, 803; United States *v.* Coolidge, 1 Gallis. 488; The State *v.* Fletcher, 5 N. H. 257; Rex *v.* Smith, 2 Doug. 441; Commonwealth *v.* Chapman, 13 Met. 68, 69; Rex *v.* De Beauvoir, 7 Car. & P. 17; Commonwealth *v.* Silsbee, 9 Mass. 417; The State *v.* Patton, 4 Ire. 16; Commonwealth *v.* Piper, 9 Leigh, 657; Reg. *v.* Price, 3 Per. & D. 421, 11 A. & E. 727, 4 Jur. 291; The State *v.* Morris Canal and Banking Co., 2 Zab. 537; Reg. *v.* Wyat, 1 Salk. 380, 2 Ld. Raym. 1189; Anonymous, 6 Mod. 96; Rex *v.* Sheffield Canal Company, 4 New Sess. Cas. 25, 14 Jur. 170. Crouther's Case, Cro. Eliz. 654; The State *v.* Commissioners, Walk. Miss. 368.

more minutely examined in the author's work on the Criminal Law.[1] So it is ordinarily criminal at common law to make a mere unsuccessful attempt[2] to commit a substantive offence, whether felony or misdemeanor; therefore, as the number of substantive offences is increased or diminished by statute, the number of indictable attempts is increased or diminished likewise.[3]

§ 139. Sixthly. *Whatever is newly created by statute draws to itself the same qualities and incidents as if it had existed at the common law:*[4] —

Accessories and Principals in New Felony — Raising a Felony to Treason — New Treason, concealing or consenting to. — This proposition is a sort of condensation of the several foregoing ones. Thus, if a new felony is created, whether out of what was before innocent, or what before was a misdemeanor, those who are present aiding and assisting are principals,[5] and other persons connected with the offence are accessories before or after the fact, according to the rules of the common law.[6] So if an offence which was felony is made treason, a crime having no accessories at common law, those who would have been accessories to the felony will be principals in the treason.[7] And if a statute creates a new treason, it virtually and consequently makes the concealing of it misprision of treason,[8] and the consenting to it treason.[9]

§ 140. **Statutory Misdemeanors — Attempts — Statutory Lar-**

[1] Crim. Law, 4th ed. I. § 535, 536.

[2] Crim. Law, 4th ed. I. § 657 et seq.

[3] 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.

[4] The State *v.* Murdock, 9 Misso. 730; Rex *v.* Wyer, 1 Leach, 4th ed. 480, 2 East P. C. 753, 2 T. R. 77; The State *v.* Smith, 32 Maine, 369; The State *v.* Wright, 4 McCord, 358; Commonwealth *v.* Macomber, 3 Mass. 254; Commonwealth *v.* Barlow, 4 Mass. 439; Rex *v.* Potts, Russ. & Ry. 353; Troy's Case, 1 Mod. 5, 6; Rex *v.* Gray, 7 Car. & P. 164; The State *v.* Bosse, 8 Rich. 276.

[5] Ante, § 135, 136.

[6] 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, Salk. 542, 11 Mod. 25, 29; Hughes *v.* The State, 12 Ala. 458; Rex *v.* Sadi, 1 Leach, 4th ed. 468, 2 East P. C. 748; Rex *v.* Gaze, Russ. & Ry. 384; Rex *v.* Bear, 2 Salk. 417, 418.

[7] Reg. *v.* Tracy, 6 Mod. 30, 32; Reg. *v.* Whistler, 11 Mod. 25, 29; 1 East P. C. 93, 94, 96.

[8] 1 East P. C. 140.

[9] Eden Penal Law, 3d ed. 125; ante, § 136.

ceny, and carrying the Goods to another County. — Likewise all the incidents of a misdemeanor by statute are the same as of a misdemeanor at the common law.[1] And where an offence of any grade is newly constituted, an unsuccessful attempt to commit it is consequently indictable, as though it existed at the common law.[2] Also, the common-law rule, that, if a thief stealing goods in one county carries them into another,[3] he may be indicted for the larceny in either county, applies as well to articles of which larceny may be committed only under statutes, as to the common-law offence.[4]

§ 141. Seventhly. *Statutes should be construed in all other respects, as far as possible, in harmony with their policy, and with the common law :* [5] —

Notice of Proceeding — Embrace only Offences within the State — Construction when express as to Offences beyond Territorial Limits. — Thus, never will a statute be interpreted, unless express words require it, to authorize a proceeding against a person without notice to him ; [6] or to embrace offences committed beyond the territorial limits of the country ; [7]

[1] Reg. *v.* Britton, 11 Q. B. 929, 947, 10 Jur. 1017, 1021 ; Hall *v.* The State, 3 Kelly, 18 ; People *v.* Brown, 16 Wend. 561.

[2] The State *v.* Maner, 2 Hill, S. C. 453 ; ante, § 138.

[3] Crim. Proced. 2d ed. I. § 59, 60.

[4] Commonwealth *v.* Simpson, 9 Met. 138.

[5] See 1 Kent Com. 464 ; Rex *v.* Peel, Russ. & Ry. 407 ; ante, § 123 ; People *v.* Goshen Turnpike, 11 Wend. 597 ; Rex *v.* John, 7 Car. & P. 324 ; Rex *v.* Ellis, 8 D. & R. 173 ; Palmer *v.* Cuyahoga Commissioners, 3 McLean, 226 ; Richardson *v.* Broughton, 3 Strob. 1 ; Wood *v.* Smith, 23 Vt. 706 ; People *v.* Mather, 4 Wend. 229, 255 ; The State *v.* Doon, R. M. Charl. 1 ; Rex *v.* Shukard, Russ. & Ry. 200 ; United States *v.* Pearce, 2 McLean, 14 ; Bump *v.* Commonwealth, 8 Met. 533 ; Hanway *v.* Boultbee, 4 Car. & P. 350, 1 Moody & R 15 ; Reg. *v.* Hamilton, 1 Car. & K. 212 ; The State *v.* Cheatwood, 2 Hill, S. C. 459 ; Murphy *v.* The State, 1 Ind. 366.

[6] Mede *v.* Deputy Marshal, 1 Brock. 324 ; Reg. *v.* Simpson, 10 Mod. 378, 380 ; The State *v.* Savannah, T. U. P. Charl. 235 ; Chase *v.* Hathaway, 14 Mass. 222, 224 ; Arthur *v.* The State, 22 Ala. 61. And see Innes *v.* Wylie, 1 Car. & K. 257, 263 ; Bigelow *v.* Stearns, 19 Johns. 39, 41 ; The State *v.* Stokes, Coxe, 392 ; Souter *v.* The Sea Witch, 1 Cal. 162. When a statute requires notice to be given, not mentioning how long it shall be in point of time, the meaning is that it shall be a reasonable notice. Burden *v.* Stein, 25 Ala. 455.

[7] Commonwealth *v.* Green, 17 Mass. 515, 540 ; United States *v.* Bevans, 3 Wheat. 336 ; People *v.* Cæsar, 1 Parker, 645, 647. See Rex *v.* Sawyer, 2 Car. & K. 101 ; United States *v.* Wiltberger, 5 Wheat. 76 ; United States *v.* Holmes, 5 Wheat. 412 ; Mitchell *v.* Tibbets, 17 Pick. 298 ; Vandeventer *v.* New York and New Haven Railroad, 27 Barb. 244 ; Commonwealth *v.* Harris, 13 Allen, 534.

and, where the words of the statute refer expressly to offences committed beyond the territorial limits, they will be so restricted in the construction as to apply only to citizens or inhabitants of the country enacting the statute.[1]

§ 142. **Jurisdiction to Courts of Other Powers — Bind State — Principal and Accessory — Other Common-law Distinctions — (Limitations, in the Note).** — Neither will a statute, unless by force of express words, be construed 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,[2] — or to bind the sovereign,[3] or the sovereign State.[4] 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]

§ 143. **Provisions overlying One Another — Liquor Law — Lord's Day — Peddling.** — Again, at the common law, criminal transactions are so arranged into specific crimes that a particular act with its evil intent may constitute a part of several distinct offences.[7] When, therefore, 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

[1] The Apollon, 9 Wheat. 362.

[2] Houston *v.* Moore, 5 Wheat. 1, 42, 66; Matter of Bruni, 1 Barb. 187, 208.

[3] Ante, § 103; Vin. Ab. Statutes, E. 10; United States *v.* Hewes, Crabbe, 307; Broom Leg. Max. 2d ed. 50.

[4] The State *v.* Garland, 7 Ire. 48; The State *v.* Milburn, 9 Gill, 105. Therefore a statute of limitations does not run against a State, unless expressly named. Broom Leg. Max. 2d ed. 46; Lindsey *v.* Miller, 6 Pet. 666; The State *v.* Arledge, 2 Bailey, 401; Weatherhead *v.* Bledsoes, 2 Tenn. 352; People *v.* Gilbert, 18 Johns. 227; State Treasurer *v.* Weeks, 4 Vt. 215; Stoughton *v.* Baker, 4 Mass. 522, 528; Nimmo *v.* Commonwealth, 4 Hen. & Munf. 57; Bagley *v.* Wallace, 16 S. & R. 245; Munshower *v.* Patton, 10 S. & R. 334; Commonwealth *v.* Baldwin, 1 Watts, 54; Wallace *v.* Minor, 6 Ohio, 366, 369; Wallace *v.* Minor, 7 Ohio, part I., 249, 252. See ante, § 103. That statutes authorizing suits against the State are to be construed liberally, see The State *v.* Curran, 7 Eng. 321, 346.

[5] The State *v.* Ricker, 29 Maine, 84; Commonwealth *v.* Knapp, 9 Pick. 496; Commonwealth *v.* Macomber, 3 Mass. 254; Commonwealth *v.* Barlow, 4 Mass. 439; ante, § 139. 31 Mich 111

[6] Drew *v.* Commonwealth, 1 Whart. 279; United States *v.* Wilson, Bald. 78; Rex *v.* Carlile, 3 B. & Ald. 161; Commonwealth *v.* Simpson, 9 Met. 138; 2 East P. C. 804; The State *v.* Absence, 4 Port. 397; Commonwealth *v.* Barlow, 4 Mass. 439; Commonwealth *v.* Newell, 7 Mass. 245; The State *v.* Butler, 3 McCord, 383; Rex *v.* Breeme, 1 Leach, 4th ed. 220, 2 East P. C. 1026; Rex *v.* Pearce, 2 Leach, 4th ed. 1046.

[7] Crim. Law, 4th ed. I. § 796 et seq.; II. § 1209, note.

no objection that it is included under multitudes of separate inhibitions, each having a separate penalty of its own. Thus, a sale of intoxicating liquor may be equally a violation of a statute prohibiting labor on the Lord's day, and of one against the selling of the liquor, and the prosecuting officer may proceed for the one or the other offence at his election.[1] In like manner, the statutory provision against selling the intoxicating liquor may be violated by an act which is equally a violation of a provision against peddling. And the principle is the same whether the inhibitions are found in separate acts or in separate clauses of the same act.[2] It has been assumed, and perhaps correctly, not only that the prosecuting power may elect for which offence to proceed; but, in the cases referred to in this section, that there may be a prosecution for both offences. This latter question is not to be discussed in the present connection; but, however it may be, there are cases in which one prosecution will bar another. In such cases, as in the other, the prosecuting officer will proceed for whichever of the offences he may choose.

§ 144. **Following Analogies of Common Law — Common-law Remedy — Revision of Statutes — The County.** — If the enactment is in its nature declaratory of the common law, it will be construed as far as may be according to the common law.[3] In like manner, 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. And this has been too long the practice of the courts to be now brought in question, or to need the aid of a reference to authority to sustain it."[4] A like principle applies to revisions of former statutes; for these are to receive the interpretations which were given to the statutes revised.[5] So, it being a rule of

[1] Commonwealth *v.* Harrison, 11 Gray, 310; Commonwealth *v.* Trickey, 13 Allen, 559.

[2] Commonwealth *v.* McConnell, 11 Gray, 204.

[3] Freeman *v.* People, 4 Denio, 9, 29; Commonwealth *v.* Humphries, 7 Mass. 242; People *v.* Butler, 16 Johns. 203; Baker *v.* Baker, 13 Cal. 87; Hewey *v.* Nourse, 54 Maine, 256.

[4] Byrd, J. in Hightower *v.* Fitzpatrick, 42 Ala. 597, 600. See ante, § 114.

[5] Commonwealth *v.* Messenger, 4 Mass. 462; Ennis *v.* Crump, 6 Texas, 34; ante, § 98. In like manner, where, by the general system of legislation

the common law that crimes are to be inquired of in the county in which they occurred, if a county is divided, the grand-juries of the respective new counties will indict only for offences committed in their respective localities before the division.[1]

§ 145. Eighthly. *The foregoing propositions are not to nullify the plain words or necessarily implied meaning of the statute :* [2] —

"Actually occupy" — Particular Nature of Offence. — Thus the words "actually occupy," referring to the place of committing an offence, seem to have been understood as excluding the idea of guilt[3] in one who did not, in the language of the provision, actually occupy the place.[4] There may also be cases in which the nature of the offence excludes the idea of criminality in any but the individual personally doing the act.[5]

§ 146. Ninthly. The courts, in weaving, as we have seen they should do,[6] the common and statutory laws into one uniform texture of jurisprudence, *can use only the material which these laws furnish them ;*[7] *they cannot take upon themselves the legislative duty of creating laws to supply a deficiency :* —

Casus Omissus. — How far the words of a criminal statute may be extended to meet a particular mischief, we shall consider somewhat in another chapter. But, when a court has

during the existence of slavery, white persons and slaves were punished differently, a white person, accessory to an offence committed by a slave, was dealt with the same as white persons in other cases were, not as slaves. The State *v.* McCarn, 11 Humph. 494; Loughridge *v.* The State, 6 Misso. 594.

[1] The State *v.* Jones, 3 Halst. 307, 357, 372. And see Crim. Proced. 2d ed. I. § 49 and note.

[2] See 1 East P. C. 96, 247, 248, 250; Reg. *v.* Nickless, 8 Car. & P. 757. And see Reg. *v.* Whittaker, 1 Den. C. C. 310; Rex *v.* Franklyn, 1 Leach, 4th ed. 255; Fletcher's Case, 1 Leach, 4th ed. 342, 2 Stra. 1166, 2 East P. C. 700; Norton *v.* The State, 4 Misso. 461; Baxter *v.* People, 3 Scam. 368; O'Blennis *v.* The State, 12 Misso. 311. "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.

[3] Ante, § 135, 136.

[4] Commonwealth *v.* Dean, 1 Pick. 387.

[5] 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. 386; Reg. *v.* Whittaker, 2 Car. & K. 636, 1 Den. C. C. 309, 3 Cox C. C. 50.

[6] Ante, § 123.

[7] See ante, § 79, 80.

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.[1] Such a case must be disposed of according to the prior law,[2] and the legislature alone can cure the defect.[3]

CHAPTER VII.

REPEAL OF CRIMINAL STATUTES.

147. Introduction.
148–163. General Doctrine of Repeal.
164–174. Particular Applications of the Doctrine.
175–187. Consequences of Repeal.

§ 147. **How the Chapter divided.** — We shall consider, I. The General Doctrine of Repeal; II. Particular Applications of the Doctrine; III. The Consequences of Repeal.

I. *The General Doctrine of Repeal.*

§ 148. **Different Sorts of Repeal.** — The different sorts of repeal, real or supposed, are, First, by Non-user; Secondly, by Express Words; Thirdly, by later Conflicting Provisions. Let us look at these in their order.

§ 149. First, *By Non-user:* —

Does not work Repeal — Obsolete, how — Usage. — It has been sometimes supposed that a long course of forbearance to follow out and act upon a statute, called *non-user*, will work a repeal of it.[4] And in South Carolina it was observed: "The

[1] See Rex *v.* Hill, Russ. & Ry. 483.

[2] Broom Leg. Max. 2d ed. 37; Hall *v.* Jacobs, 4 Har. & J. 245.

[3] Pitman *v.* Flint, 10 Pick. 504, 506; 4 Bl. Com. 302. See Kilpatrick *v.* Byrne, 25 Missis. 571.

[4] 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,

court, in Watson *v.* Blaylock,[1] 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 non-user." [2] In a still later South Carolina case, the doctrine of this earlier one, that a statute may become inoperative by non-user, appears to have been recognized.[3] But, in reason, and on the better authorities, no usage, either negative or positive, can grow into a law adverse to a statute, and only the power which can make a law can annul one. Consequently, statutes expressed in general terms, with no limitation of time, stand until repealed by the law-making power. The matter to which they relate may indeed cease to exist, and thus they may not be called into action;[4] or the reasons for their enactment may have passed,[5] and thus it may be proper for the legislature to repeal them; but, according to the better opinion, all unrepealed statutes must be enforced, when the subject and occasion call for their enforcement, and they do not become void by non-user.[6] Yet where the nature of the question is such, that the judge has a discretionary power, — as, to grant or withhold an information, — he may take into his consideration the long disuse of the statute.[7] So in determining the meaning of a statute, contemporaneous usage may, as we have seen,[8] be resorted to;[9] but this principle is altogether different from the one under consideration.

§ 150. **Custom.** — We see, therefore, that, if repeal by non-user is allowed, it is in effect a repeal by force of an adverse custom. Now, it has been laid down in England that the prior law may be repealed by a custom, when such prior law is either the common law, or a statute declaratory merely of it; but

that a statute might become obsolete; but such opinion is unfounded, and has no warrant in our law." Dwar. Stat. 2d ed. 529.

[1] Watson *v.* Blaylock, 2 Mill, 351.

[2] Canady *v.* George, 6 Rich. Eq. 103, 106.

[3] O'Hanlon *v.* Myers, 10 Rich. 128.

[4] Commonwealth *v.* Hoover, 1 Browne, Pa. App. 25.

[5] James *v.* Commonwealth, 12 S. & R. 220, 228; The State *v.* Tidwell, 5 Strob. 1.

[6] White *v.* Boot, 2 T. R. 274; The State *v.* Findlay, 2 Bay, 418; The State *v.* Tidwell, supra; Commonwealth *v.* Hoover, supra; Dwar. Stat. 2d ed. 529; Snowden *v.* Snowden, 1 Bland, 550. Contra, James *v.* Commonwealth, supra.

[7] Rex *v.* Dodd, 9 East, 516.

[8] Ante, § 104.

[9] Chesnut *v.* Shane, 16 Ohio, 599; Dwar. Stat. 2d ed. 530.

doubts have been entertained concerning the latter branch of the proposition, namely, whether a statute merely declaratory of the common law can be so superseded.[1] Plainly, on principle, it cannot be; non-user does not do away with the force of a statute; therefore a custom cannot do more, as a general doctrine; and that a statute is only declaratory of the prior law prevents not its effect as a statute. The question, however, has little practical importance in this country, where it could seldom or never arise.

§ 151. Secondly, *By Express Words:* —

Common Form — Within the Purview — Inconsistent. — The most common form of repeal, and one which needs no elucidation, is where an act says, in terms, that such a statute, or clause of a statute, or provision of the common law is repealed.[2] Then it is sometimes provided that all statutes coming within the "purview" of the act in which the repealing clause occurs, are repealed.[3] Another method of express repeal occurs where a clause of a statute provides that all acts inconsistent with the statute are repealed.

[1] Dwar. Stat. 2d ed. 475–477; Bac. Ab. Statute, G.

[2] Chambers *v.* The State, 25 Texas, 307; The State *v.* Beneke, 9 Iowa, 203. A statute provided that every person who should vend merchandise not the product of the United States, without license, should be fined. Subsequently another act was passed, in terms repealing so much of this one as required a license to vend coffee, tea, and sugar; and the court construed it to be a repeal of the former law as concerns the enumerated articles. Taylor *v.* The State, 7 Blackf. 93. In a Pennsylvania case, the legislature had repealed a clause of a bill which had not then become law for want of the Governor's signature. Afterward the bill was signed; but the court held the repeal of the clause to be effectual, on the ground, that, as the legislature could abrogate a statute duly signed, it could do the same of one before the signature was attached. Southwark Bank *v.* Commonwealth, 2 Casey, 446. If the validity of a repealing statute remains, however long, in doubt, by reason of a division of opinion among the judges, then it is finally adjudged to be valid, the act repealed will be held to have had no force during the period of doubt. Ingersoll *v.* The State, 11 Ind. 464. Where the charter of a bridge company prohibited the erection of any other bridge within a mile of that to be erected by the grantees, and the section containing the prohibition was subsequently repealed, it was held, that the grantees of the franchise stood in precisely the same position, in reference to a second bridge, as if no such prohibition had been contained in their charter. Fort Plain Bridge Co. *v.* Smith, 30 N. Y. 44.

[3] Ely *v.* Thompson, 3 A. K. Mar. 70; Scutt *v.* Commonwealth, 2 Va. Cas. 54; Payne *v.* Connor, 3 Bibb, 180. Repealing all acts inconsistent, Hale *v.* The State, 15 Conn. 242; The State *v.* Taylor, 2 McCord, 483; Jackson *v.* The State, 12 Ga. 1.

§ 152. **Inconsistent Acts, continued.** — Of course, such a clause does not repeal an act which is not inconsistent, though relating to the same subject-matter.[1] When the provisions are in direct conflict the repeal necessarily takes place.[2] But, in such a case, the repeal is effected only to the extent of the repugnance.[3] And if, for example, there is a general statute, and then comes another more specific one, with this repealing clause in it, the specific and general are not in repugnance; but, in obedience to a principle already considered,[4] they may be construed together and both will stand.[5] According to the better doctrine already discussed,[6] this sort of repealing clause has no effect upon acts inconsistent only with some provision in the repealing statute which is void as being unconstitutional.[7]

§ 153. Thirdly, *By later Conflicting Provisions:* —

Affirmative and Negative — Express Repeals. — The repeals now under consideration are, in fact, express, though they cannot properly be regarded as repeals by express words. An old division of statutes is into affirmative and negative; the one class embracing those expressed in affirmative, the other those in negative, words.[8] Thus a legislative provision, that it *shall be lawful* for a tenant in fee-simple to make a lease for twenty-one years, and the lease shall be good, is affirmative; a provision, 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.[9] Now, obviously, a negative statute, being in express denial or negation of the prior law, repeals it;[10] and it is equally obvious that this repeal is express. It appears plain that negative statutes are to be construed, in respect to the matter of repeal, strictly; that is, as abrogating the pre-existing law no further than their express words require.[11]

§ 154. **Affirmative Statutes — Implied Repeals.** — The other

[1] People *v.* Durick, 20 Cal. 94; Lewis *v.* Stout, 22 Wis. 234.

[2] Tierney *v.* Dodge, 9 Minn. 166; People *v.* Lytle, 1 Idaho, 161.

[3] Elrod *v.* Gilliland, 27 Ga. 467.

[4] Ante, § 126.

[5] Dolan *v.* Thomas, 12 Allen, 421. And see Cain *v.* The State, 20 Texas, 355; The State *v.* Macon County Court, 41 Misso. 453.

[6] Ante, § 34.

[7] Sullivan *v.* Adams, 3 Gray, 476; Harbeck *v.* New York, 10 Bosw. 366.

[8] Bac. Ab. Statute, G.

[9] Dwar. Stat. 2d ed. 475.

[10] Bac. Ab. Statute, G.; Dwar. Stat. 2d ed. 475; Gooch *v.* Stephenson, 13 Maine, 371.

[11] See the cases cited to the next three sections.

method of repeal by a conflicting statutory provision is, as we have seen, where the statute is affirmative, and the matter of it is irreconcilably inconsistent with the prior law. In this case the repeal is *implied*. We have seen,[1] that every legislative act in affirmative words is to be regarded, *prima facie*, as an *addition* to the mass of law; for such, on its face, it purports to be. Yet when it is inconsistent with the former law, it must, as the last expression of the legislative will, prevail.[2] But repeals by implication, thus explained, are not favored.[3] And a legislative intent to repeal an existing statute is never presumed.[4] If two acts, seeming to be repugnant, can be reconciled by any fair construction, they must be, when no repeal will be held to take place.[5]

§ 155. **Continued — Derogation of Common Law, or Prior Statute.** — Therefore, as we have already seen,[6] statutes in deroga-

[1] Ante, § 5.

[2] Broom Leg. Max. 2d ed. 23; Commonwealth *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.* Commonwealth, 1 Cush. 302; The State *v.* Miskimmons, 2 Ind. 440; United States *v.* Irwin, 5 McLean, 178; Sullivan *v.* People, 15 Ill. 233; Adams *v.* Ashby, 2 Bibb, 96; Moore *v.* Vance, 1 Ohio, 1; Den *v.* Pine, 4 Wash. C. C. 691; Morrison *v.* Barksdale, Harper, 101; Moore *v.* Moss, 14 Ill. 106; Ham *v.* The State, 7 Blackf. 314; McQuilkin *v.* Doe, 8 Blackf. 581; Johnston's Estate, 9 Casey, 511; Commissioners *v.* Potts, 10 Ind. 286; The State *v.* Wilson, 43 N. H. 415.

[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; Dugan *v.* Gittings, 3 Gill, 138; McCartee *v.* Orphan Asylum Society, 9 Cow. 437; Lichtenstein *v.* The State, 5 Ind. 162; Erwin *v.* Moore, 15 Ga. 361; Aspden's Estate, 2 Wallace, Jr. 368, 431; Hockaday *v.* Wilson, 1 Head, 113; Robbins *v.* The State, 8 Ohio State, 131; The State *v.* Morrow, 26 Misso. 131; Swann *v.* Buck, 40 Missis. 268; People *v.* San Francisco, &c., Railroad, 28 Cal. 254; Blain *v.* Bailey, 25 Ind. 165; Buckingham *v.* Steubenville and Indiana Railroad, 10 Ohio State, 25.

[4] Furman *v.* Nichol, 3 Coldwell, 432.

[5] Blain *v.* Bailey, 25 Ind. 165; The State *v.* Bishop, 41 Misso. 16; Nixon *v.* Piffit, 16 La. An. 379; De Pauw *v.* New Albany, 22 Ind. 204; Mullen *v.* People, 31 Ill. 444; Elliott *v.* Locknane, 1 Kansas, 126; Conner *v.* Southern Express Co., 37 Ga. 397; People *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. The principle is the same as to construing the statutes with the prior common law. To effect a repeal of the common law, said Goldthwaite, J. in an Alabama case, "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.

[6] Ante, § 119.

tion of the common law,[1] or of a previous express enactment,[2] are to be 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 a provision, as it does in the enactment of an affirmative statute, we cannot assume for it an intention also to subtract a provision; while there is any well-known rule of interpretation which, applied to the one, or to both, will enable both to stand.

§ 156. **Continued — Illustrations.** — In this way, for example, specific and general provisions will be made to stand together.[3] Thus an act exempting a certain class of property from municipal taxation is not repealed by a subsequent act giving cities power to tax "all property" within their limits; but the two acts will be construed together, and the one will be held to create an exception to the general terms of the other.[4] Again,

[1] Melody *v.* Reab, 4 Mass. 471; Gibson *v.* Jenney, 15 Mass. 205; Commonwealth *v.* Knapp, 9 Pick. 496, 514; 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; The State *v.* Norton, 3 Zab. 33; Bailey *v.* Bryan, 3 Jones, N. C. 357; Smith *v.* Moffat, 1 Barb. 65; Young *v.* McKenzie, 3 Kelly, 31; Schuyler Co. *v.* Mercer Co., 4 Gilm. 20; Dwelly *v.* Dwelly, 46 Maine, 377; Burnside *v.* Whitney, 21 N. Y. 148.

[2] White *v.* Johnson, 23 Missis. 68; Street *v.* Commonwealth, 6 Watts & S. 209; Morlot *v.* Lawrence, 1 Blatch. C. C. 608; Clarke *v.* The State, 23 Missis. 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 revolution in the mind of the legislature ought not to be indulged." Peyton *v.* Moseley, 3 T. B. Monr. 77.

[3] Ante, § 152.

[4] Blain *v.* Bailey, 25 Ind. 165. So in Mississippi it was held, that § 29 of the amended charter of the town of Holly Springs, giving the mayor and aldermen exclusive right to grant licenses for the sale of spirituous liquors, did not repeal Rev. Code, p. 197, art. 4, which requires the applicant for a license to retail to be recommended by a majority of the legal voters, &c. House *v.* The State, 41 Missis. 737. The statute authorizing a proceeding to contest the validity of a will, by "petition to the Court of Common Pleas," does not repeal the provisions of the former statute, authorizing a proceeding by bill in chancery. The maxim, *leges posteriores priores contrarias abrogant*, does not apply, except where the inconsistency or repugnancy is such that the two provisions cannot stand as cumulative or concurrent rules of action. Raudebaugh *v.* Shelley, 6 Ohio, State, 307. A law forbidding the opening of a road or street through any burial-ground is not repealed or suspended by a subsequent statute 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." Egypt

by an act of the Missouri legislature, a sum of money which had been granted to the State, by Congress, was appropriated to the redemption of certain specified bonds; a subsequent act made an appropriation, out of the same money, for a different object, and the appropriation was so large as to interfere with the payment of the bonds. It was thereupon held, that the latter statute did not in any measure repeal the former; but the subsequent appropriation should take effect only out of what was left after the bonds were paid.[1] But a subsequent statute fixing a salary different from the one formerly established, repeals the former by implication.[2] In the nature of things two such statutes as these cannot stand together; the salary must be either the one sum or the other, it cannot be both.

§ 157. **Whether the Doctrine has Exceptions — What.** — The doctrine thus laid down is, it is believed, accepted as law everywhere in the United States, when stated thus in general terms. But there is, in the minds of some judges, what seems to the writer to be a confusion of ideas with respect to one or two of the propositions when applied to the actual interpretation of the statutes. Looking at the legal doctrine truly, when a subsequent legislative enactment is found to be, neither in express words, nor by necessary intendment, in conflict with the previous law, there would seem to be, in principle, no possible circumstance by reason of which it should be held to repeal such prior law. And that most courts do hold the doctrine thus strictly and rigidly is what the author believes to be fully apparent from the authorities cited to the sections accompanying this one.

§ 158. **Continued — Apparent Exception stated and illustrated — Difficulty of understanding the Cases.** — If we take into our

Street, 2 Grant, Pa. 455. Where a statute prohibits an act, under a penalty to be enforced by indictment, and a subsequent statute gives a *qui tam* action for such penalty, the latter is merely cumulative of, and does not repeal, the remedy given by the former statute. Bush *v.* The Republic, 1 Texas, 455. In South Carolina, § 1 of the act of 1857, making it an indictable offence "wilfully, unlawfully, and maliciously" to "cut, shoot," &c., "any horse," &c., was not repealed by § 21 of the act of 1865, declaring "every wilful trespass" to be a misdemeanor. The State *v.* Alexander, 14 Rich. 247. 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. The State *v.* Wilson, 43 N. H. 415.

[1] The State *v.* Bishop, 41 Misso. 16.

[2] Pierpont *v.* Crouch, 10 Cal. 315.

hands the eleventh volume of Wallace's Reports,—being the last volume of decisions of the Supreme Court of the United States published at the time of the present writing, — we shall find in one of the cases the following, from Field, J. pronounced in delivering the opinion of the whole court: "When there are two acts on the same subject, the rule is to give effect to both if possible. But if the two 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." Now, this is a good statement of the general doctrine, as everywhere held. But he 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."[1] When the author read this sentence from the opinion of the learned judge, it seemed to him that what he deems to be a great legal heresy, which has sprung up in some of our State tribunals, had possibly found its way into the Supreme Court of our nation, which had heretofore appeared to repudiate it. True, the facts of the case did not perhaps require this language, while doubts might exist as to how much was really meant by it. The point decided, according to the reporter's head note, was: "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." And this point was justly decided, according to the general doctrine. We saw, in the last section, that, if a statute provides a new salary, it abrogates the old statute, because the two salaries cannot stand together, and the last expression of the legislative will must prevail. So here, the second statute embraced all which the first did, *but provided new penalties.* It, therefore, must prevail as the last expression of the legislative will, and the first could not stand with it. Then, turning further over in the same volume of reports, we find an opinion by Strong, J. who, speaking for the whole court, and referring to this opinion, frees the court from any suspicion of legal

[1] United States *v.* Tynen, 11 Wal. 88 92.

heresy in the following language: He said the doctrine of this case is, "that the former statute is impliedly repealed *so far* as the latter statute, making new provisions, is plainly intended as a substitute for it. Where the powers or directions under the several acts are such as *may well subsist together*, an implication of repeal cannot be allowed."[1] Still this expression of the doctrine is unfortunate; it being much more simple and easily understood merely to say, that, where the two statutes can be made by construction to subsist together, the one shall not operate as a repeal of the other.

§ 159. **Continued.** — How much of what is to be found in the adjudications and *dicta* of State tribunals, exceptional to the general doctrine, can be so fortunately explained away, the writer will not undertake to determine. Looking at the cases perhaps less critically than in the last section, we find that a partial innovation upon the doctrine seems to have been made in some of these courts, — it is not quite easy to say in just how many and of what States, — but perhaps of Massachusetts,[2] Maine,[3] Pennsylvania,[4] Vermont,[5] and possibly Alabama,[6] and some others,[7] to the extent, simply and no further, that,

[1] Henderson's Tobacco, 11 Wal. 652, 657.

[2] Commonwealth *v.* Cooley, 10 Pick. 37; Goodenow *v.* Buttrick, 7 Mass. 140; Bartlett *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.* Commonwealth, 17 Pick. 80; Commonwealth *v.* Ayer, 3 Cush. 150; Commonwealth *v.* Foster, 1 Mass. 488; Nichols *v.* Squire, 5 Pick. 168.

[3] Towle *v.* Marrett, 3 Greenl. 22; Pingree *v.* Snell, 42 Maine, 53; Buck *v.* Spofford, 31 Maine, 34, 36.

[4] Commonwealth *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." And therefore it was held, that an indictment did not lie at common law against an officer for taking illegal fees, the remedy being under the statute of March 28, 1814, § 20. Commonwealth *v.* Evans, 13 S. & R. 426. And the general doctrine is still maintained in Pennsylvania, that there is no repeal by implication where the two acts can be construed together. Shinn *v.* Commonwealth, 3 Grant, Pa. 205.

[5] Giddings *v.* Cox, 31 Vt. 607; Farr *v.* Brackett, 30 Vt. 344; Isham *v.* Bennington Iron Co., 19 Vt. 230.

[6] The State *v.* Whitworth, 8 Port. 434; Smith *v.* The State, 1 Stew. 506. But see George *v.* Skeates, 19 Ala. 738.

[7] The State *v.* Seaborn, 4 Dev. 305, 310; Dugan *v.* Gittings, 3 Gill. 138; Caldwell *v.* St. Louis Perpetual Ins. Co., 1 La. An. 85; Smith *v.* The State, 14 Misso. 147; Bryan *v.* Sunberg, 5 Texas, 418; Rogers *v.* Watrous, 8 Texas, 62;

where a new statute covers the whole ground occupied by a previous one or by the common law, it repeals by implication the prior law, though there is no repugnance. Some of the cases add as a qualification to this proposition, that, to produce this result, the new statute must plainly appear to have been intended by the legislature as a substitute for the old, or as furnishing the only rule of law in the case.

§ 160. **Objections to Exceptional Doctrine — True Rule repeated.** — Now, if the legislature did intend that the new act should stand in place of the old one, or in the place of the common law, and this intention appears in any legitimate way, plainly, as already seen,[1] the intent must prevail. But, since the legislative intent must appear in the act itself, it is not easy to see how, when the later and former provisions "may," in the language of Strong, J. in the Supreme Court of the United States, "*well subsist together*,"[2] a judicial inference can be drawn of an intent, not to permit them to stand together, but to supersede the earlier by the later. A court cannot leap from the language before it to conjectures, without violating a principle fundamental in all judicial proceedings. Hence the exception, if it really exists, is confined to a few States, where it should not be permitted to take to itself any new propositions; while the general American doctrine, like the English, has no exceptions, and is, that an affirmative statute never repeals the prior law, unless there is a direct contradiction between the two.[3]

Erwin *v.* Moore, 15 Ga. 361; Illinois and Michigan Canal *v.* Chicago, 14 Ill. 334; Pankey *v.* People, 1 Scam. 80; Leighton *v.* Walker, 9 N. H. 59; Wakefield *v.* Phelps, 37 N. H. 295; Pulaski County *v.* Downer, 5 Eng. 588; Gorham *v.* Luckett, 6 B. Monr. 146; Stirman *v.* The State, 21 Texas, 734; Swann *v.* Buck, 40 Missis. 268; Sacramento *v.* Bird, 15 Cal. 294; The State *v.* Conkling, 19 Cal. 501; Industrial School District *v.* Whitehead, 2 Beasley, 290. See Daviess *v.* Fairbairn, 3 How. U. S. 636, 645.

[1] Ante, § 70.

[2] Ante, § 158.

[3] The reader is referred, among other authorities, including those before cited in the course of this discussion, to the following: Wood *v.* United States, 16 Pet. 342, 362; Rex *v.* Paine, 1 East P. C. 5; Morlot *v.* Lawrence, 1 Blatch. C. C. 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, 6 Jur. 783; 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; Planters' Bank *v.* The State, 6 Sm. & M.

§ 161. **Objections to Exceptional Doctrine, continued.** — It may be further added of the exceptional doctrine, that it is difficult and uncertain in its application, therefore specially objectionable. Moreover, it is not supported by any satisfactory reasoning.[1] Its most plausible application 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

628; Kinney *v.* Mallory, 3 Ala. 626; Canal Company *v.* Railroad Company, 4 Gill & J. 1; The State *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; United States *v.* Twenty-five Cases of Cloths, Crabbe, 356, 370, 382; The State *v.* Moore, 19 Ala. 514; Freeman *v.* The State, 6 Port. 372; Morris *v.* Delaware and 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 Wallace, Jr. 368, 431; Daviess *v.* Fairbairn, 3 How. U. S. 636; Mitchell *v.* Duncan, 7 Fla. 13; The State *v.* Fuller, 14 La. An. 667; The State *v.* Kitty, 12 La. An. 805; Beridon *v.* Barbin, 13 La. An. 458; Pratt *v.* Atlantic and St. Lawrence Railroad, 42 Maine, 579; Richards *v.* Patterson, 30 Missis. 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; The State *v.* Smith, 7 Iowa, 244; Edgar *v.* Greer, 8 Iowa, 394; The State *v.* Woodside, 9 Ire. 496. In New York, the act of April 10, 1824, § 12, authorized a divorce from bed and board on the prayer of 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. § 761, note. In the Illinois case of Bruce *v.* Schuyler, 4 Gilm. 221, 271, 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." In accordance with the view in the text appears also to be the Scotch law. 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 words." Even though the second private act is declared to be a public one, the consequence is the same. Birkenhead Docks *v.* Birkenhead Docks Company, 23 Eng. L. & Eq. 389.

[1] In Ellis *v.* Paige, 1 Pick. 43, 45, the court put the matter 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." The fallacy of this reasoning is obvious when we consider that the question is not, whether the parts omitted are to be *revived by construction;* but whether the whole is to be *repealed by construction;* in other words, whether we are to impute to the legislature, either the ignorance of not knowing what was the previous law, or the carelessness of not saying that they intend its repeal. Yet an examination of the cases which have admitted the doctrine we are combating will show, that on this particular fallacy of reasoning the doctrine is generally made to rest.

that our statute repeals the English,[1] — a view entitled to great consideration on the question whether we have adopted the English act; but, supposing we have adopted it, why may it not stand until the legislature dissents from it, either by direct words or by an inconsistent enactment?

§ 162. **Continued.** — Another view of the question is this: if the new statute contains nothing inconsistent with the prior law, no presumption can arise of an intent to repeal it; since the common law itself, in harmony with which all legislative enactments are to be interpreted,[2] recognizes the doctrine of a variety of remedies for a single wrong, of a variety of offences committed by a single act, of a variety of modes of procedure to gain a common right, of a variety of jurisdictions over a given matter, of a variety of results from a single cause. Nature recognizes the same. And for a court to interpose views of its own against wisdom from both these sources, and, without any positive or necessarily implied direction from the legislature, to assume a repeal, is to perform the functions of the law-giver, rather than of the judge.

§ 163. **Authorities collected in Order of States.** — We have thus seen, that the rules governing implied repeal by the operation of affirmative statutes, on the ground of repugnance, are not identical in our States. The practitioner may therefore like to see, in a note,[3] references to some of the further authorities showing when a repeal takes place, arranged in the order of the countries and States to which they belong. But in con-

[1] Mason *v.* Waite, 1 Pick. 452; The State *v.* Seaborn, 4 Dev. 305, 310; Report of Judges, 3 Binn. 595, 597; Towle *v.* Marrett, 3 Greenl. 22.

[2] Ante, § 141.

[3] *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, 4th ed. 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; Rex *v.* Pugh, 6 Mod. 140, 141; Reg. *v.* Sill, 14 Eng. L. & Eq. 135; Rex *v.* O'Brian, 7 Mod. 378, 379; Reg. *v.* Brecon, 3 New Sess. Cas. 434, 13 Jur. 422, 18 Law J. N. S. M. C. 123; Reg. *v.* Thompson, 20 Law J. N. S. M. C. 183, 15 Jur. 654; Rex *v.* Stanley, Russ. & Ry. 432; Rex *v.* Royall, 2 Bur. 832, 2 Keny. 549; Michell *v.* Brown, 1 Ellis & E. 267.

Ireland. Reg. *v.* Murphy, Jebb, 315.

United States. United States *v.* Pirates, 5 Wheat. 184; United States *v.*

nection with these authorities, he should consult the foregoing sections, and those of the next sub-title.

Halberstadt, Gilpin, 262; United States *v.* Jones, 3 Wash. C. C. 209; Morlot *v.* Lawrence, 1 Blatchf. C. C. 608; United States *v.* A Package of Lace, Gilpin, 338; United States *v.* Irwin, 5 McLean, 178; The Estrella, 4 Wheat. 298.

Alabama. The State *v.* Coleman, 5 Port. 32; Smith *v.* The State, 1 Stew. 506; Hodges *v.* The State, 8 Ala. 55; The State *v.* Whitworth, 8 Port. 434; The State *v.* Jones, 5 Ala. 666; The State *v.* Flanigin, 5 Ala. 477; Hawkins *v.* The State, 3 Stew. & P. 63; Moore *v.* The State, 16 Ala. 411; The State *v.* Moseley, 14 Ala. 390; The State *v.* Allaire, 14 Ala. 435; Hirschfelder *v.* The State, 18 Ala. 112; Sterne *v.* The State, 20 Ala. 43; The State *v.* Moore, 19 Ala. 514; Huggins *v.* Ball, 19 Ala. 587; DeBernie *v.* The State, 19 Ala. 23; Jordan *v.* The State, 15 Ala. 746; Turner *v.* The State, 40 Ala. 21; Jeffries *v.* The State, 39 Ala. 655; Magruder *v.* The State, 40 Ala. 347.

Arkansas. Scoggin *v.* Taylor, 8 Eng. 380; Campbell *v.* Campbell, 8 Eng. 513; Ex parte Trapnall, 1 Eng. 9; Hamilton *v.* Buxton, 1 Eng. 24.

California. People *v.* Chu Quong, 15 Cal. 332.

Connecticut. Hale *v.* The State, 15 Conn. 242; Knowles *v.* The State, 3 Day, 103; The State *v.* Danforth, 3 Conn. 112; Southworth *v.* The State, 5 Conn. 325.

Delaware. The State *v.* Harker, 4 Harring. Del. 559.

Florida. Luke *v.* The State, 5 Fla. 185.

Georgia. The State *v.* Calvin, R. M. Charl. 151; The State *v.* Maloney, R. M. Charl. 84; The State *v.* Savannah, T. U. P. Charl. 235; Union Branch Railroad *v.* East Tennessee and Georgia Railroad, 14 Ga. 327; Gorman *v.* Hammond, 28 Ga. 85; Bloom *v.* The State, 20 Ga. 443; Wall *v.* McNeil, 20 Ga. 239; Wheeler *v.* The State, 23 Ga. 9; Georgia Railroad *v.* Kirkpatrick, 35 Ga. 144.

Illinois. Bruce *v.* Schuyler, 4 Gilman, 221; Town of Ottawa *v.* County of La Salle, 12 Ill. 339; Illinois and Michigan Canal *v.* Chicago, 14 Ill. 334; Tyson *v.* Postlethwaite, 13 Ill. 727; Perry *v.* People, 14 Ill. 496.

Indiana. The State *v.* Mullikin, 8 Blackf. 260; Fuller *v.* The State, 1 Blackf. 63; Strong *v.* The State, 1 Blackf. 193; Cheezem *v.* The State, 2 Ind. 149; The State *v.* Miskimmons, 2 Ind. 440; King *v.* The State, 2 Ind. 523; The State *v.* Youmans, 5 Ind. 280; The State *v.* Horsey, 14 Ind. 185; The State *v.* Pierce, 14 Ind. 302; Cordell *v.* The State, 22 Ind. 1; Webb *v.* Baird, 6 Ind. 13; Dodd *v.* The State, 18 Ind. 56.

Iowa. The State *v.* Moffett, 1 Greene, Iowa, 247; Goodwin *v.* Thompson, 2 Greene, Iowa, 329; Baker *v.* The Milwaukee, 14 Iowa, 214; The State *v.* Donehey, 8 Iowa, 396; Stoneman *v.* Whaley, 9 Iowa, 390.

Kentucky. Ely *v.* Thompson, 3 A. K. Mar. 70; Ervine *v.* Commonwealth, 5 Dana, 216; Harrison *v.* Chiles, 3 Litt. 194; Gregory *v.* Commonwealth, 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; Commonwealth *v.* Craig, 15 B. Monr. 534.

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; New Orleans *v.* Mechanics and Traders Bank, 15 La. An. 107; The State *v.* Judge, 14 La. An. 486.

Maine. Gooch *v.* Stephenson, 13 Maine, 371; Towle *v.* Marrett, 3 Greenl. 22; Parsons *v.* Bridgham, 34 Maine, 240; The State *v.* Woodward, 34 Maine, 293.

Maryland. Dugan *v.* Gittings, 3 Gill, 138; Wright *v.* Freeman, 5 Har. & J. 467; Canal Company *v.* Railroad Company, 4 Gill & J. 1.

Massachusetts. Commonwealth *v.*

II. *Particular Applications of the Doctrine of Repeal.*

§ 164. **Election — Choice of Courts — Statute or the Common Law.** — Where the new statute does not repeal the prior law,

Worcester, 3 Pick. 462; Jennings *v.* Commonwealth, 17 Pick. 80; Wilde *v.* Commonwealth, 2 Met. 408; Commonwealth *v.* Cooley, 10 Pick. 37; Shattuck *v.* Woods, 1 Pick. 171; Goodenow *v.* Buttrick, 7 Mass. 140; Bartlett *v.* King, 12 Mass. 537; Ashley, Appellant, 4 Pick. 21; Mason *v.* Waite, 1 Pick. 452; Nichols *v.* Squire, 5 Pick. 168; Commonwealth *v.* Ayer, 3 Cush. 150; Ellis *v.* Paige, 1 Pick. 43; Commonwealth *v.* Kimball, 21 Pick. 373; Commonwealth *v.* King, 13 Met. 115; Britton *v.* Commonwealth, 1 Cush. 302; Salem Turnpike and Chelsea Bridge *v.* Hayes, 5 Cush. 458; Commonwealth *v.* Herrick, 6 Cush. 465; Commonwealth *v.* Norton, 13 Allen, 550; Carter *v.* Burt, 12 Allen, 424.

Minnesota. Maple Lake *v.* Wright, 12 Minn. 403.

Mississippi. White *v.* Johnson, 23 Missis. 68; Shelton *v.* Baldwin, 26 Missis. 439.

Missouri. The State *v.* Merry, 3 Misso. 278; Smith *v.* The State, 14 Misso. 147.

New Hampshire. The State *v.* Buckman, 8 N. H. 203; Leighton *v.* Walker, 9 N. H. 59.

New Jersey. Perine *v.* Van Note, 1 Southard, 146; Buckallew *v.* Ackerman, 3 Halst. 48.

New York. Vallance *v.* King, 3 Barb. 548; People *v.* Townsey, 5 Denio, 70; Crittenden *v.* Wilson, 5 Cow. 165; 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; 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; Hand *v.* Ballou, 2 Kernan, 541; People *v.* McCann, 16 N. Y. 58; New York *v.* Walker, 4 E. D. Smith, 258; Manchester *v.* Herrington, 10 N. Y. 164.

North Carolina. The State *v.* Henderson, 2 Dev. & Bat. 543; The State *v.* Walker, 2 Taylor, 229; The State *v.* Seaborn, 4 Dev. 305, 310; The State *v.* Nat, 13 Ire. 154.

Ohio. Carter *v.* Hawley, Wright, 74; Moore *v.* Vance, 1 Ohio, 1; Dodge *v.* Gridley, 10 Ohio, 173, 178; Seymour *v.* Milford and Chillicothe Turnpike, 10 Ohio, 476, 482; Calkins *v.* The State, 14 Ohio State, 222.

Pennsylvania. Foster *v.* Commonwealth, 8 Watts & S. 77; Drew *v.* Commonwealth, 1 Whart. 279; Report of Judges, 3 Binn. 595; Commonwealth *v.* Cromley, 1 Ashm. 179; Street *v.* Commonwealth, 6 Watts & S. 209; Commonwealth *v.* Evans, 13 S. & R. 426; Jefferson *v.* Reitz, 6 Smith, Pa. 44; Gwinner *v.* Lehigh, &c. Railroad, 5 Smith, Pa. 126.

Rhode Island. The State *v.* Wilbor, 1 R. I. 199.

South Carolina. The State *v.* Jones, 1 McMullan, 236; The State *v.* Williams, 2 Rich. 418; The State *v* Baldwin, 2 Bailey, 541; The State *v.* Brown, 2 Speers, 129; The State *v.* Bowen, 3 Strob. 573; The State *v.* Nicholas, 2 Strob. 278; The State *v.* Thompson, 2 Strob. 12; The State *v.* Cattell, 2 Hill, S. C. 291; The State *v.* Huntington, 3 Brev. 111; The State *v.* Evans, 3 Hill, S. C. 190; The State *v.* Brock, 11 Rich. 447; The State *v.* Elrod, 12 Rich. 662; Linam *v.* Johnson, 2 Bailey, 137.

Tennessee. The State *v.* Gainer, 3 Humph. 39; The State *v.* Rutledge, 8 Humph. 32; Simpson *v.* The State, 10 Yerg. 525; Taylor *v.* The State, 7 Humph. 510.

Texas. Fowler *v.* Brown, 5 Texas, 407; Rogers *v.* Watrous, 8 Texas, 62; The State *v.* Horan, 11 Texas, 144.

Vermont. The State *v.* McLeran, 1 Aikens, 311; The State *v.* Wilkinson,

both laws have a concurrent efficacy, and suitors may elect under which to proceed.[1] For example, "If by a former law," says Blackstone, "an offence be indictable at the quarter sessions; and the later law makes the same offence 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 offence shall be indictable at the assizes, and not elsewhere."[2] So it is every-day practice, in the criminal courts, for a prosecutor to proceed on either one of two statutes, or at the common law, as he may elect;[3] and, where an indictment is intended to be drawn upon a statute, but is found defective as such, yet good at the common law, it stands, — the courts rejecting the concluding words, "against the form of the statute," as surplusage.[4]

§ 165. **What Repugnance works Implied Repeal — Prior Statute modified by Later.** — The nature of the repugnance which by implication works a repeal of the prior law was seen in a general way under our last sub-title, but it is now to be more particularly considered. We have already seen, also, how distinct

2 Vt. 480; Pratt *v.* Jones, 25 Vt. 303, 307.

Virginia. Commonwealth *v.* Pegram, 1 Leigh, 569; Lanthrop *v.* Commonwealth, 6 Grat. 671.

Wisconsin. Schieve *v.* The State, 17 Wis. 253.

[1] 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 Maine, 371; Fuller *v.* The State, 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.

[2] 1 Bl. Com. 90.

[3] 1 Saund. Wms. ed. (6th) 135 *b*, note; Gooch *v.* Stephenson, 13 Maine, 371; The State *v.* Abram, 4 Ala. 272. See The State *v.* Savannah, T. U. P. Charl. 235; The State *v.* Wilkinson, 2 Vt. 480; 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; The State *v.* Morton, 1 Wms. Vt. 310; The State *v.* Norton, 3 Zab. 33; The State *v.* Berry, 4 Halst. 374. 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 and Whitehall Turnpike *v.* People, 9 Barb. 161.

[4] Rex *v.* Dickenson, note, 1 Saund. Wms. ed. 135; Reg. *v.* Wigg, 2 Ld. Raym. 1163; Bennet *v.* Talbois, 1 Ld. Raym. 149; The State *v.* Walker, 2 Taylor, 229. And see Crim. Proced. I. § 228 et seq. 349. So 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.

statutory and common-law provisions operate one upon another, contracting, expanding, and modifying one another; and how, when they so operate, their construction is determined, not necessarily by the order in which they were established, but by other principles.[1] Therefore, where a provision of law is thus modified or cut short, it is not, in any proper sense, repealed. And we may lay down the doctrine broadly, that no repeal takes place if the earlier provision can stand, to any extent, consistently with the later.[2] Yet this proposition must not be misapplied. For if the later statute conflicts in any particular with the earlier, then the earlier is so far abrogated; though we do not say, speaking of the earlier as a whole, that it is repealed. Now the abrogation of a provision of law may extend only to something which is incidental; or, on the other hand, its principal part may be abrogated, leaving only the minor matter to stand. It will help us to determine when an abrogation takes place, and how widely it operates, if we first consider into what parts a statutory provision may for this purpose be separated. Let us look a little at that question.

§ 166. **Into what Parts, for Repeal or Modification, Statute separable — Offence and Punishment — How Indictment drawn.** — We may always separate the offence from the punishment; and so a statute which provides a new punishment for an old offence operates as a repeal of so much only of the old law as relates to the punishment.[3] A person offending will then be indictable, either at the common law or under the old statute, as the case may be, leaving the court to inflict the punishment ordained by the new;[4] or under the new statute, at the election

[1] Ante, § 126–146.

[2] 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.

[3] We are now upon cases in which the new statute provides a new punishment. It appears (a proposition, indeed, about which there can be no doubt), that, if a statute simply repeals so much of a previous one, creating an offence and affixing a penalty, as relates to the penalty, all right to prosecute for a violation of it is gone. Reg. *v.* Adams, Car. & M. 299.

[4] Commonwealth *v.* Searle, 2 Binn. 332, 339; Williams *v.* Reg., 7 Q. B. 251; The State *v.* Wilbor, 1 R. I. 199; McCann *v.* The State, 13 Sm. & M. 471; The State *v.* Thompson, 2 Strob. 12; Rex *v.* Berry, 1 Moody & R. 463; The State *v.* Williams, 2 Rich. 418.

of the prosecutor.[1] This doctrine, however, should not be confounded with another. In the work on Criminal Procedure we saw,[2] that, as fundamental doctrine relating to the indictment, whether at common law or under a statute, the allegations must cover every particular element of crime entering into the punishment to be inflicted. The doctrine of this section, therefore, is, and is only, that, if the same elements of crime are punishable alike at the common law and under a statute, the indictment may in form be drawn either on the one or on the other; and, of course, it in its substantial parts will be the same in either case.

§ 167. **Form of the Indictment, continued.** — It was indeed ruled in an English nisi prius case,[3] harmoniously with the doctrine apparently best sustained by authority,[4] that, where the offence 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. But this is at most a mere technical rule of pleading, not resting well on principle; and, in this country, the question has been decided both ways,[5] — a matter of pleading,

[1] Rex *v.* Dickenson, 1 Saund. Wms. ed. 135; Rex *v.* Dixon, 30 Mod. 335, 337, Say. 226; Rex *v.* Urlyn, note, 2 Saund. Wms. ed. 308; Rex *v.* Chatburn, 1 Moody, 403; Sir John Knight's Case, 3 Mod. 117; Rex *v.* O'Brian, 7 Mod. 378, 379. See, however, Felix *v.* The State, 18 Ala. 720.

[2] Crim. Proced. 2d ed. I. § 77 et seq.

[3] Reg. *v.* Adams, Car. & M. 299.

[4] 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.

[5] That the singular form is sufficient, Strong *v.* The State, 1 Blackf. 193; The State *v.* Wilbor, 1 R. I. 199; The State *v.* Dayton, 3 Zab. 49; The State *v.* Berry, 4 Halst. 374; Butman's Case, 8 Greenl. 113. That the plural form must be employed, The State *v.* Moses, 7 Blackf. 244, and King *v.* The State, 2 Ind. 523, the judges being apparently unaware of their previous decision in Strong *v.* The State; The State *v.* Cassel, 2 Har. & G. 407. See Kane *v.* People, 8 Wend. 203; United States *v.* Gibert, 2 Sumner, 19; Sears *v.* United States, 1 Gallis. 257, 259. In The State *v.* Pool, 2 Dev. 202, the majority of the judges held, that, where one statute creates an offence punishable by a penalty recoverable in an action civil in form, and another statute makes the offence indictable, the indictment must conclude against the form of the statutes, in the plural. But Henderson, C. J. dissented, observing: "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 statutes 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

however, more exactly considered in our work on Criminal Procedure.[1] Now, although the punishment is the measure of the offence (there being no offence where there is no punishment, and the offence 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, since otherwise it does not set out fully the offence,[2] the true view as to this question of pleading seems to have been expressed by Lord Denman, thus: "It is the offence which is the subject of indictment, not the punishment;"[3] and the doctrine is settled in both countries, that, if the offence is originally at common law, and the punishment is by statute, a conclusion at common law is sufficient.[4]

§ 168. **Effect, as a Repeal, of Statute changing Punishment.** — It is clear that, if a new statute provides a milder punishment than was before imposed for the same offence, and adopts no

prosecution, and the punishment on 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." p. 207, 208. In the Supreme Court of Maine, Parris, J. drew the distinctions as follows: "Where one statute creates the offence, 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 offence, and the first of them was never discontinued, and the later only qualify the method of proceeding upon the earlier, 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 offence 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.

[1] Crim. Proced. 2d ed. I. § 594–607.

[2] Ante, § 166.

[3] Reg. *v.* Williams, 14 Law J. N. S. M. C. 164.

[4] Reg. *v.* Williams, supra; Rex *v.* Chatburn, 1 Moody, 403; Fuller *v.* The State, 1 Blackf. 63; Rex *v.* O'Brian, 7 Mod. 378, 379; Rex *v.* Jones, 1 Leach, 4th ed. 174; Reg. *v.* Bethell, 6 Mod. 17; The State *v.* Evans, 7 Gill & J. 290; Williams *v.* Reg., 10 Jur. 155; Russell *v.* Commonwealth, 7 S. & R. 489. See The State *v.* Flanigin, 5 Ala. 477; The State *v.* Jones, 5 Ala. 666; Rex *v.* Brown, 2 East P. C. 1007. In King *v.* The State, 2 Ind. 523, the court, after laying down the doctrine, that, where one statute defines the offence 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." But the reader will notice, that in fact the former statute would have supported it, the same as the common law would have done, if the offence had existed at common law; for if the former statute had failed to prescribe any penalty, then, as we have seen, ante, § 138, the offence created by it would have been punishable at the common law.

different remedy, it repeals so much of the old law as concerns the punishment.[1] From some cases and *dicta* we might infer, that the converse is not true; but, if by a more recent enactment a heavier punishment is established, a prisoner may be sentenced under either law.[2] The better view however appears to be, that, where there is no change in the character or circumstances of the offence, or nature of the remedy, a new law establishing any different punishment in amount, whether more or less, is so far inconsistent with and repeals the old.[3] Where, by two sections of one statute, jurisdiction over the same offence was given to different courts, and different degrees of punishment were prescribed, it was held that only the milder degree could be ordered by either court.[4]

§ 169. **Continued — Punishments or Remedies of Different Natures — Nuisance.** — Several concurrent remedies "of a different nature,"[5] carrying with them their respective penalties, may be provided for one offence; and each remedy may stand, penalty and all, without conflicting with the others.[6] "Therefore keeping of swine in the city, &c., 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 act of Parliament, by sale of the swine."[7] So a statute making it penal to "in-

[1] Henderson *v.* Sherborne, 2 M. & W. 236, 239; Smith *v.* The State, 1 Stew. 506; The State *v.* Thompson, 2 Strob. 12; The State *v.* Whitworth, 8 Port. 434; United States *v.* Jones, 3 Wash. C. C. 209; The State *v.* Upchurch, 9 Ire. 454; The State *v.* Ripley, 2 Brev. 300; Barton *v.* Watkins, 2 Hill, S. C. 674.

[2] Harrison *v.* Chiles, 3 Litt. 194; The State *v.* Taylor, 2 McCord, 483; Reg. *v.* Pugh, 6 Mod. 140, 141.

[3] Nichols *v.* Squire, 5 Pick. 168; Perine *v.* Van Note, 1 Southard, 146; Buckallew *v.* Ackerman, 3 Halst. 48; Carter *v.* Hawley, Wright, 74; Commonwealth *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.* The State, 23 Missis. 261; The State *v.* Ward, 6 N. H. 529; Sullivan *v.* People, 15 Ill. 233; post, § 169–171. In Pennsylvania, this has been so provided, substantially, by statute. Commonwealth *v.* Evans, 13 S. & R. 426.

[4] Scrinegrour *v.* The State, 1 Chand. 48.

[5] Lord Abinger, in Henderson *v.* Sherborne, 2 M. & W. 236, 239.

[6] 1 Mod. 34, note; Rex *v.* Jackson, Cowp. 297; Reg. *v.* Wigg, 2 Ld. Raym. 1163; Jennings *v.* Commonwealth, 17 Pick. 80; Crittenden *v.* Wilson, 5 Cow. 165; The State *v.* Rutledge, 8 Humph. 32; Hodges *v.* The State, 8 Ala. 55; Rex *v.* Moor, 2 Mod. 128; Simpson *v.* The State, 10 Yerg. 525; Pitman *v.* Commonwealth, 2 Rob. Va. 800; United States *v.* Halberstadt, Gilpin, 262; Renwick *v.* Morris, 3 Hill, N. Y. 621, 7 Hill, N. Y. 575.

[7] Reg. *v.* Wigg, 2 Ld. Raym. 1163.

jure a mill-dam" does not take away the common-law right to abate the nuisance, if the mill-dam becomes such.[1] And a statute providing a specific method of abating a nuisance does not abrogate the common-law method.[2] The reason of these propositions is, that, since no repeal of a prior law is implied from a subsequent enactment, except in cases of repugnance, there can be no repeal in these circumstances; for there is no repugnance between provisions of differing natures, to cure a common evil. And the reason of some other of the foregoing doctrines — as that, where there are two provisions differing not in nature from each other, one, for instance, visiting the offender with a heavier punishment, of the same kind, than the other, the later repeals the earlier — is because nature forbids two identical things, in this instance the things being identical a certain way, to occupy the same space.

§ 170. **Continued — Obstructing Way — Penal Action and Indictment.** — What are remedies of different natures, within the rule just stated, we may not find it easy to lay down in a word; and perhaps the cases are not entirely harmonious. The Vermont court held, that a statutory provision imposing a fine of seven dollars, 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.[3] In New Jersey, a statute having prohibited a thing under a penalty of ten dollars, to be recovered in an action of debt by any person suing for it; and a subsequent statute having made the same thing indictable, and the offender liable to twenty dollars' fine; the later provision was held to repeal the earlier. The ground of the last decision was, that it could not be presumed both penalties were to stand; and that, therefore, the last must prevail.[4]

§ 171. **Continued — Two Separate Proceedings — Offences included in One Another — Aggravation with Added Penalty, &c.** —

[1] The State *v.* Moffett, 1 Greene, Iowa, 247.

[2] Wetmore *v.* Tracy, 14 Wend. 250.

[3] The State *v.* Wilkinson, 2 Vt. 480.

[4] Buckallew *v.* Ackerman, 3 Halst. 48. And see Salem Turnpike and Chelsea Bridge *v.* Hayes, 5 Cush. 458.

Perhaps some of the difficulties on this point may be obviated, by calling to mind certain principles considered by us more at large elsewhere. One is, that the law may, sometimes does, attach two or more separate penalties or punishments — as a fine and a forfeiture, or a fine and imprisonment — to the same act, and even authorize them to be enforced in separate prosecutions, — a proposition which requires some consideration to determine its precise constitutional limits.[1] In such a case, it is of course no objection that the right to prosecute is derived from statutes passed at different times. Another principle is, that, to a considerable extent, offences are like successive circles of different sizes enclosed within one another, a robbery, for example, being an assault committed under particular circumstances of aggravation; and that, in these cases, the offender may be convicted of either the simpler or aggravated form, at the election of the prosecutor; except that, sometimes, the line between felonies and misdemeanors cannot in this way be passed. These several degrees of the same offence have their corresponding degrees of punishment; though, when a prisoner has been convicted in one degree, he cannot be convicted in another degree. Therefore, if the new statute adds aggravations not existing in the old law of the offence, and creates a higher penalty;[2] or omits some aggravating quality and provides a lower penalty;[3] or if the new statute is applicable to a particular class only of persons, who owe particular duties in the matter;[4] the new punishment does not supersede the old.[5] This is clear: but, where

[1] People *v.* Stevens, 13 Wend. 341; Reg. *v.* White, 20 Eng. L. & Eq. 585; Blatchley *v.* Moser, 15 Wend. 215. The Illinois court held, that an officer is not indictable in Illinois for taking illegal fees, observing: "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.* People, 1 Scam. 80. Still there is doubt whether this Illinois doctrine is sound. A civil remedy in the nature of a penalty for the offence may well stand with a common-law indictment, the two remedies being enforceable together.

[2] The State *v.* Maloney, R. M. Charl. 84.

[3] The State *v.* Buckman, 8 N. H. 203; Rex *v.* Taylor, Russ. & Ry. 373; The State *v.* Danforth, 3 Conn. 112; Southworth *v.* The State, 5 Conn. 325.

[4] Gregory *v.* Commonwealth, 2 Dana, 417.

[5] Ante, § 164, 169. And see The State *v.* Taylor, 2 McCord, 483; Rex *v.* Waddington, 1 B. & C. 26; Knowles *v.* The State, 3 Day, 103; Commonwealth *v.* Pegram, 1 Leigh, 569; Allen *v.* Commonwealth, 2 Leigh, 727; Taylor *v.* The State, 7 Humph. 510.

the law is changed in a way 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 offence of a higher grade than the old, it superseded the old.[1]

§ 172. **Continued — Observations.** — The difficulties disclosed in the last few sections will be found less embarrassing, in the facts of cases as they arise, than they appear upon this naked statement. Because, when a court takes into its view the large range of subjects entering into questions of the interpretation of statutes, it will usually discern some circumstance to relieve any doubts which might encumber an abstract proposition.

§ 173. **Implied Repeal as to the Offence.** — Having thus considered the question of implied repeal as respects the punishment, we next come to look at it as respects the offence itself. And the instances are rare in which a statute operates as a repeal of the prior law, statutory or common, concerning merely the offence, distinguished from the punishment. Of course, from this statement must be excluded the peculiar doctrine of some tribunals, mentioned in previous sections.[2] Since there are, under many circumstances, various shades and degrees of legal offence attaching to a single act, no reason exists why any new provision of statutory law should be construed otherwise than as creating an additional offence, though of the same general kind which existed before.[3]

§ 174. **Continued — Misdemeanor raised to Felony, and the Reverse.** — But, on principles which will become apparent when we consider the distinction between felonies and misdemeanors, if a statute elevates to a 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.[4]

[1] Smith *v.* The State, 1 Stew. 506. And see The State *v.* Jones, 5 Ala. 666; The State *v.* Flanigin, 5 Ala. 477.

[2] Ante, § 157–162.

[3] See cases cited ante, § 154–164; Commonwealth *v.* Herrick, 6 Cush. 465.

[4] Reg. *v.* Button, 12 Jur. 1017, 1021; Rex *v.* Robinson, 2 East P. C. 1110, 1114, 1115, 2 Leach, 4th ed. 749; Rex *v.* Walford, 5 Esp. 62; The State *v.* Wright, 4 McCord, 358; Barton *v.* Watkins, 2 Hill, S. C. 674; The State *v.* Dick, 2 Murph. 388; Warner *v.*

III. *The Consequences of Repeal.*

§ 175. **The Right and Remedy distinguished — Rules different.** — Law divides itself into that which concerns the right, and that which concerns the remedy. Rights depend on the rule prevailing at the place where, and the time when, the fact transpired; remedies, on that of the place where they are sought to be enforced,[1] as existing at the time[2] when the proceedings are carried on and the judgment is rendered.

§ 176. **What pertains to Remedy — Punishment — Procedure — By what Law regulated.** — The punishment, we have seen,[3] to be treated of as separable from the offence, belongs, under this division, to the remedy. A prisoner, therefore, is to receive the sentence legally provided for him when it is pronounced by the court.[4] And the same rule applies to the proceedings, which must conform to the law as it is while they are progressing.[5]

§ 177. **Repeal of Statute — Procedure — Punishment.** — It follows, therefore, that no proceedings can be carried on under a law which, being repealed,[6] is not existing to give authority to the court. Consequently if the common or statutory law, which authorizes a prosecution and conviction for a specific offence, is repealed or expired[7] before final judgment, the court can go no further with the case.[8] Even if a verdict has

Commonwealth, 1 Barr, 154; Rex *v.* Cross, 1 Ld. Raym. 711, 12 Mod. 634; Rex *v.* Pim, Russ. & Ry. 425.

[1] May *v.* Breed, 7 Cush. 15, 34; Story Confl. Laws, § 556–558.

[2] Hale *v.* The State, 15 Conn. 242; Lore *v.* The State, 4 Ala. 173; The State *v.* Fletcher, 1 R. I. 193; Davidson *v.* Wheeler, Morris, 238; Knoup *v.* Piqua Bank, 1 Ohio State, 603.

[3] Ante, § 166, 167.

[4] The State *v.* Williams, 2 Rich. 418; The State *v.* Fletcher, 1 R. I. 193; ante, § 166.

[5] Lore *v.* The State, 4 Ala. 173; Hale *v.* The State, 15 Conn. 242. See Van Valkenburgh *v.* Torrey, 7 Cow. 252.

[6] Miller's Case, 3 Wils. 420, 1 W. Bl. 451; Hunt *v.* Jennings, 5 Blackf. 195; Road in Hatfield, 4 Yeates, 392; Directors of the Poor *v.* Railroad Company, 7 Watts & Serg. 236; The State *v.* Lackey, 2 Ind. 285; Reg. *v.* Denton, 14 Eng. L. & Eq. 124; Commonwealth *v.* Commissioners, 6 Pick. 501, 508; Illinois and Michigan Canal *v.* Chicago, 14 Ill. 334; North Canal Street Road, 10 Watts, 351; Fenelon's Petition, 7 Barr, 173.

[7] Ship Helen, 6 Cranch, 203; Rachel *v.* United States, 6 Cranch, 329; Yeaton *v.* United States, 5 Cranch, 281; The Irresistible, 7 Wheat. 551; Davidson *v.* Wheeler, Morris, 238; Eaton *v.* Graham, 11 Ill. 619. But see post, § 181, 182.

[8] Commonwealth *v.* Kimball, 21 Pick. 373; Commonwealth *v.* Marshall, 11 Pick. 350; Taylor *v.* The State, 7 Blackf. 93; Mayers *v.* The State, 2 Eng. 68; Anonymous, 2 Lewin, 22;

been rendered against the prisoner, sentence cannot be pronounced; and he must be discharged.[1] The same result follows, if there is a judgment which has been vacated by an appeal[2] or a writ of review.[3] But, after final judgment, the execution of the sentence is not affected by a repeal of the law.[4] This principle, being general, applies of course to *qui tam* and other actions under penal statutes, and the like,[5] as well as to indictments. If the repealing statute, though enacted, has not gone into operation, it produces no effect whatever in any case.[6]

§ 178. **Continued — Vested Rights — When — Constitutional — Taking away Remedy — Modifying.** — Where private rights of property, however, have actually vested in individuals,[7] even

United States *v.* Passmore, 4 Dall. 372; Stoever *v.* Immell, 1 Watts, 258; Commonwealth *v.* Beatty, 1 Watts, 382; Scutt *v.* Commonwealth, 2 Va. Cas. 54; The State *v.* Cole, 2 McCord, 1; The State *v.* Fletcher, 1 R. I. 193; Attoo *v.* Commonwealth, 2 Va. Cas. 382; Commonwealth *v.* Leftwich, 5 Rand. 657; Anonymous, 1 Wash. C. C. 84; People *v.* Townsey, 5 Denio, 70, 72; 1 Kent Com. 465; The State *v.* Allaire, 14 Ala. 435; Jordan *v.* The State, 15 Ala. 746; The State *v.* Lloyd, 2 Ind. 659; Heald *v.* The State, 36 Maine, 62; Howard *v.* The State, 5 Ind. 183; The Governor *v.* Howard, 1 Murph. 465; The State *v.* O'Conner, 13 La. An. 486; The Rachel *v.* United States, 6 Cranch, 329; United States *v.* The Helen, 6 Cranch, 203; Yeaton *v.* United States, 5 Cranch, 281; Wall *v.* The State, 18 Texas, 682; The State *v.* Ingersoll, 17 Wis. 631; The State *v.* Cress, 4 Jones, N. C. 421; Genkinger *v.* Commonwealth, 8 Casey, Pa. 99; The State *v.* Edward, 5 Mart. La. 474; Lunning *v.* The State, 9 Ind. 309; Calkins *v.* The State, 14 Ohio State, 222; Griffin *v.* The State, 39 Ala. 541. When the statute declaring the penalty for an offence is repealed, a person who had committed it cannot even be punished under a general provision, that, in a case of legal conviction where no punishment is provided by statute, the court shall award such sentence as is conformable to the common usage and practice, according to the nature of the offence. Commonwealth *v.* McDonough, 13 Allen, 581.

[1] Commonwealth *v.* Duane, 1 Binn. 601; Keller *v.* The State, 12 Md. 322.

[2] The Rachel *v.* United States, 6 Cranch, 329; Eaton *v.* United States, 5 Cranch, 281.

[3] Lewis *v.* Foster, 1 N. H. 61.

[4] The State *v.* Addington, 2 Bailey, 516; Foster *v.* Medfield, 3 Met. 1.

[5] Pope *v.* Lewis, 4 Ala. 487; The State *v.* Towbeckbee 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; Commonwealth *v.* Welch, 2 Dana, 330; Saco *v.* Gurney, 34 Maine, 14; Broughton *v.* Branch Bank, 17 Ala. 828; Eugle *v.* Shurts, 1 Mich. 150; Thompson *v.* Basset, 5 Ind. 535; Welch *v.* Wadsworth, 30 Conn. 149; Williams *v.* Middlesex, 4 Met. 76; Uwchlan Township Road, 6 Casey, Pa. 156; Gaul *v.* Brown, 53 Maine, 496.

[6] Grinad *v.* The State, 34 Ga. 270; ante, § 31.

[7] As to what are vested rights, see 1 Bishop Mar. & Div. § 667, 672-676, 678. Rights of property depend on the statutes as existing at the time they vest. Hunt *v.* Hunt, 37 Maine,

under a statute in form penal,[1] if a legislative act attempts to divest them, it is unconstitutional and void;[2] and so is one not merely modifying the remedy, but taking all remedy away,[3] or providing a remedy so difficult to be enforced as to render it practically of no avail.[4] There is some nice law as to what act will vest, in the person performing it, the right to a penalty incurred by another, so as to prevent the repeal of the statute from cutting off prosecution for the penalty. Under the head of pardon, this point is discussed in the author's work on the Criminal Law.[5] But the proposition probably is, that, when the suit is in the name of the government, the right does not vest until final judgment;[6] on the other hand, when the private individual prosecutes as plaintiff, in his own name, the commencement of the suit vests the right.[7] There is no such thing as a vested right in any particular remedy.[8]

§ 179. **Statute limiting Effect of Repeal.** — The consequences of a repeal, where a right to prosecute for an offence has accrued to the State, being usually such as to defeat the ends of justice, the new statute often provides that it shall not operate to destroy rights of prosecution for crimes already committed. And the same thing may be done by a general provision. Thus, in Missouri, "no offence committed, and no fine, penalty, or forfeiture incurred, previous to the time when any statutory provision shall be repealed, shall be affected by such repeal; but the trial and punishment of all offences, and the recovery of such fines, penalties, and forfeitures, shall be had

333; Mays *v.* Williams, 27 Ala. 267; Yarmouth *v.* North Yarmouth, 34 Maine, 411.

[1] Taylor *v.* Rushing, 2 Stew. 160; Dow *v.* Norris, 4 N. H. 16; Palmer *v.* Conly, 4 Denio, 374, 2 Const. 182. And see McGowen *v.* Deyo, 8 Barb. 340.

[2] See, also, Rice *v.* Railroad, 1 Black, 358; Ex parte Graham, 13 Rich. 277; Sinking Fund Commissioners *v.* Northern Bank, 1 Met. Ky. 174; Davis *v.* Miner, 1 How. Missis. 183; James *v.* Dubois, 1 Harrison, 285; Grace *v.* Donovan, 12 Minn. 580.

[3] Story Const. § 1385, 1391; Butler *v.* Palmer, 1 Hill, N. Y. 324, 328; De Cordova *v.* Galveston, 4 Texas, 470.

[4] Riggs *v.* Martin, 5 Pike, 506. See Newkirk *v.* Chapron, 17 Ill. 344.

[5] Crim. Law, 4th ed. I. § 757, 758.

[6] The State *v.* Youmans, 5 Ind. 280; Bank of St. Mary's *v.* The State, 12 Ga. 475.

[7] Costs are not governed by the statutes in force when the suit is commenced, but by those in force at the time of judgment rendered. Ellis *v.* Whittier, 37 Maine, 548; Onondaga *v.* Briggs, 3 Denio, 173. And see Commonwealth *v.* McKenney, 14 Gray, 1.

[8] Commonwealth *v.* Commissioners, 6 Pick. 501.

in all respects as if the provision had remained in full force."[1] And similar provisions prevail in some of the other States.[2]

§ 180. **Saving Clause in Repealing Statute — Lapsed Right to prosecute revived — New Jurisdiction — Transfer of Causes.** — When, therefore, the repealing statute contains a saving clause, authorizing a prosecution under the old law for offences already committed;[3] or when, the old law having been repealed, the legislature by subsequent act authorizes the proceedings, as by repealing the repealing statute;[4] in every such case, though the right to prosecute should have once lapsed, a conviction may be had. The repealing statute "operates," in the language of Wilde, J., "only as a suspension of his liability, and not in the nature of a pardon."[5] And, upon a like principle, if there are civil causes depending in a court which is abolished by law, and, owing to some defect in the law, these causes are not transferred to any court, the legislature at a subsequent period may provide for their transfer.[6] A statute creating a new court, or giving jurisdiction to an existing one, to try offences previously committed, is not *ex post facto*.[7]

§ 181. **Simultaneous Re-enactment of Repealed Statute — Degrees in Manslaughter.** — If a statute, repealing a former one,

[1] The State *v.* Matthews, 14 Misso. 133.

[2] See McCuen *v.* The State, 19 Ark. 634; Reynolds *v.* The State, 3 Kelly, 53; Commonwealth *v.* Adcock, 8 Grat. 661; The State *v.* Shaffer, 21 Iowa, 486; People *v.* Quinn, 18 Cal. 122; Jordan *v.* The State, 38 Ga. 585; Richardson *v.* The State, 3 Cold. 122.

[3] Taylor *v.* The State, 7 Blackf. 93; Commonwealth *v.* Marshall, 11 Pick. 350; Commonwealth *v.* Kimball, 21 Pick. 373; United States *v.* Ship Helen, 6 Cranch, 203; The Irresistible, 7 Wheat. 551.

[4] Commonwealth *v.* Mott, 21 Pick. 492; Commonwealth *v.* Getchell, 16 Pick. 452. See Van Valkenburgh *v.* Torrey, 7 Cow. 252, 255; The State *v.* Dunkley, 3 Ire. 116; Dawson *v.* The State, 6 Texas, 347; McMullen *v.* Guest, 6 Texas, 275; Commonwealth *v.* Leech, 12 Harris, Pa. 55.

[5] Commonwealth *v.* Getchell, 16 Pick. 452; and see Roby *v.* West, 4 N. H. 285; Matter of Pennsylvania Hall, 5 Barr, 204. Contra, Roberts *v.* The State, 2 Tenn. 423. There seems nevertheless to be both reason and authority for the proposition, that, if process has been actually abated by the repeal of a statute, the revival of this statute or the enactment of a new one, cannot operate to reinstate the particular abated process. Commonwealth *v.* Leech, 12 Harris, Pa. 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.

[6] Scott *v.* Smart, 1 Mich. 295. And see Freeborn *v.* Smith, 2 Wal. 160.

[7] Commonwealth *v.* Phillips, 11 Pick. 28; Perry *v.* Commonwealth, 3 Grat. 632. And see Baugher *v.* Nelson, 9 Gill, 299; The State *v.* Howard, 15 Rich. 274.

contains a substantial re-enactment of its provisions, a suit brought under the old may be finished under the new.[1] The re-enactment of an existing law is not necessarily a repeal of it;[2] and, if the legislature enacts a law in the terms of a former one, and at the same time repeals the former, this amounts to a mere affirmance of the former law, which it does not in legal contemplation repeal. The provision is continued without any intermission.[3] 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.[4] In Wisconsin, the facts of a case were, that, at the time of the finding of an indictment for manslaughter, there were no degrees of this offence; but, before the trial took place, the legislature divided manslaughter into four degrees; and the court held the judgment to be properly rendered under the new provision.[5]

§ 182. **Statute expiring by its own Limitation.** — If the period to which a penal law is made by its terms applicable simply elapses, the prosecution for an offence already committed under it may go on.[6] This last proposition seems to be in conflict with a proposition in an earlier section.[7] But 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 the statute, and the statute has run its time, then, of course, since there can be no proceeding, there can be no punishment following.

§ 183. **Different Punishments for Acts done at Different Times — "Hereafter" — Saving Clauses, continued — Bankruptcy.** — From the foregoing views we learn, that an offence may be subjected to a particular punishment when committed before the repeal of a legal provision, and to a different one when committed

[1] McMullen *v.* Guest, 6 Texas, 275. And see People *v.* Livingston, 6 Wend. 526.

[2] Martindale *v.* Martindale, 10 Ind. 566; Cordell *v.* The State, 22 Ind. 1; Alexander *v.* The State, 9 Ind. 337.

[3] Fullerton *v.* Spring, 3 Wis. 667.

[4] 1 Bishop Mar. Women, § 325, 326.

[5] Keene *v.* The State, 3 Chand. 109. And see Commonwealth *v.* Gardner, 11 Gray, 438.

[6] Stevens *v.* Dimond, 6 N. H. 330.

[7] Ante, § 177.

after, if the statutes so direct. And where the provision was, that persons "*hereafter*" doing a thing before penal should receive a particular punishment differing from the old one, it was held, that sentences for former offences should be under the old law.[1] Still the legislative intent must, in some way, appear affirmatively on the face of the new statute, which is to be strictly construed, that former offences be prosecuted or punished under the former provision, or it will not so operate. The act, therefore, repealing the United States bankrupt law, having declared that "the repeal shall in no wise affect the execution of any commission of bankruptcy, which may have issued prior to the passage of this act, but every such commission shall be proceeded in and fully executed as if this act had not been passed," — it was held, that no prosecution could be had for perjury previously committed under the repealed statute.[2]

§ 184. **Repeal of Punishment, New Statutes, &c., in Special Circumstances.** — There seems to be a doctrine resting on one case, that, if a statute establishes a new punishment for a common-law offence; and, during the continuance of this statute, a criminal act is committed; and then the statute is repealed, and a new punishment ordained for the *future;* the criminal act may be subjected to the common-law punishment.[3] We cannot easily see how this is, unless we suppose, that, contrary to the doctrine laid down a few sections back,[4] the first statute was cumulative, leaving the common-law punishment as well as offence to remain; for how can the courts pronounce a sentence known to the law neither at the time the criminal thing was done nor afterward? Possibly, however, the judges considered the second of the two statutes equivalent to an enactment that previous offences be punished by the common law; deciding, therefore, the case on the just principle, that the punishment is to be regulated by the law existing at the time

[1] Commonwealth *v.* Pegram, 1 Leigh, 569; Allen *v.* Commonwealth, 2 Leigh, 727. And see Rex *v.* McKenzie, Russ. & Ry. 429; Pitman *v.* Commonwealth, 2 Rob. Va. 800; The State *v.* Daley, 29 Conn. 272.

[2] Anonymous, 1 Wash. C. C. 84, 89.

[3] Rex *v.* McKenzie, Russ. & Ry. 429. See People *v.* Townsey, 5 Denio, 70; Roberts *v.* The State, 2 Tenn. 423; The State *v.* Daley, 29 Conn. 272.

[4] Ante, § 168.

of sentence pronounced.[1] Where a statute operated as a repeal of the common law itself, not merely of the punishment,[2] the court held, that a revival of the common law, by a repeal of this statute, could not subject one to the old law, which was not in force when he did the act.[3]

§ 185. **Increasing Punishment for Old Offence — Ex Post Facto Laws — What is in Mitigation — (Points, in the Note).** — The general doctrine, that the punishment of offences must follow the law existing at the time of judgment rendered, though a punishment differing from this prevailed in the law when they were committed, is limited, moreover, in this country, by the constitutional inhibition against *ex post facto* laws, binding in its terms both the Federal and State legislatures.[4] A statute, to be obnoxious to this constitutional inhibition, need not require that acts innocent when done be punished; it is equally so if it imposes a heavier penalty than was then provided in the law. If, however, the statute is in mitigation of punishment, it is not liable to this objection.[5] And 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.[6] So, by a statute of Indiana, the punishment being changed from whipping not exceeding one hundred stripes, to imprisonment not exceeding seven years, the court held, that this was in mitigation, and therefore constitutional.[7] But certainly the court went far in this last case. Where the nature of the punishment is entirely changed, there is difficulty in

[1] Ante, § 166, 167, 176, 180, 183; post, § 185.

[2] Ante, § 173.

[3] Commonwealth *v.* Marshall, 11 Pick. 350. And see The State *v.* Daley, 29 Conn. 272, stated in note to next section.

[4] 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. And see Hope *v.* Johnson, 2 Yerg. 123; ante, § 85.

[5] Story Const. § 1345; Commonwealth *v.* Mott, 21 Pick. 492, 500, 501; Flaherty *v.* Thomas, 12 Allen, 428; Commonwealth *v.* McKenney, 14 Gray, 1; Strong *v.* The State, 1 Blackf. 193; Keene *v.* The State, 3 Chand. 109; Boston *v.* Cummins, 16 Ga. 102; The State *v.* Arlin, 39 N. H. 179. See Mullen *v.* People, 31 Ill. 444.

[6] The State *v.* Williams, 2 Rich. 418. And see Leighton *v.* Walker, 9 N. H. 59.

[7] Strong *v.* The State, 1 Blackf. 193. And see Clarke *v.* The State, 23 Missis. 261; Dawson *v.* The State, 6 Texas, 347; Holt *v.* The State, 2 Texas, 363; Herber *v.* The State, 7 Texas, 69; Martin *v.* The State, 24 Texas, 61.

saying that the one penalty is less than the other; though any thing not extending to the life is clearly milder than death.[1]

§ 186. **Repeal of Repealing Statute.** — When a repealing statute is itself repealed, the old law, statutory or common, is thereby revived.[2] This is so even where the statute thus re-

[1] However, in Herber *v.* The State, 7 Texas, 69, 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." Still a punishment is not to be estimated, as to its weight or severity, exclusively by its degrading nature. The matter of this section has been considerably discussed of late in New York. There, in 1860, the statute providing the punishment for certain kinds of homicide was repealed, and by the repealing act what was subject to death before was made subject to imprisonment for life; and it was declared, that offences already committed should be punished under the new law. And the court held, that, the old law being unqualifiedly repealed, there could be no punishment under it; neither, on the other hand, could the new punishment be inflicted, because, it was considered, this would be a punishment *ex post facto*. Hartung *v.* People, 22 N. Y. 95; Shepherd *v.* People, 25 N. Y. 406. These two decisions show a variety of points to have been presented, and they are worthy of examination; but, as seems often to happen in New York, the judges did not much enlighten their understandings, before deciding the cases, by looking into what had theretofore proceeded, on the same subject, from our other American tribunals. See, further, as to the New York law, Hartung *v.* People, 26 N. Y. 167, 28 N. Y. 400; Ratzky *v.* People, 29 N. Y. 124; McKee *v.* People, 32 N. Y. 239. In Connecticut, a statute having provided that one who committed manslaughter should be punished in the State prison not less than two years nor more than ten, a man committed the offence, then a legislative act repealed this provision and directed that, when manslaughter should be *thereafter* committed, it should be punished by imprisonment in the State prison or county jail not less than ten years. The majority of the court held, that the offender could not be made to suffer the old punishment, because the statute was repealed, or the new punishment, because the new statute did not apply to past offences. The dissenting judge deemed that the offender could be subjected to the common-law punishment, the offence being at common law. The State *v.* Daley, 29 Conn. 272. Some Alabama cases hold, that, where a statute provides an increased punishment for an offence if afterward committed, and is silent concerning the offence 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," &c. Said Judge, J.: "The latter statute has operative effect only as to the offences therein named when committed subsequent to its passage." Miles *v.* The State, 40 Ala. 39, 42; Moore *v.* The State, 40 Ala. 49; Stephen *v.* The State, 40 Ala. 67; Wade *v.* The State, 40 Ala. 74.

[2] The State *v.* Rollins, 8 N. H. 550, 567; Commonwealth *v.* Churchill, 2 Met. 118; Commonwealth *v.* Mott, 21 Pick. 492; Directors of the Poor *v.* Railroad Company, 7 Watts & S. 236; James *v.* Dubois, 1 Harrison, 285; 1 Kent Com. 466; Doe *v.* Naylor, 2 Blackf. 32; Janes *v.* Buzzard, Hemp. 259; Harrison *v.* Walker, 1 Kelly, 32. And see Commonwealth *v.* Marshall, 11 Pick. 350, 351.

pealed had merely superseded the old law by its implied force;[1] or, where it had merely modified the old law, the implied modification ceases with the repeal of the statute.[2] "But," observes Dwarris,[3] "if a statute be repealed by several acts, a repeal of one act, or two, and not of all, does not revive the first statute.[4] If a repealing statute, and part of the original statute, be repealed by a subsequent act, the residue of the original statute is revived.[5] If an act of Parliament be revived, all acts explanatory of that so revived are revived also."[6] Such is the common-law doctrine; but often the repealing statute provides otherwise, and then the special provision stands in place of the common-law rule. And in some of the States a general statute provides a rule of its own. 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."[7] A like statute prevails in Louisiana.[8] In Ohio the words 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 provision 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.[9] A statute which refers to and adopts the provisions of another statute is not repealed by the subsequent repeal of the statute adopted.[10]

§ 187. **Repealing Statute expiring.— Temporary Statute, &c.** — But where the repealing act expires under its own limitation, a different rule prevails; the old law not reviving in this case.[11] If there is a temporary statute, subsequently continued, made perpetual, or revived by another, after its period has elapsed,

[1] Hastings *v.* Aiken, 1 Gray, 163.

[2] Glaholm *v.* Barker, Law Rep. 1 Ch. Ap. 223, 229.

[3] Dwar. Stat. 2d ed. 534.

[4] The Bishops' Case, 12 Co. 7; Tattle *v.* Grimwood, 3 Bing. 493, 496.

[5] 9 B. & C. 354.

[6] 2 Bur. 747.

[7] Sullivan *v.* People, 15 Ill. 233.

[8] Tallamon *v.* Cardenas, 14 La. An. 509; Witkouski *v.* Witkouski, 16 La. An. 232.

[9] 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. In England, Stat. 13 & 14 Vict. is to the like effect with those mentioned in the text. See Glaholm *v.* Barker, supra, at p. 229.

[10] Siker *v.* Chicago, &c. Railroad, 21 Wis. 370.

[11] United States *v.* Twenty-five Cases of Cloths, Crabbe, 356.

or, of course, before, all things done are to be considered as done under the first statute; though, if there is an intermediate time in which it had no force, such time, unless saved by a special provision, is lost.[1]

CHAPTER VIII.

HOW, IN THE ABSENCE OF REPEAL, CRIMINAL STATUTES EXPAND AND CONTRACT, BY FORCE OF PARTICULAR RULES AND CIRCUMSTANCES.

188. Introduction.
189–201. General Views of Expansion and Contraction of Statutes.
202–225. Rule of Strict Interpretation as against Defendants.
226–240. Rule of Liberal Interpretation in their Favor.

§ 188. **How the Chapter divided.** — The discussions of this chapter will be presented in the following order: I. General Views of the Expansion and Contraction of Statutes; II. The Rule of Strict Interpretation, which does not admit of Expansion, as against Defendants; III. The Rule of Liberal Interpretation, which admits of the Largest Expansion, in Favor of Defendants.

I. *General Views of the Expansion and Contraction of Statutes.*

§ 189. **Distinction between Meaning of Statute and its Effect in the Laws — Scope of the Present Chapter.** — In the chapter before the last, we took into view the operations of the different provisions of statutory and common law upon one another; the purpose being, not to aid the reader in determining the meaning of a statute, but to guide his investigations as to the effect of it, after its meaning is ascertained. This chapter has no relation to that. Its object is entirely different; being to illustrate the effect of different rules and circumstances upon the meaning of the statute itself. All

[1] 1 Kent Com. 466.

statutes, whether relating to the civil or criminal department of our law, are more or less elastic; that is, what otherwise would be their meaning will more or less give way before the pressure of particular rules provided by the law for their construction, and the special circumstances which attach themselves to the particular enactment.[1] Some statutes are more elastic than others, — the distinction depending upon the subject and upon various other things.

§ 190. **Letter — Mischief — How expand and contract.** — It has been said, in reference not particularly to criminal statutes, that cases out of the letter of an act, yet within the mischief or cause of making it, should be brought within the remedy by construction; for the reason that the law-makers could not set down all cases in express terms.[2] But evidently if this doctrine were freely acted upon, even in the construction of statutes relating to the civil department of our law, it would prove dangerous, as substituting the will of a judge for that of the legislature; therefore it is greatly limited,[3] and subjected to so many exceptions as to be, perhaps, itself the exception rather than the rule. What its limits are, we shall not have occasion in these chapters fully to consider. Courts are less ready to extend statutes to include cases within the mischief, but not the words, than to restrain them so as to exclude cases within the words, but not the mischief.[4] Whatever may be the force of the doctrine which allows the expansion of a statute beyond its words, it is not permitted to operate in a criminal statute against defendants; but in favor of them it has a force, as we shall see further on,[5] probably greater than anywhere else in the law. On the other hand, the doctrine is of very extensive applicability in the construction of statutes of every kind, that

[1] See ante, § 70, 78–82, 87, 93.

[2] Broom Leg. Max. 2d ed. 59; Co. Lit. 24 *b*; 3 Bl. Com. 430, 431; Jenk. Cent. 58, 60, 226; Bac. Ab. Statute, I. 5, 6; Holbrook *v.* Holbrook, 1 Pick. 248, 254; Brown *v.* Thorndike, 15 Pick. 388, 402; The State *v.* Stephenson, 2 Bailey, 334; Brinker *v.* Brinker, 7 Barr, 53, 55; Van Valkenburgh *v.* Torrey, 7 Cow. 252.

[3] Smith Stat. & Const. Law, p. 831. Lord Kenyon seems to have had the same doctrine in his mind when he said: "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. Ab. Statute, I. 6; Broom Leg. Max. 2d ed. 60; Dwar. Stat. 2d ed. 622 et seq.; ante, § 145, 146.

[4] Rex *v.* Parker, 2 East P. C. 592.

[5] Post, § 196.

cases are to be excepted out of their operation, if clearly not within the mischief intended to be remedied.[1]

§ 191. **Liberal Interpretation — Strict — What — How operate together.** — In applying the various specific rules of statutory interpretation to cases actually arising, we recognize two dissimilar kinds of interpretation; namely, liberal, or open; and strict, or close. In the liberal interpretation, the sense is expanded to cover a larger space than the words import; in the strict, it is kept within the words, or even contracted to a less space.[2] But both of these interpretations are variously modified, according to the requirements of particular cases. For example, the rule that each specific clause be made to harmonize, if possible, with the general purpose of the entire act,[3] may compel us to apply to all the clauses either a close or an open interpretation; or one of these to one clause, and the other to another clause; or to resort to a middle course, or blending of the two, as will best accomplish the object. Then, to enlarge the idea, since, when we construe a particular statute, we look, not at it alone, but at the entire body and spirit of the law, statutory and common,[4] — it results, that, in the particular case, we may find the general spirit urging to a different interpretation from what is indicated by the one statute viewed alone; or we may find all the considerations acting together, either to expand the law or to contract it. In the last-mentioned instance, the interpretation will be either most strict or most liberal.[5]

§ 192. **Continued — Things Odious — Favored — When Liberal and when Strict — Remedial — Beneficial — Forfeitures — Hardships.** — There are things which the law esteems odious; not indeed as being unnecessary, but odious 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. In respect to things odious, we are to employ a strict interpretation; and, in respect to things favored, a

[1] Bac. Ab. Statute, I. 5, 6; Williams *v.* Prichard, 4 T. R. 2, 3; Canal Company *v.* Railroad Company, 4 Gill & J. 1; Holbrook *v.* Holbrook, 1 Pick. 248, 254; Brown *v.* Thorndike, 15 Pick. 388, 402.

[2] See ante, § 119, 120.

[3] Ante, § 82.

[4] Ante, § 86-91, 123.

[5] See also post, § 199.

liberal one: as a father, in chastising his child, would keep within the necessity of the case to the letter; while, in bestowing a merited reward, he would cast in something also from affection. The law, for example, loves harmony and right; therefore it construes remedial statutes, made to amend some defects in the common law, liberally:[1] it loves honesty and fair-dealing, and so construes liberally statutes made to suppress frauds between individuals;[2] and, generally, it employs a liberal interpretation for statutes which operate beneficially upon those whom they immediately concern.[3] But enactments of the opposite character, taking away rights, or working forfeitures,[4] or creating hardships of any kind, it construes strictly.[5]

§ 193. **Continued — Penal — Forfeiture, continued — Summary Process — Liberty — Degree of Punishment — Derogation of Common Law — Party as Witness.** — The law delights in the life, liberty, and happiness of the subject; and deems statutes which deprive him of these, or of his property, however necessary they may be, in a sense odious. Therefore, and for kindred reasons,[6] as well as for the reason that every man should

[1] 1 Bl. Com. 86, 87; Broom Leg. Max. 2d ed. 60; The State *v.* Stephenson, 2 Bailey, 334; Neal *v.* Moultrie, 12 Ga. 104; ante, § 120.

[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 where the statute acts upon the offence, 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 Misso. 781.

[3] Bac. Ab. Statutes, I. 7, 9.

[4] Bac. Ab. 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 Maine, 438; post, § 193.

[5] See further, as to these distinctions, Jortin *v.* Southeastern Railway, 3 Eq. Rep. 281, 24 Law J. N. S. 343, 1 Jur. N. S. 433, 31 Eng. L. & Eq. 320.

[6] "The rule that penal laws are to be construed strictly is perhaps not 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 lawmaker 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

be able to know certainly when he is guilty of a crime,[1] statutes which subject one to a punishment or penalty[2] or forfeiture,[3] or to a summary process[4] calculated to take away his opportunity of making a full defence, or in any way depriving him of his liberty,[5] are to be construed strictly. And the degree of strictness will depend somewhat on the severity of the punishment they inflict.[6] In like manner all statutes in dero-

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 United States *v.* Wiltberger, 5 Wheat. 76, 95, 96. "Where a law imposes a punishment which acts on 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 The State *v.* Stephenson, 2 Bailey, 334. And see Commonwealth *v.* Loring, 8 Pick. 370; United States *v.* Wigglesworth, 2 Story, 369.

[1] Beccaria on Crimes, c. 11; Livingston, J. in The Enterprise, 1 Paine, 32.

[2] Andrews *v.* United States, 2 Story, 202, 213; Commonwealth *v.* Martin, 17 Mass. 589; Commonwealth *v.* Keniston, 5 Pick. 420; Carpenter *v.* People, 8 Barb. 603, 605; The State *v.* Upchurch, 9 Ire. 454; Van Rensselaer *v.* The Sheriff, 1 Cow. 443; Seaving *v.* Brinkerhoff, 5 Johns. Ch. 329; Courteen's Case, Hob. 270; Searle *v.* Williams, Hob. 288; Hall *v.* The State, 20 Ohio, 7; Warner *v.* Commonwealth, 1 Barr, 154; The State *v.* Solomons, 3 Hill, S. C. 96; Bettis *v.* Taylor, 8 Port. 564; Van Valkenburgh *v.* Torrey, 7 Cow. 252; Hughes *v.* The State, 1 Eng. 131; Reed *v.* Davis, 8 Pick. 514, 517; United States *v.* Starr, Hemp. 469; United States *v.* Ramsay, Hemp. 481; United States *v.* Beaty, Hemp. 487; United States *v.* Ragsdale, Hemp. 497; Lair *v.* Killmer, 1 Dutcher, 522; Gunter *v.* Leckey, 30 Ala. 591; The State *v.* Whetstone, 13 La. An. 376. A statute giving a party double damages is to be construed strictly. Smith *v.* Causey, 22 Ala. 568.

[3] Ante, § 192; United States *v.* Eighty-four Boxes of Sugar, 7 Pet. 453; The State *v.* Dill, 2 Sneed, 414.

[4] Logwood *v.* Planters' and Merchants' Bank, Minor, 23; Childress *v.* McGehee, Minor, 131; Crawford *v.* The State, Minor, 143; Yancey *v.* Hankins, Minor, 171; Hale *v.* Burton, Dudley, Ga. 105.

[5] Pierce's Case, 16 Maine, 255.

[6] See Randolph *v.* The State, 9 Texas, 521; post, § 199.

gation of common-law rights are strictly construed.[1] Such, for instance, is a statute allowing a party to testify in his own cause for himself.[2]

§ 194. **Strict Interpretation Illustrated.** — Such statutes[3] are to reach no further in meaning than their words; no person is to be made subject to them by implication;[4] and all doubts concerning their interpretation are to preponderate in favor of the accused.[5]

§ 195. **Revenue Laws.** — Revenue laws, too, come within this rule of strict interpretation; for, though their primary object is, not the punishment of crimes, but the collection of duties,[6] yet, as they impose fines, work forfeitures, and deprive men of their property, they are within the same reason as other penal statutes.[7]

§ 196. **Criminal Statutes — Interpretation both Liberal and Strict — Exercise Trade.** — The doctrine of a strict interpretation extends only so far as it is supported by the reasons on which it is thus seen to rest; therefore those parts of a criminal statute which exempt from punishment are not to be strictly construed. Thus, Lord Mansfield, speaking of the old statutory English offence of exercising a trade — "set up,

[1] Sibley *v.* Smith, 2 Mich. 486; Sugar *v.* Sackett, 13 Ga. 462; Rathbun *v.* Acker, 18 Barb. 393; ante, § 155.

[2] Hotaling *v.* Cronise, 2 Cal. 60; Warner *v.* Fowler, 8 Md. 25. So of a statute granting a franchise, as a turnpike charter. The State *v.* Clarksville and R. Turnpike, 2 Sneed, 88. See also Academy of Fine Arts *v.* Philadelphia, 10 Harris, Pa. 496. So of one taking the land of individuals for the public use. Sharp *v.* Speir, 4 Hill, N. Y. 76; Sharp *v.* Johnson, 4 Hill, N. Y. 92. See also Rathbun *v.* Acker, 18 Barb. 393.

[3] See ante, § 119, 191.

[4] The State *v.* McOmber, 6 Vt. 215; Rex *v.* Mitchell, 2 East P. C. 936, 937; Rex *v.* Hammond, 2 East P. C. 1119, 1 Leach, 4th ed. 444; Leonard *v.* Bosworth, 4 Conn. 421; The State *v.* Sumner, 10 Vt. 587; The State *v.* Sanford, 1 Nott & McCord, 512, 515; Rex *v.* Parker, 2 East P. C. 592, 1 Leach, 4th ed. 320, note; Rex *v.* Hickman, 1 Leach, 4th ed. 318, 2 East P. C. 593; United States *v.* Wigglesworth, 2 Story, 369; Rawson *v.* The State, 19 Conn. 292; United States *v.* Wilson, Bald. 78, 102; Schooner Harriet, 1 Story, 251; Bell *v.* Dole, 11 Johns. 173; post, § 220.

[5] The Enterprise, 1 Paine, 32; United States *v.* Wigglesworth, 2 Story, 369; The People *v.* Howell, 4 Johns. 296; Commonwealth *v.* Macomber, 3 Mass. 254; Kent *v.* The State, 8 Blackf. 163; post, § 218.

[6] United States *v.* Twenty-eight Packages, Gilpin, 306, 326. And see Attorney-General *v.* Radloff, 10 Exch. 84, 26 Eng. L. & Eq. 413.

[7] United States *v.* Eighty-four Boxes of Sugar, 7 Pet. 453; United States *v.* Wigglesworth, 2 Story, 369; Dwar. Stat. 2d ed. 642; Rex *v.* Hymen, 7 T. R. 536; Walwin *v.* Smith, 1 Salk. 177. And see The Mayor *v.* Davis, 6 Watts & S. 269; Taylor *v.* United States, 3 How. U. S. 197.

occupy, use, or exercise" — without having certain qualifications required by the enactment, 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 within the equity of this doctrine, which extends a statute beyond its words in favor of a defendant, while holding it to its words as against him, the court decided, in the case in which these observations were made, that one not qualified to exercise a trade himself, by having served an apprenticeship, does not render himself liable to the penalties of the statute by entering into a partnership with a qualified person, and sharing the profits and losses of the partnership, where he does not exercise the trade personally.[1] Indeed the same principles which require a statute to receive a close interpretation as against defendants, demand that it be construed openly and liberally in their favor.[2] And as these principles sometimes unite with others calling also for a liberal interpretation, it may happen that a criminal statute is thus expanded further beyond its words than any other.[3]

§ 197. **Continued — Strict and Liberal to a Single Provision — Jurisdiction.** — Thus we see that the rule which is commonly

[1] Raynard *v.* Chase, 1 Bur. 2, 6. The statute on which this question arose is 5 Eliz. c. 4, § 31, the material words of which are: "It shall not be lawful for any person, &c., to set up, occupy, use, or exercise any craft, mystery, or occupation now used or occupied within the realm, &c., except he shall have been brought up thereto seven years at the least as an apprentice in manner and form, &c.; nor to set any person on work in such mystery, art, or occupation, &c., 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." The little inaccuracy of expression, in this transcript, accords with the standard text.

[2] "In expounding penal statutes, it is an established rule, that the construction must be strict as *against* the defendant, but liberal in his *favor*." Gould, J. in Myers *v.* The State, 1 Conn. 502. "Penal statutes are construed strictly against the subject, and favorably and equitably for him." 1 Hawk. P. C., Curw. ed., p. 90, § 8. And see The State *v.* Upchurch, 9 Ire. 454, and the observations of Lord Mansfield in Rex *v.* Parker, 2 East P. C. 592. See also United States *v.* New Bedford Bridge, 1 Woodb. & M. 401.

[3] Ante, § 191; post, § 199.

expressed as demanding a strict construction for criminal statutes is really better stated in a different form of words. It is, that the construction should be strict against defendants, and liberal in their favor. Indeed, many statutes are to be construed by this blending of the strict and liberal in the interpretation. For example, if a limited jurisdiction is created by a statute, the enactment should be construed strictly as to the extent of the jurisdiction,[1] and liberally as to the mode of proceeding.[2]

§ 198. **Exception — When Criminal Statutes liberally construed — Venue — Arrest.** —Nor does the rule of strict construction apply to all criminal statutes, even as against defendants. Thus 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 to be construed strictly.[3] It seems, also, that a similar view has been taken of statutes defining the rights of officers to make arrests in criminal cases; for the English statute of 29 Car. 2, c. 7, § 6, having forbidden and made penal arrests on the Lord's day, "except in cases of treason, felony, or breach of the peace," these words were extended by judicial interpretation to include all indictable offences.[4] Yet the court refused, in another particular, to extend by judicial exposition another and somewhat similar statute; 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."[5]

§ 199. **Differing Degrees of Strictness — Weight of Punishment — Frauds, &c.** — Moreover, the construction of different criminal statutes will, as already intimated,[6] be more or less strict according to the different pressures of the principles controlling them. For we should remember that the interpretation of no law, written or unwritten, is the result of any one rule alone, but of all the legal reasons applicable to the case com-

[1] The State *v.* Anderson, 2 Tenn. 6; Shawnee *v.* Carter, 2 Kansas, 115.

[2] Russell *v.* Wheeler, Hemp. 3.

[3] People *v.* Hulse, 3 Hill, N. Y. 309, 319; Nash *v.* The State, 2 Greene, Iowa, 286; 2 Hawk. P. C., Curw. ed., p. 456, § 52.

[4] Rawlins *v.* Ellis, 10 Jur. 1039.

[5] Bowditch *v.* Balchin, 5 Exch. 378.

[6] Ante, § 191, 193, 196.

bined. Now, we may have one principle bearing more or less strongly in a particular direction; as, 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; and the combined result may be a trembling of the balance, or the one scale or the other may simply preponderate, according to the peculiar circumstances of the case, or the views of the particular judge.[2] But the circumstances will be rare in which any court will so extend an enactment by construction as to involve penal consequences not within the express words.

§ 200. **Strict Interpretation further illustrated — Legislative Intent — Other Rules — Absurd — Eluded — Title — Preamble.** — From these views it follows, that the rule of strict interpretation for criminal statutes does not prevent the courts from feeling after the legislative will, — to ascertain which will is the great end of all interpretation.[3] Neither does this rule prevent our calling in the aid of other rules, and giving each its appropriate scope, yet not so as to overturn this one.[4] For example, penal statutes, like all others, are to be so construed as not to work an absurdity,[5] or defeat their own purpose, or

[1] The State *v.* Wilcox, 3 Yerg. 278; Rex *v.* Mitchell, 2 East P. C. 936, 937; Commonwealth *v.* Snelling, 4 Binn. 379; The State *v.* Upchurch, 9 Ire. 454; Reg. *v.* McNeill, 1 Crawf. & Dix C. C. 80; Commonwealth *v.* Fisher, 17 Mass. 46, 49; United States *v.* Moulton, 5 Mason, 537; ante, § 193.

[2] See and compare Taylor *v.* United States, 3 How. U. S. 197; Fairbanks *v.* Antrim, 2 N. H. 105; Abbott *v.* Wood, 22 Maine, 541; Sickles *v.* Sharp, 13 Johns. 497; Van Valkenburgh *v.* Torrey, 7 Cow. 252.

[3] Ante, § 70, 75, 82; The State *v.* Brooks, 4 Conn. 446; Rawson *v.* The State, 19 Conn. 292; Commonwealth *v.* Loring, 8 Pick. 370; The Enterprise, 1 Paine, 32; United States *v.* Wilson, Bald. 78; Pike *v.* Jenkins, 12 N. H. 255.

[4] Schooner Harriet, 1 Story, 251; Pike *v.* Jenkins, 12 N. H. 255.

[5] Rawson *v.* The State, 19 Conn. 292;

the process of the court instituted for their enforcement,[1] or be eluded ; [2] and we may gather light concerning their meaning from the title and preamble.[3]

§ 201. **Continued — Intent Clear.** — The object of interpretation being to ascertain the legislative intent, the doctrine follows as a necessary consequence, that, whenever this intent is clear on the face of an enactment, no room is left for the application of any particular rules. Therefore we should bear it on our minds throughout this whole discussion, that our several propositions apply only in cases where, without them, doubts concerning the meaning might arise. Yet, again, in considering whether a doubt might be, we must remember that the question is not concerning a doubt in the mind of an uninformed person, but in the legal mind.

II. *The Rule of Strict Interpretation, not admitting of Expansion, as against Defendants.*

§ 202. **Introduction.** — We are to inquire, under the present sub-title, what are the boundaries of the rule that criminal statutes must be construed strictly as against defendants. That we may see somewhat where these boundaries lie, let us look for some things which have been found, in the actual administration of the law, to be connected with the rule. Therefore, in considering how far, consistently with this rule of strict interpretation, statutes may be enlarged as against defendants, when the reason of the law and the evident intent of the legislature require it, we observe, —

§ 203. First. *They may be extended by other provisions of statutory law, and by the common law, combining with them :* —

How this regarded. — This doctrine was explained in our chapter before the last. But, as we have seen,[4] the doctrines under that head concern, not properly the meaning of statutes, but their effect, where the meaning is ascertained.

Commonwealth *v.* Loring, 8 Pick. 370 ; Schooner Harriet, 1 Story, 251.

[1] Bartolett *v.* Achey, 2 Wright, Pa. 273.

[2] The Emily and The Caroline, 9 Wheat. 381, 388 ; Commonwealth *v.* McGeorge, 9 B. Monr. 3.

[3] The State *v.* Stephenson, 2 Bailey, 334 ; The State *v.* Fields, 2 Bailey, 554 ; The State *v.* Smith, Cheves, 157.

[4] Ante, § 189.

§ 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: —*

The Rule, what — Popular Sense — Legislative Intent. — For example, the words in a criminal statute, the same as in any other, may, in a particular instance, contrary to the general rule,[1] have their wider popular meaning instead of their narrower technical one. The doctrine under this head is, that the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.[2]

[1] Ante, § 96.

[2] Pike *v.* Jenkins, 12 N. H. 255; The People *v.* Howell, 4 Johns. 296; The Mayor *v.* Davis, 6 Watts & S. 269. For illustrations of this principle, see the remaining cases cited to this section and the six sections next following; also, Rex *v.* Glover, 2 Russ. Crimes, Grea. ed. 146; Reg. *v.* Hale, 2 Car. & K. 326; Rex *v.* Taylor, Russ. & Ry. 373; Stone *v.* The State, Spencer, 401; Hodgman *v.* People, 4 Denio, 235; Rex *v.* Hickman, 1 Leach, 4th ed. 318, 2 East P. C. 593; Rex *v.* Parker, 2 East P. C. 592, 1 Leach, 4th ed. 320, note; The State *v.* Anone, 2 Nott & McCord, 27; Reg. *v.* Bowden, 2 Moody, 285; 1 Car. & K. 147; Reg. *v.* Charretie, 13 Q. B. 447; Reg. *v.* Wallace, 2 Moody, 200; Commonwealth *v.* Stearns, 2 Met. 343; Smith *v.* Commonwealth, 4 Grat. 532; Commonwealth *v.* Phillips, 11 Pick. 28; Commonwealth *v.* Smith, 14 Mass. 374; Rex *v.* Willoughby, 2 East P. C. 944; Rex *v.* Shepherd, 2 East P. C. 944; 1 Leach, 4th ed. 226; Hopkins *v.* Commonwealth, 3 Met. 460; Commonwealth *v.* Briggs, 5 Met. 559; Commonwealth *v.* Homer, 5 Met. 555; Rex *v.* Foster, 7 Car. & P. 495; Rice *v.* Commonwealth, 12 Met. 246; The State *v.* Cullum, 2 Speers, 581; People *v.* Mather, 4 Wend. 229, 255; The State *v.* Taylor, 2 McCord, 483; The State *v.* Bell, 3 Ire. 506; Linney *v.* The State, 6 Texas, 1; Hudgins *v.* The State, 2 Kelly, 173; Downman *v.* The State, 14 Ala. 242; Commonwealth *v.* Pash, 9 Dana, 31; Cole *v.* Commonwealth, 8 Dana, 31; The State *v.* Gurney, 33 Maine, 527; The State *v.* Robinson, 33 Maine, 564; Rex *v.* Moore, 2 Car. & P. 235, 1 Moody, 122; Commonwealth *v.* Smith, 7 Pick. 137; Commonwealth *v.* Kneeland, 20 Pick. 206; Ream *v.* Commonwealth, 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.* The State, 14 Ala. 608; The State *v.* Fearson, 2 Md. 310; The State *v.* Girkin, 1 Ire. 121; The State *v.* Crawford, 2 Dev. 425; Bell's Case, Foster, 430; Reg. *v.* Yorkshire Justices, 2 Eng. L. & Eq. 296; Rex *v.* Ridgaly, 1 East P. C. 171, 1 Leach, 4th ed. 189; Angel *v.* Commonwealth, 2 Va. Cas. 228; United States *v.* Brewster, 7 Pet. 164; United States *v.* Staats, 8 How. U. S. 41; United States *v.* Bailey, 9 Pet. 238; People *v.* Hennessey, 15 Wend. 147; The State *v.* Stutson, Kirby, 52; White *v.* Commonwealth, 4 Binn. 418; The State *v.* Carr, 5 N. H. 367; Bagley *v.* The State, 1 Hump. 486; Reg. *v.* Evans, Car. & M. 298; The State *v.* Britt, 3 Dev. 122; Rex *v.* Cornwall, Russ. & Ry. 336; The State *v.* Findlay, 2 Bay, 418; Rex *v.* Beacall, 1 Car. & P. 310, 454; Thomas *v.* Commonwealth, 2 Leigh, 741; Nancy *v.* The State, 6 Ala. 483; Rex *v.* Wyer, 1 Leach, 4th ed. 480; Rex *v.* Reekspear, 1 Moody, 342; Rex *v.* Cox, 1 Moody, 337, 5 Car. & P 297; James *v.* Elder, 23 Missis. 134; The State *v.* Glaze, 9 Ala. 283; Rex *v.* Robinson, 2 Stark. 485; Rex *v.* Thomas, 2 East P. C. 605, 2

§ 205. **Illustrations — "Subject" — Foreign Lotteries — Foreign Authority — Kidnapping — Foreign Bank Notes — Betting on Elections — "Exportation."** — Thus, a foreigner living in England under the protection of the king is an English *subject*, within an act of Parliament, defining crimes; "but it was admitted, that, if the statute had said *natural-born subject*, it would not have extended to him."[1] 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 of the Federal or State government, having force in the particular locality.[2] And a provision for the punishment of 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 of another State coming, by order of the military powers of their own State, under martial law in a time of civil insurrection, to seize and carry back their insurgent citizens found here.[3] 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 *exportation*," in the inspection laws of a State, refer to exportation to another of the United States, as well as to a foreign country.[6]

§ 206. **Illustrations, continued — Forgery — Smoking in Streets — "Way."** — The English statute, 7 Geo. 2, c. 22, against the

Leach, 4th ed. 877; Rex *v.* Rowley, Russ. & Ry. 110; Reg. *v.* Mence, Car. & M. 234; The State *v.* Brown, 4 Port. 410; Redman *v.* Sanders, 2 Dana, 68; United States *v.* Jones, 3 Wash. C. C. 209; The State *v.* Smith, 32 Maine, 369; Commonwealth *v.* Houghton, 8 Mass. 107; Brown *v.* Commonwealth, 8 Mass. 59; Commonwealth *v.* Whitmarsh, 4 Pick. 233; The State *v.* Blythe, 3 McCord, 363; The State *v.* Clarksville and R. Turnpike, 2 Sneed, 88.

[1] 1 East P. C. 53, 54.

[2] Commonwealth *v.* Dana, 2 Met. 329. And see People *v.* Warner, 4 Barb. 314; Commonwealth *v.* Cone, 2 Mass. 132.

[3] Commonwealth *v.* Blodgett, 12 Met. 56.

[4] Cummings *v.* Commonwealth, 2 Va. Cas. 128. The same principle has been held to apply to the forging, in this State, of a deed of lands lying in another State. People *v.* Flanders, 18 Johns. 164. And see Rex *v.* McKeay, 1 Moody, 130; Rex *v.* McKay, Russ. & Ry. 71.

[5] Quarles *v.* The State, 5 Humph. 561; Givens *v.* Rogers, 11 Ala. 543.

[6] Commonwealth *v.* King, 1 Whart. 448.

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.[1] So 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.[2]

§ 207. **"Dwelling-house" — "Jail" — "Advertisement" — Lotteries.** — It is held that a jail is an "inhabited dwelling-house," within the statutes against arson.[3] 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.[4]

§ 208. **Continued — "Erect and build" — "Wooden Buildings," &c.** — To elevate and enlarge a wooden building, so as materially to alter its character, is to "erect and build" it, within statutes and ordinances designed to prevent the spread of fires in populous places;[5] but to suffer one already erected to remain does not come within these provisions of law:[6] neither

[1] Rex *v.* Graham, 2 East P. C. 945.

[2] Commonwealth *v.* Thompson, 12 Met. 231.

[3] People *v.* Cotteral, 18 Johns. 115; Commonwealth *v.* Posey, 4 Call. 109. So it is a "house." Rex *v.* Donnavan, 1 Leach, 4th ed. 69, 2 East P. C. 1020; Stevens *v.* Commonwealth, 4 Leigh, 683.

[4] Commonwealth *v.* Hooper, 5 Pick. 42.

[5] Douglass *v.* Commonwealth, 2 Rawle, 262. And see Tuttle *v.* The State, 4 Conn. 68. The enlarging and fitting up, as a livery stable, in Boston, within one hundred and seventy feet of a church, of a dwelling-house which was built before the passing of the Massachusetts Stat. of 1810, c. 124, is an "erecting" of a livery stable within the meaning of that statute, and, while the building is used and improved as a livery stable, renders the owner or keeper thereof liable to the penalties imposed by that act. Hastings *v.* Aiken, 1 Gray, 163. The removal of a building from one part of a lot to another, and its permanent location in the place to which it is removed, do not constitute an erection of a building within the intent of the Connecticut statute which forbids the erection of wooden buildings in certain cases. Brown *v.* Hunn, 27 Conn. 332.

[6] The State *v.* Brown, 16 Conn. 54; Tuttle *v.* The State, 4 Conn. 68. Neither is keeping possession of a thing within a statute against "receiving" it. Attorney-General *v.* King, 5 Price, 195. Nor is the ordinance of a city, forbidding any person "to spread any awning," &c., violated when the person continues to keep spread an awning spread before. The State *v.* Cleaveland, 3 R. I. 117.

is it within them to make merely internal alterations in the building, and apply it to a new use; as, to convert a meeting-house or a joiner's shop into a dwelling-house.[1] Within these statutes, a building partly of wood and partly of brick, called brick-pane, has been held not to be a "wooden building"; though, had the act been a remedial one, instead of penal, the result would have been otherwise.[2]

§ 209. **Continued — "Crew" — Assault on Seamen — "Goods or Merchandise" — "Personal Goods" — "Materials for Lottery."** — So, where a statute made it an offence 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, and consequently a master was deemed liable for the imprisonment of his first mate.[3] The luggage of a steamboat passenger is "goods or merchandise," within a statute against larceny from any vessel in any navigable river;[4] but the words "personal goods," in another criminal statute, have been held not to include *choses in action*.[5] Books kept in relation to the proceedings of a lottery are "materials for a lottery."[6]

§ 210. **Continued — "Pedler," &c. — "Deal in Selling" — "Cause False Entry."** — One who carries about goods, offering them for sale, is held to "trade, deal, and traffic, as a pedler, hawker, or petty chapman," in the goods he so carries and offers.[7] And to sell spirituous liquors in a single instance is to "deal in the selling" of them.[8] In England, a woman went to a registrar of births, requesting him to register the birth of a child; she

[1] Booth *v.* The State, 4 Conn. 65.

[2] Stewart *v.* Commonwealth, 10 Watts, 306, decided on a city ordinance.

[3] United States *v.* Winn, 3 Sumner, 209. As to the meaning of the word "mariner," see Brush *v.* Bogardus, 8 Johns. 157.

[4] Stat. 7 & 8 Geo. 4, c. 29, § 17; Rex *v.* Wright, 7 Car. & P. 159.

[5] United States *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, &c.; 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."

[6] Commonwealth *v.* Dana, 2 Met. 329.

[7] Merriam *v.* Langdon, 10 Conn. 460. See, however, Page *v.* The State, 6 Misso. 205.

[8] The State *v.* Paddock, 24 Vt. 312. And see The State *v.* Von Glon, 1 McMullan, 187.

stated the necessary particulars, every one of which was false; and, when he had made the entry, she signed it as the person giving the information; — and it was held, that this amounted to the felony of causing a false entry to be made, within Stat. 6 & 7 Will. 4, c. 86, § 43, the words of which are, "shall wilfully insert or cause to be inserted, &c., any false entry of any birth," &c.; and not merely to the misdemeanor of making a "false statement," under § 41 of that statute.[1]

§ 211. **Continued — "Progress of Manufacture" — Building, &c. — "Deliver Manifest" — Disturb Meeting — "Woman" — "Horse," &c. — Sale of Slave — Lottery Ticket — Mould or Die — Counterfeiting.** — Goods remain in "a stage, process, or progress of manufacture," after the texture is complete, until brought into a fit condition for sale.[2] 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.[3] The captain of a vessel does not comply with the law requiring him to deliver a manifest of his cargo, unless the manifest he delivers is a true one.[4] If a statute makes it penal to "disturb any congregation assembled in any church, meeting-house, or other place of religious worship," its protection extends to a congregation of Methodists holding a camp-meeting, on camp-ground, at times when religious services are not actually progressing.[5] 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.[6] The selling of a slave's services is a sale of the slave, within a former act prohibiting persons who introduce slaves into the State from selling them as slaves.[7] So a quarter-ticket in a lottery is a

[1] Reg. *v.* Dewitt, 2 Car. & K. 905. And see Reg. *v.* Brown, 2 Car. & K. 504; Smith *v.* The State, 5 Humph. 163; Rex *v.* Harley, 4 Car. & P. 369.

[2] Rex *v.* Woodhead, 1 Moody & R. 549.

[3] Rex *v.* Gregory, 2 Nev. & M. 478, 5 B. & Ad. 555.

[4] Phile *v.* Anna, 1 Dall. 197.

[5] Commonwealth *v.* Jennings, 3 Grat. 624.

[6] Commonwealth *v.* Watts, 4 Leigh, 672; Charles *v.* The State, 6 Eng. 389, 406, 410. But the word "woman" does not always, in statutes similar to the above, include a girl under twelve. See Commonwealth *v.* Bennet, 2 Va. Cas. 235.

[7] Link *v.* Beuner, 3 Caines, 325.

lottery ticket;[1] and a statute against being possessed of any mould, pattern, die, &c., adapted to coining, is violated by having one half, or any smaller part, of the apparatus necessary to effect this object;[2] or the apparatus to make one side only of a counterfeit coin.[3]

§ 212. Thirdly. *A strict construction is not violated by giving the words of a statute a reasonable meaning, according to the sense in which they were intended, and disregarding captious objections, and even the demands of an exact grammatical propriety:*[4] —

Illustrations — "Person" — Corporation — State — "His" — "Sheep" — "Cattle." — Thus the State[5] or a corporation[6] may be included in the word "person"; a woman may be meant by the masculine pronoun "his";[7] a ewe[8] or a lamb,[9] by the word "sheep"; a girl, as we have seen,[10] by the word "woman"; and horses,[11] geldings,[12] asses,[13] and pigs,[14] may come under the general term "cattle."

§ 213. **Continued — Singular — Plural — House — Dwelling-house, &c.** — The singular number, likewise, may be compre-

[1] Freleigh *v.* The State, 8 Misso. 606.

[2] The State *v.* Griffin, 18 Vt. 198. And see, under Stat. 14 Geo. 2, c. 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.

[3] Commonwealth *v.* Kent, 6 Met. 221.

[4] For illustrations of this doctrine, see the cases cited to this and the next four sections; also Commonwealth *v.* Martin, 17 Mass. 359; Commonwealth *v.* Keniston, 5 Pick. 420; The State *v.* Mairs, Coxe, 453; Rex *v.* Atkinson, Russ. & Ry. 104; Rex *v.* Harris, 7 Car. & P. 446; Rex *v.* Shadbolt, 5 Car. & P. 504; Commonwealth *v.* Loring, 8 Pick. 370.

[5] Stewart *v.* The State, 4 Blackf. 171; Martin *v.* The State, 24 Texas, 61.

[6] Germania *v.* The State, 7 Md. 1; Planters and Merchants' Bank *v.* Andrews, 8 Port. 404; People *v.* Utica Insurance Co., 15 Johns. 358, 381; Fisher *v.* Horicon Company, 10 Wis. 351. See The State *v.* Ohio and Mississippi Railroad, 23 Ind. 362. On this point some doubt seems formerly to have existed. See Rex *v.* Harrison, 1 Leach, 4th ed. 180, 2 East P. C. 926, 988; Rex *v.* Jones, 1 Leach, 4th ed. 366, 2 East P. C. 991. Unquestionably the particular phraseology of a statute, or its particular relation to other statutes, or to circumstances connected with it, may show that corporations are not intended to be embraced within the word "person."

[7] Rex *v.* Smith, Russ. & Ry. 267.

[8] Reg. *v.* Barran, Jebb, 245; Reg. *v.* Bannam, 1 Crawf. & Dix C. C. 147.

[9] Reg. *v.* Spicer, 1 Car. & K. 699; The State *v.* Tootle, 2 Harring. Del. 541.

[10] Ante, § 211.

[11] Rex *v.* Moyle, 2 East P. C. 1076.

[12] Rex *v.* Mott, 2 East P. C. 1075, 1 Leach, 4th ed. 73, note.

[13] Rex *v.* Whitney, 1 Moody, 3.

[14] Rex *v.* Chapple, Russ. & Ry. 77.

hended in the plural: as, where a statute makes it felony to purloin from a post-office "bank-*notes*," it is within the prohibition to steal a single note;[1] or, to commit larceny of "bills obligatory," a person who takes a single bill obligatory breaks the provision;[2] and, if it is made an offence "to keep open tippling-*houses* on the Sabbath day," the offence is committed by keeping open one tippling-house.[3] But a statute having taken away clergy from the felony of burning a *dwelling*-house, a person convicted of burning a *house*, omitting the word "dwelling," was held not to be excluded from his clergy.[4] The doctrines of this section and the last are stated without reference to the connection of the words in question with other words of the statute, — a point to be considered further on.

§ 214. **Continued — "Demolish" — "Destroy" — Counterfeit Coin — Standing Jack.** — To consume a house by fire is to demolish it;[5] and to destroy the parts of a thrashing machine, which the owner has taken down in apprehension of a mob, is to destroy the machine.[6] Under a statute against having in possession ten similar pieces of gold or silver counterfeit coin, there is a violation if the offender has ten pieces of either kind, though not all of the same denomination.[7] A statute having prohibited the standing of a jack without license, and the letting of him to mares for profit and hire, the court held the provision violated by an unlicensed standing under a contract to purchase the mules at a price below their value.[8]

§ 215. **Continued—False Grammar — Redundant Words.** — The

[1] Rex *v.* Hassel, 1 Leach, 4th ed. 1, 2 East P. C. 598.

[2] Commonwealth *v.* Messinger, 1 Binn. 273.

[3] Hall *v.* The State, 3 Kelly, 18.

[4] The State *v.* Sutcliffe, 4 Strob. 372. But see Commonwealth *v.* Posey, 4 Call, 109.

[5] Reg. *v.* Howell, 9 Car. & P. 437; Reg. *v.* Harris, Car. & M. 661. And see Reg. *v.* Bowen, 1 Den. C. C. 22.

[6] Rex *v.* Mackerell, 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. As to what is destroying a vessel, see United States *v.* Johns, 1 Wash. C. C. 363.

[7] Brown *v.* Commonwealth, 8 Mass. 59, 71. And see Commonwealth *v.* Whitmarsh, 4 Pick. 233; Commonwealth *v.* Smith, 7 Pick. 137. However, the court said in Brown *v.* Commonwealth: "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.

[8] Commonwealth *v.* Harris, 8 B. Monr. 373.

Alabama act which made it punishable to "buy, *sell*, or receive *from* any slave" certain things without his master's consent, 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.[1] So 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, shall defile her by carnally knowing her," &c.; and thus the act applies to persons who are not guardians, as well as to those who are.[2]

§ 216. Fourthly. *But the words of a penal statute must not be extended by construction beyond what they will fairly and reasonably bear:*[3] —

Illustrations — "Beat" — "Assault" — "Wound inflicted" — "Ship" — "Vessel" — "Stack of Straw" — "Office" — Resisting Process — "Implements of Gaming" — "In" — Building. — Therefore pulling a person to the ground, and holding him there, is not "beating" him.[4] And where an act makes an assault indictable, it means a real assault, not a constructive one.[5] A wound, incurred by a person in forcing a part of his body against a weapon with which another is attacking him, is not

[1] Worrell *v.* The State, 12 Ala. 732.

[2] The State *v.* Acuff, 6 Misso. 54.

[3] For illustrations of this doctrine, see, besides the other cases cited to this section and the one next following, The State *v.* Jim, 3 Murph. 3; Rex *v.* Snell, 2 Moody & R. 44; The State *v.* Smith, Cheves, 157; Rex *v.* Mountford, 7 Car. & P. 242, 1 Moody, 441; Rex *v.* Aris, 6 Car. & P. 348; United States *v.* Tenbroek, 2 Wheat. 248; Williams *v.* The State, 12 Sm. & M. 58; Commonwealth *v.* Catlin, 1 Mass. 8; Wellington *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's Case, Comyns, 440; Rex *v.* Nixon, 7 Car. & P. 442; Calvert *v.* Commonwealth, 5 B. Monr. 264; Rex *v.* Richardson, 6 Car. & P. 335; The State *v.* Briley, 8 Port. 472; Rex *v.* Wakeling, Russ. & Ry. 504; Reg. *v.* Adams, Car. & M. 299; Hickerson *v.* Benson, 8 Misso. 8; The State *v.* Shoemaker, 7 Misso. 177; Rex *v.* Palmer, 2 Leach, 4th ed. 680, 2 East P. C. 586; Rex *v.* Davis, 2 East P. C. 593, 1 Leach, 4th ed. 496, note; The State *v.* Pinchback, 2 Mill, 128; Leonard *v.* Bosworth, 4 Conn. 421; Culp *v.* The State, 1 Port. 33; Rex *v.* Pike, 1 Leach, 4th ed. 317, 2 East P. C. 647; Wash *v.* The State, 14 Sm. & M. 120; United States *v.* Pearce, 2 McLean, 14; Reg. *v.* Thorn, Car. & M. 206; Moore *v.* The State, 13 Sm. & M. 259.

[4] Reg. *v.* Hale, 2 Car. & K. 326.

[5] The State *v.* Freels, 3 Humph. 228; Evans *v.* The State, 1 Humph. 394; Humphries *v.* The State, 5 Misso. 203.

a wound inflicted by the other.[1] 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.[2] A stack, of which the lower part is coleseed[3] straw, and the upper is wheat stubble, is not a stack of straw.[4] One specially deputed by a justice of the peace, under authority of a statute, to serve a particular process, the Vermont court has held, is not an "officer," within the provision making it criminal to "impede or resist any officer" in the execution of his office.[5] Game-cocks, being live animals, are not "implements" of gaming.[6] When a legislative enactment made penal, among other things, the erection, to any building, of a wooden addition having "in" it a chimney or fireplace, — the court held, that, supposing the addition warmed solely by means of a fireplace opening into it from the old part, within which old part both the fireplace and chimney are entirely located, for the exclusive accommodation of the new part, it does not violate the provision.[7]

§ 217. **Continued — "Security for Money" — "Instrument, Arms, &c." — Escape — "Alter" — Forgery — Illegal Fees — "Stack of Wheat."** — Money is not meant by the words "security for money."[8] 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."[9] One does not "alter" bank-bills, who so cuts them as, by putting the parts together, to make a greater number.[10] A counterfeit bill on an existing bank, if the name which purports to be the cashier's is fictitious, is not in the similitude of a bank-bill "countersigned by the cashier thereof."[11] A statute against "any officer taking greater or other fees" than are prescribed in it, is not violated by one who,

[1] Rex *v.* Beckett, 1 Moody & R. 526.

[2] United States *v.* An Open Boat and Lading, 5 Mason, 120.

[3] A species of cabbage.

[4] Rex *v.* Tottenham, 7 Car. & P. 237.

[5] The State *v.* McOmber, 6 Vt. 215. Possibly some difference of opinion may be entertained on this question.

[6] Coolidge *v.* Choate, 11 Met. 79.

[7] Daggett *v.* The State, 4 Conn. 60

[8] Rex *v.* Skutt, 1 Leach, 4th ed. 106, 2 East P. C. 582.

[9] Hughes *v.* The State, 1 Eng. 131.

[10] Commonwealth *v.* Hayward, 10 Mass. 34.

[11] Commonwealth *v.* Boynton, 2 Mass. 77.

out of office, receives such fees for services rendered while in office.[1] Wheat thrashed from the straw is not a "stack of wheat."[2]

§ 218. Fifthly. *If the court entertains a reasonable doubt concerning the meaning of a statute, this doubt will prevail in favor of the prisoner:* —

How — Cases within the Spirit of this Rule — Multiply Felonies — How reckon Term of Imprisonment — Deserting Seamen. — The general doctrine has been already stated.[3] Within the spirit of this doctrine, the court will strive so to construe a statute as not to multiply felonies.[4] Likewise the day on which a prisoner is sentenced will be reckoned as a part of his term of imprisonment.[5] So, also, under the act of Congress which authorizes 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.[6]

§ 219. **Observations on Foregoing Doctrines — On Doctrine which follows.** — The several doctrines thus far stated under the present sub-title do not develop much which is peculiar to the criminal law; though they should all be borne in mind when we are examining criminal statutes. They show us what meanings the words may take under the pressure of the ordinary rules of interpretation, without violating the principles governing penal laws. Our next proposition is the one which, more than any other, distinguishes the strict interpretation which is applied to criminal statutes as against defendants, from liberal. It is —

§ 220. Sixthly. *No case is to be brought by construction within a statute unless it is completely within its words:* —

Doctrine explained. — Hawkins states the rule thus: "No parallel case, which comes within the same mischief, shall be construed to be within the purview of it [the statute], unless

[1] Gallagher *v.* Neal, 3 Pa. 183.

[2] Commonwealth *v.* Erskine, 8 Grat. 624.

[3] Ante, § 194.

[4] Commonwealth *v.* Macomber, 3 Mass. 254; Commonwealth *v.* Barlow, 4 Mass. 439.

[5] Commonwealth *v.* Keniston, 5 Pick. 420. See ante, § 105–111.

[6] The State *v.* Patterson, T. U. P. Charl. 311.

it can be brought within the meaning of the words." [1] Therefore if a case is fully within the mischief to be remedied, and is even of the same class and within the same reason as other cases enumerated, still, if not within the words, construction will not be permitted to bring it within the statute.[2]

§ 221. **Illustrations — Burglary — Night — Gaming — Whites and Blacks cohabiting — Clergy, &c.** — Thus, under a provision for the punishment of those who, with intent to commit any felony, "shall in the night-time enter *without* breaking, or in the daytime break and enter, any warehouse," an entry in the night by breaking was held not to be prohibited.[3] It being enacted, that no faro-table should be set up "in any dwelling-house, out-house, or place occupied by any tavern-keeper, retailer of wine, spirituous liquors, beer, or cider," the court decided, that no offence was committed by setting up such a table in a locality not specifically mentioned in the enumeration; as, for instance, in a house used solely for this purpose.[4] "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," &c., — so a Tennessee statute provided; and this was held to make the act penal only in the white person, not

[1] 2 Hawk. P. C., Curw. ed., p. 188, § 16.

[2] Rex *v.* Hammond, 2 East P. C. 1119, 1 Leach, 4th ed. 444; Leonard *v.* Bosworth, 4 Conn. 421; Hall *v.* The State, 20 Ohio, 7; Rex *v.* Senior, 1 Leach, 4th ed. 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; The State *v.* Lovett, 3 Vt. 110; Rex *v.* Paddle, Russ. & Ry. 484; Carpenter *v.* People, 8 Barb. 603; The State *v.* Cooper, 16 Vt. 551; Hamuel *v.* The State, 5 Misso. 260; Sharpe's Case, 2 Lewin, 233; Kyle *v.* The State, 10 Ala. 236, 2 East P. C. 919; Hawkins *v.* The State, 3 Stew. & P. 63; The State *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.* Commonwealth, 2 Rob. Va. 791; The State *v.* Curtis, 5 Humph. 601; Commonwealth *v.* Barrett, 9 Leigh, 666; United States *v.* An Open Boat and Lading, 5 Mason, 120; Rex *v.* Watson, 2 East P. C. 562, doubted in Rex *v.* Lavender, East P. C. 566; The State *v.* Savage, 32 Maine, 583; Rex *v.* Ross, Russ. & Ry. 10, 2 East P. C. 1067; Rex *v.* Ellis, 5 B. & C. 395, 8 D. & R. 173; United States *v.* Nott, 1 McLean, 499; The State *v.* Clemons, 3 Dev. 472; Williams *v.* Matthews, 3 Cow. 252; The State *v.* Black, 9 Ire. 378; Commonwealth *v.* Gee, 6 Cush. 174; United States *v.* Hiler, 1 Morris, 330.

[3] Commonwealth *v.* Carrol, 8 Mass. 490.

[4] Baker *v.* The State, 2 Har. & J. 5.

in the other.[1] Where a statute ousts clergy from an offence when committed under circumstances of aggravation, the circumstances must all transpire in the county in which the trial takes place, or the case is not within the enactment.[2]

§ 222. **Continued — Marriage Solemnization — File Certificate — "Cord of Wood" — Free Negro — Credit to Student — "Privately stealing."** — Again; we may see how fully a case must come within every clause, by illustrations like the following: A statute in Indiana requires the clergyman or magistrate, who solemnizes a marriage, to file the marriage certificate in the clerk's office of the proper county within three months from the time of its solemnization, under a penalty for the delay, after the first three months, of five dollars a month; yet it is 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.[3] 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.[4] In Georgia, by a former statute, "if any slave, *free negro*, Indian," &c., shall do certain things mentioned, "any such slave or slaves, and his and their accomplices," must suffer death; and the court decided, that this does *not* apply to a *free negro*.[5] Where 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," — it was held, that there could not be a violation of this provision, unless there had been authority conferred on some officer of the college, "by the government thereof," to give or withhold the consent.[6] A statute against "privately" stealing is not violated when

[1] The State *v.* Brady, 9 Humph. 74.
[2] 2 East P. C. 773.
[3] Kent *v.* The State, 8 Blackf. 163; 1 Bishop Mar. and Div. § 346.
[4] Pray *v.* Burbank, 12 N. H. 267.
[5] Ex parte George, T. U. P. Charl. 80. For another illustration of the same principle, see The State *v.* Roberts, 1 Tread. 116. So also The State *v.* Conover, 3 Harring. Del. 565; The State *v.* Moseley, 14 Ala. 390; Butler *v.* Cook, 14 Ala. 576; Frierson *v.* Hewitt, 2 Hill S. C. 490.
[6] Morse *v.* The State, 6 Conn. 9.

there is force used;[1] though, as matter of proof, the prosecutor need not show affirmatively that there was no force.[2]

§ 223. **Continued — "Suffer" — Swine at large — "Adjoining" — Liquor Laws — Fictitious Bank Bills — Election Frauds — Destroy House — Right to Slave Property — "Maintain."** — So an enactment that "no swine shall be *suffered* to go at large" is not violated when the animals escape, without the owner's will.[3] Grounds separated from a dwelling-house by a narrow walk, and a paling with a gate in it, are not "adjoining" the house.[4] It was provided, in Indiana, that no intoxicating liquor be sold at a "booth, tent, wagon, huckster's shop, or other place erected, brought, kept, continued, or maintained within the distance aforesaid"; and the court held, that a sale within the prohibited distance was no offence, unless made at a place specified in the act.[5] So the Ohio statute of 1835, against passing bills "purporting to be 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.[6] A person 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 liable under the Pennsylvania statute, by which it was made an offence to threaten 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.[7] Under the English statute, 7 & 8 Geo. 4, c. 30, § 8, against beginning to destroy any house (the words are, "shall unlawfully and with force demolish, pull down, or destroy, or *begin to* demolish, pull down, or destroy," &c.), one cannot be convicted unless his intention was to proceed so far as to leave in fact no house.[8]

[1] Rex *v.* Cartwright, 2 East P. C. 641; Rex *v.* Jones, 2 East P. C. 641.

[2] Rex *v.* Matthews, 2 East P. C. 642.

[3] Commonwealth *v.* Fourteen Hogs, 10 S. & R. 393.

[4] Stat. 7 & 8 Geo. 4, c. 29, § 38; Rex *v.* Hodges, Moody & M. 341.

[5] Bouser *v.* The State, Smith, Ind. 408. See, as to the constitutionality of this sort of legislation, Fetter *v.* Wilt, 10 Wright, Pa. 457.

[6] Cahoon *v.* The State, 8 Ohio, 537.

[7] Commonwealth *v.* Gibbs, 4 Dall. 253.

[8] 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 cases where the intent, as well as the act,

Where a punishment was provided for "any free person who, by speaking or writing, shall maintain that owners have not right of property in their slaves," the court held a mere denial of the right insufficient; it must be *maintained*, which meant something more; and the right of property denied must be a legal right, not simply a moral one.[1]

§ 224. **Continued — "Cut down" — Destroy Trees — "Destroy Vessel" — "Castaway."** — This strictness will not, however, be carried to extremes; therefore, where a statute made it criminal to "unlawfully and maliciously *cut down or otherwise destroy any trees*," the judges decided, that a total destruction was not necessary, and that the statute was violated when the tree was "cut down," though the stump left could be grafted.[2] And the word "destroy," used in the act of Congress punishing with death those who destroy vessels, has been held not to require an irreparable disruption of all the parts; but the term is generic, 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]

§ 225. **"Sell" — "Persuading to enlist" — Administer Poison. — Buying Counterfeits.** — In like manner, the act forbidden must be fully done in all its parts; else the perfected statutory offence is not completed;[4] though, indeed, there may be an indictable attempt. When, therefore, a statute had made it criminal knowingly to *sell* "any free person for a slave"; and the prisoner had transferred to the alleged vendee the possession of a free negro, under a written agreement to be paid for him; it being added, in the writing, that the vendee should take the negro on trial for a month, and at the end thereof should pay the price if he liked him, and receive a bill of sale; but before the month elapsed the negro ran away, and the

must come within the statute, see Commonwealth *v.* Morse, 2 Mass. 128; People *v.* Griffin, 2 Barb. 427.

[1] Bacon *v.* Commonwealth, 7 Grat. 602.

[2] Rex *v.* Taylor, Russ. &. Ry. 373. See ante, § 214.

[3] United States *v.* Johns, 1 Wash. C. C. 363.

[4] Leonard *v.* Bosworth, 4 Conn. 421; Redman *v.* Sanders, 2 Dana, 68; United States *v.* Battiste, 2 Sumner, 240; Barefield *v.* The State, 14 Ala. 603; People *v.* Genung, 11 Wend. 18; Reg. *v.* Charretie, 13 Jur. 450, 18 Law J. N. S. M. C. 100; Mayers *v.* The State, 3 Eng. 222; United States *v.* Twenty-eight Packages, Gilpin, 306. See Commonwealth *v.* Hancock Free Bridge, 2 Gray, 58.

prosecution was commenced, — the court held, that the offence was not committed, the sale not having been finished.[1] So 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 court decided that the offence was not complete until the person persuaded had actually enlisted.[2] In like manner, a statute against administering poison is not violated until something more is done than a mere delivery of the poison from the party administering; though perhaps it need not be taken into the stomach.[3] For a similar reason, 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," it was held, that the offence was not committed unless the counterfeits were finished ready for circulation.[4]

III. *The Rule of Liberal Interpretation, permitting the Largest Expansion, in Favor of Defendants.*

§ 226. **All Rules applicable — Doctrine epitomized.** — The doctrine sufficiently appears in the foregoing sections, that, in the interpretation of criminal statutes, we are to apply all the rules of a general statutory interpretation, the same as when we construe civil ones. Yet the doctrine appears also, in our discussion, to be modified in this way; namely, that, while the general rules are suffered to do their work, they are not to press out the meaning of these criminal enactments so as to bring within their prohibitions persons not guilty within the words themselves; while also they are to be expanded to relieve from their penalties all who are guilty only within the letter, not having violated their spirit.[5] Let us, however, see

[1] Commonwealth *v.* Nix, 11 Leigh, 636.

[2] Respublica *v.* Robert, 1 Dall. 39.

[3] 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."

[4] Reg. *v.* Bradford, 2 Crawf. & Dix C. C. 41.

[5] Ante, § 196.

a little further how these provisions of written law are suffered to contract and expand in favor of defendants.

§ 227. **Strict against and Liberal for Defendants, continued — Counsel — Trover.** — To illustrate, therefore, the proposition, that criminal statutes are to be strictly interpreted only as against defendants, the interpretation being made liberal in their favor:[1] when Stat. 7 Will. 3, c. 3, § 1, provided, that, in indictments for high treason, "all and every person, &c., shall be received and admitted to make his and their full defence by counsel, &c.; and the court, &c., 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"; — it was held, that, where more persons than one were indicted jointly, each one was entitled to two counsel.[2]

§ 228. **Continued — Threatening Letters — "Name subscribed" — Spirit of Statute.** — So, under the English statutes, 9 Geo. 1, c. 22, § 1, and 27 Geo. 2, c. 15, against sending threatening letters, "without any name subscribed thereto, or signed with a fictitious name," — if a letter bears on its face no name, real or fictitious, but is still in the undisguised handwriting of the prisoner, with which handwriting the individual to whom it is sent is familiar; or, if it contains allusions showing that the prisoner meant to make known who he was, — the statutory offence is not committed; because, although the threatening letter is "without any name subscribed thereto," within the words of the act, it is still not unsigned, within its spirit.[3] We have seen how, on the other hand, a man cannot be condemned for having violated the spirit of a statute; but the thing done must fall also within the words.[4] And we have seen,[5] and shall presently see further, that even this is not enough: it must be also contrary to its spirit.[6]

§ 229. **Exception — Proviso — "Divorced" — Polygamy — Divorce Sentence appealed from.** — If the statute has an exception or proviso in the defendant's favor, he need only bring him-

[1] Ante, § 196, 197. And see Heward *v.* The State, 13 Sm. & M. 261; Sneed *v.* Commonwealth, 6 Dana, 338; Dull *v.* People, 4 Denio, 91.

[2] 1 East P. C. 111.

[3] Rex *v.* Heming, 2 East P. C. 1116, 1 Leach, 4th ed. 445, note.

[4] Ante, § 191, 192, 194, 219, 220.

[5] Ante, § 226.

[6] Post, § 232.

self within the letter of such a clause, regardless of its spirit. Therefore, when the first English enactment against polygamy excepted persons "divorced,"[1] this was held, correctly, yet still contrary to the entire policy of the act, to shield from punishment those who should contract second marriages after a judicial separation from bed and board; such a separation being called, in the language of the law, a divorce. "It is also," says 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."[2]

§ 230. **Doctrine condensed — Spirit and Letter.** — The meaning of the propositions of the last few sections may be condensed into the simpler statement, that, whenever the thing done comes not within the mischief which evidently the statute was intended to suppress, though it comes within its words, the person doing the thing is not punishable; while, on the other hand, a prisoner may defend himself by showing, if he can, that either the main part of the enactment, or some clause put into it to create an exception, is so unguardedly worded as to open an escape for him through the letter, his act being still a complete violation of its spirit.

§ 231. In favor, therefore, of defendants, criminal statutes are both contracted and expanded.

First. *They are contracted:* —

General Doctrine — Intent — False Pretences, &c. — We had occasion to notice, in the chapter before the last, how common-law and statutory provisions cut short one another. So, likewise, in a criminal statute as well as in any other, a thing may be excepted out of general words, for the reason that to include it would be contrary to the general spirit and policy of the law.[3] Perhaps, under this head, might be embraced cases like those already alluded to,[4] where a prohibition in general terms is held to apply only to wilful transgressions, — it being a principle of the common law, that no one shall suffer criminally for an act in which his mind does not concur. In this

[1] 1 Bishop Mar. & Div. § 297.
[2] 1 East P. C. 467.
[3] See ante, § 141.
[4] Ante, § 138.

way, too, the statutes against false pretences are greatly restrained in their operation ;[1] and indeed the books are full of illustrations of the same principle.[2] And, generally, 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. **Doctrine otherwise stated — Illustrations — Mischief — Reason — Importing Slaves, &c. — Consent — Champerty.** — This doctrine is usually stated in terms somewhat narrower than those last employed ; in substance, that the case 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, the act of Congress, that " it shall not be lawful 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," — was, in the time of slavery, held not to be violated by conveying slaves from the United States to Europe, and thence back to the United States, where they are again held in bondage ; because the object of the law was to put an end to the slave trade ; and this case, therefore, though within its letter, is not within the mischief to be suppressed.[5] So the sale of a free negro into slavery, with his own consent, under the collusive agreement between him and the seller to divide the proceeds, was not within a statute against " selling a free person for a slave, knowing the person so sold to be free."[6] So, if it is made penal to " entice or persuade any

[1] See ante, § 133 ; also People *v.* Stetson, 4 Barb. 151 ; Rex *v.* Douglas, 1 Moody, 462 ; Rex *v.* Henderson, Car. & M. 328.

[2] See ante, § 123, 141, 190. And see Reg. *v.* Marner, Car. & M. 628, 2 East P. C. 703–706 ; Richardson *v.* Broughton, 3 Strob. 1.

[3] The State *v.* Clarksville and R. Turnpike, 2 Sneed, 88.

[4] Haynes *v.* The State, 5 Humph. 120 ; Daggett *v.* The State, 4 Conn. 60 ; The State *v.* Sumner, 10 Vt. 587 ; Commonwealth *v.* Clark, 2 Ashm. 105. And see, for illustrations, besides the other cases referred to, Reg. *v.* Marner, Car. & M. 628 ; The State *v.* Boozer, 5 Strob. 21 ; The State *v.* Mahan, 2 Ala. 340 ; Rex *v.* Corry, 5 East, 372 ; The State *v.* Newbegin, 25 Maine, 500 ; The State *v.* Lane, 8 Ire. 256 ; Hancock *v.* Sturges, 13 Johns. 331 ; Preston *v.* Hunt, 7 Wend. 53 ; Richardson *v.* Broughton, 3 Strob. 1 ; The State *v.* Johnson, 1 Dev. 360 ; Rex *v.* Sharpe, 1 Moody, 125 ; Wood *v.* Smith, 23 Vt. 706 ; Commonwealth *v.* Slack, 19 Pick. 304 ; Wragg *v.* The State, 14 Ala. 592 ; United States *v.* Hiler, 1 Morris, 330 ; Rex *v.* Williams, 1 Leach, 4th ed. 629.

[5] United States *v.* Skiddy, 11 Pet. 73.

[6] Mercer *v.* Commonwealth, 2 Va.

servant or slave to absent him or herself from his or her owner's service; or harbor or maintain, under any pretence whatever," such servant or slave; one who takes another's slave under claim of property in himself is not within the prohibition.[1] And a man killing deer under color of right is not within the English statutes against deer stealing.[2] Likewise a judicial sale is not embraced by the statutes against champerty.[3]

§ 233. **Illustrations, continued — Compound Larcenies — In Shops, Dwelling-houses, &c. — Wife.** — The principle under consideration finds frequent illustration in those statutes which visit with special consequences larceny committed in specified places; the general rule being, that such statutes apply only to things usually kept in the places, and under their protection; and to persons who come within the spirit of their provisions. Thus, when Stat. 11 Will. 3, c. 3, forbade clergy to "any person who, by night or day, shall, in any shop, warehouse, coach-house, or stable, privately and feloniously steal any goods of the value of five shillings or more, though such shop, &c., be not broken open, and though the owner or any other person be or be not in such shop," — it was decided, that "the statute was made as a remedy for the owners of shops to preserve their own goods which might be left there by way of trade"; and, 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.[4] So Stat. 12 Anne, stat. 1, c. 7, against stealing goods "being in any dwelling-house, &c., although such house, &c., be not actually broken in by such offender,

Cas. 144. But the consent of a boy eight years old will not excuse the offence. Davenport *v.* Commonwealth, 1 Leigh, 588.

[1] Gordon *v.* Farquhar, Peck, 155.

[2] Rex *v.* Speed, 1 Ld. Raym. 583, the judge observing: "The case is out of the intent of the act, but is plainly within its 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.

[3] Sims *v.* Cross, 10 Yerg. 460; Tuttle *v.* Jackson, 6 Wend. 213; Jackson *v.* Anderson, 4 Wend. 474; Hoyt *v.* Thompson, 1 Seld. 320.

[4] Anonymous, 8 Mod. 165; S. P. Rex *v.* Storer, 1 Leach, 4th ed. 334, 2 East P. C. 643; Rex *v.* Seas, 1 Leach, 4th ed. 304, 2 East P. C. 643.

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 thing 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 usually deemed to be under the protection of the dwelling-house.[4]

§ 234. **Continued — Consent, continued.** — For similar reasons, an Alabama enactment, providing a particular punishment for "every person who shall enter any dwelling-house" and commit larceny therein, was held not applicable to one who, before entertaining the criminal intent, entered by the owner's permission.[5] But the contrary was held under the Georgia statute; 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] And there is an English case under Stat. 7 & 8 Geo. 4, c. 29, § 12, enacted as a substitute for the statute of Anne, repealed (mentioned in the last section), the words of which statute of George are simply, "shall steal in any dwelling-house, any chattel, money, or valuable security to the value in the whole of five pounds or more," wherein the judges held, that one may commit the offence in his own house by there stealing another's goods.[7]

[1] Rex *v.* Thompson, 1 Leach, 4th ed. 338, 2 East P. C. 644. But where a lodger invites a man into his room, and there steals his goods, this 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, 4th ed. 339, note; Commonwealth *v.* Hartnett, 3 Gray, 450.

[3] Rex *v.* Campbell, 2 Leach, 4th ed. 564, 2 East P. C. 644; Rex *v.* Watson, 2 East, 680, 681; Rex *v.* Owen, 2 East P. C. 645, 2 Leach, 4th ed. 572. And see The State *v.* Chambers, 6 Ala. 855. A man went to bed with a prostitute, having put 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 consequence 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 house, and by mistake is left in the possession of the occupier under the supposition that it is for one of the persons in the house, the stealing of it will come within these statutes. Rex *v.* Carroll, 1 Moody, 89.

[5] The State *v.* Chambers, 6 Ala. 855.

[6] Berry *v.* The State, 10 Ga. 511.

[7] Reg. *v.* Bowden, 2 Moody, 285. And see Commonwealth *v.* Hartnett, 3 Gray, 450.

This case does not overrule the former doctrine, because the words of the two statutes differ, yet perhaps it creates some doubt whether the present English judges would not walk, even under the old statute, upon a different line of adjudication.

§ 235. **Observations on excepting what not within Intent of Statute — Legislative Will — Private Opinions of Judges.** — This doctrine of excepting out of the operation of criminal statutes cases not within their spirit and true intent, is highly beneficial. The law does not attempt to punish all wrongs. Therefore, though a case is within the mischief to be corrected by a legislative act, no particular perturbation in the workings of the legal system comes from permitting the offender to escape, whenever his conduct appears not to have been prohibited within the words. But to punish one who has not violated the spirit and intent of a law, merely because its terms are broad enough to cover the thing done, is to strike a blow at the root of our jurisprudence, as well as to commit a great wrong against the individual. Especially in this country, where emphatically the law emanates from the people, — not 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 to it, they are liable in fact, whatever may be their real purpose, to construe it so rigidly by the letter as to punish persons whom its framers never meant to punish; and suffer to escape those whom, if they had followed more its spirit, they would have seen to be within the letter of its provisions. Clearly the legislature alone is to determine its own policy; and, if what it does is within its general and constitutional powers, the judges have no right to interfere: they are, on the other hand, to concur judicially in the propriety of the statute, and administer it in its true spirit, whatever be their individual opinions upon the legislative question.[1]

[1] And see ante, § 70 and note.

§ 236. **Cases not within Original Mischief — Kidnapping.** — At the same time, we should remember that the words of a statute are our primary guide to its meaning.[1] On this point, Shaw, C. J. in a Massachusetts case, observed, that "it is not unusual in legislation, when 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."[2] Therefore, in the case before the tribunal, an act, the motive for which was probably to prevent colored people from being kidnapped, and reduced to slavery in other States, was held applicable to the seizure and carrying away of white men for a different purpose.[3]

§ 237. **Limits of the Doctrine — Illustrations — Trading with Slave — Solemnizing Marriage — Lord's Day.** — Care should be taken neither to misapply the rule,[4] nor carry it too far.[5] Thus, where a statute forbade trading with a slave without a permit from his master *in writing*, it was well held, a person was not justified in acting on a verbal permit.[6] And a command not to join in marriage minors, "unless the parent be present and consent to the marriage, or give a certificate in writing under his hand," is violated by a clergyman who performs the ceremony in the absence of the parent; though the parent had expressed verbally to third persons his approbation of the marriage, of which he was cognizant.[7] So 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.[8]

§ 238. **Continued — Differing Views — Liquor Laws — Medicine — Necessity — Practising Medicine — Carrying Weapons.** —

[1] Ante, § 146.

[2] Commonwealth *v.* Blodgett, 12 Met. 56, 79. But see Rex *v.* Williams, 1 Leach, 4th ed. 529.

[3] Commonwealth *v.* Blodgett, supra. And see, for a further statement of this case, ante, § 205.

[4] Stated ante, § 232.

[5] And see, besides the other cases cited to this section, Rex *v.* Ledbitter, 1 Moody, 76; The State *v.* Findley, 1 Brev. 107.

[6] The State *v.* Hart, 4 Ire. 246; The State *v.* Stroud, 1 Brev. 551. As to what words in a permit are sufficient, see Hurt *v.* The State, 19 Ala. 19.

[7] Wyckoff *v.* Boggs, 2 Halst. 138. See ante, § 232 and note; 1 Bishop Mar. & Div. § 342.

[8] Specht *v.* Commonwealth, 8 Barr, 312.

Nor should we be surprised at finding some contrariety of decision under the rule we are now considering. The minds of judges, as of other men, differ; some seeing the same thing differently from the rest, and some esteeming themselves more closely bound than the rest by the letter.[1] Thus, in Massachusetts, under the statutes against selling intoxicating drinks without license, the terms being general, it has been decided that no necessity of the purchaser to use the liquor, even if prescribed by a physician as an indispensable medicine, and there is no person in the county with authority to sell, will protect the vendor.[2] In Indiana, on the other hand, under a similar provision, the court, entering more into its spirit and following the principle of legal interpretation we are considering, held, 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.[3] The statute of Tennessee against permitting slaves "to go about the country under the pretext of practising medicine, or healing the sick," was interpreted to embrace all circumstances of medical practice, even those in which the slave is competent to exercise the healing art, and undertakes it, with his master's encouragement, from motives of humanity.[4] In Indiana, the law against carrying weapons concealed about the person is held to be broken by so carrying a pistol for the purpose of merely exhibiting it as a curiosity.[5] These several cases evidently lie close to the line dividing the two methods of interpretation, and we need not be surprised at seeing different views entertained concerning them.

§ 239. Secondly. *Criminal statutes are expanded in favor of defendants:* —

How — Illustrations — Intent. — Not only are they expanded in the way explained in our chapter before the last, but they are so also after the manner of remedial laws.[6] We have

[1] See, besides the other cases cited to this section, The State *v.* Griffin, 3 Harring. Del. 560; The State *v.* Isaacs, 1 Speers, 223.

[2] Commonwealth *v.* Sloan, 4 Cush. 52; Commonwealth *v.* Kimball, 24 Pick. 366.

[3] Donnell *v.* The State, 2 Ind. 658. See also, on this point, People *v.* Safford, 5 Denio, 112; Wood *v.* Smith, 23 Vt. 706. And see, as illustrative, Brown *v.* Maryland, 12 Wheat. 419; Bode *v.* The State, 7 Gill, 326; Hall *v.* The State, 4 Harring. Del. 132.

[4] Macon *v.* The State, 4 Humph. 421.

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

[6] See 1 East P. C. 248. And see

already mentioned a forcible illustration of this doctrine in the interpretations given by the English judges to the statutes against the exercise of trades by unqualified persons.[1] It is further illustrated in those cases, already referred to,[2] 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,[3] — the court in fact inserting, by construction, a clause in favor of the accused.[4]

§ 240. **Continued — House-breaking — Second Offence.** — So, under Stat. 1 Edw. 6, c. 12, § 10, — which takes away clergy from persons convicted of "breaking 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; and then adds, that clergy shall be *allowed*, "*in all other cases of felony*," — it was held, that, to bring a defendant within the former clause, the breaking must be such as amounts to a felony. "So that," observes Mr. East, "the general words of it ought to be applied with an intendment; namely, where the party is convicted of breaking the house in the night *burglariously*, or in the day, and *stealing* therein."[5] So it is a general proposition, that, whenever a statute makes the second offence a felony, the first being a misdemeanor; or punishes the second more heavily than the first, — this must be enlarged to mean, after a *conviction* for the first, and not merely after it is committed.[6]

Duchess of Kingston's Case, 1 Leach, 4th ed. 146.

[1] Ante, § 196.

[2] Ante, § 132, 231; Reg. *v.* Allday, 8 Car. & P. 136; Smith *v.* Kinne, 19 Vt. 564.

[3] Ante, § 232, 233.

[4] Commonwealth *v.* Slack, 19 Pick. 304.

[5] 2 East P. C. 625, 631.

[6] People *v.* Butler, 3 Cow. 347. And see Dwar. Stat. 2d ed. 643.

CHAPTER IX.

SOME FURTHER DOCTRINES OF STATUTORY INTERPRETATION CONSIDERED.

§ 241. **Introduction.** — There are a few principles of interpretation, not embraced in the foregoing expositions, of so frequent application in the criminal law as to render important some mention of them here. And there are some others, already brought to our notice, of which further unfoldings are desirable.

§ 242. **Technical Words — Legal — "Infamous" — "Charged" with Crime — "Accused" — "Complaint" — "Manslaughter" — "Negligent Escape" — Statutory Sense.** — One of the latter class of principles is, that, when a word or phrase has acquired a technical meaning, as employed in respect to a particular subject, if it is then used in reference to the same subject in a statute, it is there to be understood in the technical sense, in distinction from the popular.[1] The common application of this rule is to words and phrases which have obtained a peculiar legal signification; for a legislator, making laws, uses legal language. And in law phrase many words have an exact technical meaning, unlike or more limited or extended than their popular one; in which meaning they are ordinarily to be understood in statutes.[2] Thus, an English statute having made indictable the act of sending a letter threatening to accuse the person to whom it is sent 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

[1] Ante, § 96–101.

[2] United States *v.* Magill, 1 Wash. C. C. 463; Adams *v.* Turrentine, 8 Ire. 147; United States *v.* Wilson, Bald. 78, 95; Reg. *v.* Ellis, Car. & M. 564; Kitchen *v.* Tyson, 3 Murphy, 314; Macy *v.* Raymond, 9 Pick. 285; Bennac *v.* People, 4 Barb. 164; Eason *v.* The State, 6 Eng. 481; Spencer *v.* The State, 20 Ala. 24; United States *v.* Smith, 5 Wheat. 153; United States *v.* Pirates, 5 Wheat. 184; The State *v.* Mace, 5 Md. 337; Ex parte Vincent, 26 Ala. 145.

[3] Stat. 4 Geo. 4, c. 54, § 3.

'*infamous*' in its legal sense; 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."[1] And a former Alabama statute against concealing or carrying away a slave, "charged with a capital crime," to prevent his being brought to punishment, was construed by the courts to mean a crime *charged in legal form;* so that the statutory offence cannot be committed until proceedings are commenced against the slave.[2] In South Carolina, on a statute similar in expression, the court held, that a slave is "accused of crime" when complaint is made to a magistrate for the purpose of having a warrant issued.[3] A statute authorizing a criminal prosecution to be instituted "on complaint," means complaint under oath, technically understood.[4] Likewise the word "manslaughter," applied to the killing of a slave, was adjudged to have its technical signification, according to the rules of law regulating that species of homicide.[5] So "negligent escape" means the same in a statute as at the common law.[6] And a word may have acquired a peculiar signification by its statutory use, equally as by its common-law use, so that when it occurs in a subsequent act it will have the same meaning.[7]

§ 243. **Grammatical Construction — "And" — "Or" — "Such" — Mistake.** — In obedience to the doctrine, that, when the legislative meaning is plain, the exact grammatical construction and propriety of language may be disregarded, even in a penal statute,[8] — the courts have interpreted the word "and" as

[1] Rex *v.* Hickman, 1 Moody, 34. Substantially the same meaning has been given to the words "infamous crime," as used in the Constitution of Pennsylvania. Commonwealth *v.* Shaver, 3 Watts & S. 338.

[2] The State *v.* Duncan, 9 Port. 260. And see Willington *v.* Stearns, 1 Pick. 497. But a "fleeing from justice," within the proviso of the United States statute of limitations for crimes, does not necessarily import a fleeing from prosecution begun. United States *v.* Smith, 4 Day, 121.

[3] The State *v.* South, 5 Rich. 489.

[4] Campbell *v.* Thompson, 16 Maine, 117.

[5] The State *v.* Fleming, 2 Strob. 464. And see United States *v.* Magill, 1 Wash. C. C. 463; The State *v.* Taylor, 2 McCord, 483.

[6] Adams *v.* Turrentine, 8 Ire. 147. For "rob," "jeopardy," "dangerous weapons," see United States *v.* Wilson, Bald. 78; for "party" see Merchants Bank *v.* Cook, 4 Pick. 405, 411.

[7] The State *v.* Nates, 3 Hill, S. C. 200.

[8] Ante, § 79–81, 93, 212.

disjunctive, and the word "or" as conjunctive, when the sense absolutely required it;[1] and this, in extreme cases, in criminal statutes against the accused.[2] So the word "such," when evidently it has no reference to any thing preceding it, may be disregarded.[3] This, indeed, comes from the general proposition, that, where a mistake appears on the face of an act, — for instance, a misnomer of a person or corporation, — which mistake can be corrected by other parts, the courts, in construing it, will make the correction,[4] — another application, also, of the doctrine of looking at the whole enactment.[5]

§ 244. **Offence within Statute — Independent Clauses — "Or" — Indictment, how — Evidence.** — The reader remembers the proposition, that every case against a defendant must come within all the words of the statute.[6] But this proposition, let us here add, is subject to the qualification, that, if there are independent clauses connected by the conjunction "or," no more need be done than satisfy one of the alternatives.[7] In such circumstances the indictment either sets out the offence as covered by all the clauses, usually connecting the parts of the allegation by the conjunction *and* where *or* is found in the statute,[8] or it states only what falls within one clause, at the

[1] The State *v.* Mitchell, 5 Ire. 350; Hall's Case, Cro. Eliz. 307; Creswick *v.* Rooksby, 2 Bulst. 47; Waterhouse *v.* Kean, 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.* Stauss, 24 Wis. 394.

[2] The State *v.* McCoy, 2 Speers, 711; The State *v.* Miles, 2 Nott & McCord, 1; Foster *v.* Commonwealth, 8 Watts & S. 77. Contra, The State *v.* Kearney, 1 Hawks. 53. It has on the other hand been said, by way of dictum, that "and" in a penal statute can never be construed to mean "or." United States *v.* Ten Cases of Shawls, 2 Paine, C. C. 162.

[3] The State *v.* Beasley, 5 Misso. 91.

[4] Blanchard *v.* Sprague, 3 Sumner, 279.

[5] Ante, § 82, 86.

[6] Ante, § 220.

[7] Commonwealth *v.* Loring, 8 Pick. 370; The State *v.* Layman, 8 Blackf. 330; The State *v.* Miles, 2 Nott & McCord, 1; The State *v.* Kearney, 1 Hawks, 53; Commonwealth *v.* Clapp, 5 Pick. 41; Commonwealth *v.* Burns, 4 J. J. Mar. 177; Davenport *v.* Commonwealth, 1 Leigh, 588; Rex *v.* Baylis, Cas. temp. Hardw. 277; Rex *v.* Dixon, Russ. & Ry. 53; The State *v.* Murphy, 6 Ala. 845; Carrico *v.* The State, 11 Misso. 579; The State *v.* Fidler, 7 Humph. 502; The State *v.* Hull, 21 Maine, 84. See Crim. Proced. 2d ed. I. § 436, 586–588.

[8] Angel *v.* Commonwealth, 2 Va. Cas. 231; The State *v.* Murphy, 6 Ala. 845; Mooney *v.* The State, 8 Ala. 328; McElhaney *v.* The State, 24 Ala. 71; The State *v.* Price, 6 Halst. 203, 215. But see, contra, Miller *v.* The State, 5 How. Missis. 250. See also Washburn *v.* McInroy, 7 Johns. 134. In The State *v.* Woodward, 25 Vt. 616, it was observed: "The rule is undoubtedly lim-

election of the pleader;[1] and, whichever form is adopted, the proof need cover only so much of the allegation as constitutes a complete offence.

§ 245. **Particular Words followed by General — Violation of Lord's Day — "Other Person" — "Other Craft."** — Lord Bacon observed, that, "as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases enumerated."[2] This doctrine is in part the foundation of the "celebrated rule,"[3] that, where particular words are followed by general ones, — as if, after the enumeration of several classes of persons or things, the words are added, "and *all others*," — these general words are restricted in meaning to objects of the like kind with those specified.[4] Therefore, under Stat. 29 Car. 2, c. 7, § 1, providing "that no tradesman, artificer, workman, laborer, or *other person* whatsoever" should exercise his ordinary calling on the Lord's day, the words "other person" were held not to include a farmer, who is not a person of the like denomination with those persons specifically mentioned; for, as Bayley, J. said, if all persons were meant, there was no need of the specific enumeration.[5] And where a statute employed the words "wherry, lighter, or *other craft*," the word "craft" was held not to include a steam-tug; because, although a steam-tug is a craft, yet it is not one of the same character as a wherry or a lighter.[6]

§ 246. **Continued — Malicious Killing of Cattle.** — This rule, like all other rules which concern the interpretation of statutes, is only a means to be employed by the courts for ascertaining the legislative intent.[7] Consequently the courts,

ited in its application to cases where the offences created in a statute are not repugnant."

[1] Rex *v.* Franks, 2 Leach, 4th ed. 644; The State *v.* Laney, 4 Rich. 193.

[2] Story Const. § 448; Page *v.* Allen, 8 Smith, Pa. 338.

[3] Smith Cont. 172.

[4] 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; The State *v.* Burrows, 11 Ire. 477; The State *v.* Sumner, 10 Vt. 587; Reg. *v.* St. George, 9 Car. & P. 483; 1 East P. C. 187, 188.

[5] Reg. *v.* Whitnash, 7 B. & C. 596; Smith Cont. 172.

[6] Reg. *v.* Reed, 23 Law Times Rep. 156, 28 Eng. L. & Eq. 133.

[7] Ante, § 70, 82. Thus, it is laid down in South Carolina, the rule of construction that general and unlimited terms are restrained and limited by particular recitals when used in connection with them, does not require the rejection of general terms entirely; and it is to be taken in connection with

especially of the United States, allow the general words to be taken, even as against defendants in penal statutes, more broadly than the specific, when such appears clearly to have been the meaning of the legislature.[1] It is not easy to lay down any propositions which will much help the reader to determine whether, in a particular instance, the legislature must be presumed to have intended the courts should, in their constructions, follow the rule, or not. An American illustration of the rule is the following: A statute of Texas made it an offence 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 court held, that the killing of a dog does not come within the act. Wheeler, J. said: "Dogs are not mentioned in the statute; nor do 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."[2] Indeed, as dogs are not property of which larceny could be committed at the common law,[3] the doctrine of this decision is, in a certain sense,

other rules of construction, such as that an act shall be so construed as to carry out the declared intention of the legislature. The State *v.* Williams, 2 Strob. 474.

[1] Foster *v.* Blount, 18 Ala. 687. See also on this point, and for further views and illustrations, The State *v.* Holman, 3 McCord, 306; Shropshire *v.* Glascock, 4 Misso. 536; Boynton *v.* Curle, 4 Misso. 599; Commonwealth *v.* Wyman, 8 Met. 247; Commonwealth *v.* Percavil, 4 Leigh, 686; Vicaro *v.* Commonwealth, 5 Dana, 504; The State *v.* Williams, 2 Strob. 474; United States *v.* Pearce, 2 McLean, 14; Calder *v.* Delieseline, Harper, 186; Eubanks *v.* The State, 5 Misso. 450; The State *v.* Wilson, Cheves, 163; Rex *v.* Norris, Russ. & Ry. 69; Rex *v.* Parker, 1 Leach, 4th ed. 320, note; Riley *v.* The State, 9 Humph. 646; The State *v.* Cooper, 5 Day, 250; Rex *v.* Blick, 4 Car. & P. 377; The State *v.* Edmund, 4 Dev. 340; Commonwealth *v.* Wyatt, 6 Rand. 694; Reg. *v.* Oldham, 14 Eng. L. & Eq. 568, 2 Den. C. C. 472; The State *v.* Moseley, 14 Ala. 390; Rex *v.* Coates, 6 Car. & P. 394; Jenning's Case, 2 Lewin, 130; Elmsly's Case, 2 Lewin, 126; United States *v.* Briggs, 9 How. U. S. 351; Crow *v.* The State, 6 Texas, 334.

[2] The State *v.* Marshall, 13 Texas, 55. Again, in Wisconsin, a statute relating to the management of houses of correction having given the supervisors of Milwaukee County power to remove from office "for incompetency, improper conduct, or other cause satisfactory to the board," it was held that "other cause" must be construed to mean other kindred cause. The State *v.* McGarry, 21 Wis. 496.

[3] Crim. Law, 4th ed. II. § 956, and note.

an illustration of the other doctrine, that statutes are to be construed in harmony with the common law.[1] But the true foundation of this doctrine undoubtedly rests in the principle and the fact already several times mentioned in this volume, that, in the words of Chase, C. J. in the Supreme Court of the United States, "the poverty of language often compels the employment of terms in quite different significations,"[2] consequently we look to the context to ascertain their meaning. A particular consequence of this fact and doctrine is, that sometimes general expressions are construed as specific, and specific expressions are at other times construed as general.[3] If, therefore, the draftsman of an act makes certain specifications of things, and these things belong to a class distinguished from another class within which nothing is mentioned, his mind is thereby shown to be dwelling within the former class; then, if he adds, "all others," or any other words of the like sort, here is nothing to show that his mind has expanded beyond the class, and, in reason, as well as authority, the general words must be understood to refer to the other things within the class. But there are cases to which this sort of reasoning does not apply; and, when it does not, in legal principle, and, it is believed, on the weight of authority, the general words should not be thus restrained.

§ 247. **Where Words overlie One Another in Meaning.** — There is another doctrine of the older law, in some measure perhaps analogous to the foregoing, which, however, does not, like it, rest also either in natural reason or in sound legal principle. It is, in substance, that, when a statute enumerates several things, and the several words are so broad in meaning as to overlie one another, the less specific words are narrowed in the interpretation to prevent this overlying. Thus it has been held, that, if, for example, a statute makes the stealing of "a sheep or a ewe" punishable in a particular way mentioned, an indictment describing the animal as a sheep is not supported by proof of stealing a ewe.[4] But this doctrine appears to have

[1] Ante, § 114.

[2] Texas *v.* White, 7 Wal. 700, 720.

[3] Ante, § 102. And thus a statute, enumerating things or persons of an inferior dignity, will not be construed to extend to those of a superior dignity. Woodworth *v.* Paine, Breese, 294.

[4] Rex *v.* Puddifoot, 1 Moody, 247; Rex *v.* Birket, 4 Car. & P. 216; The State *v.* Tootle, 2 Harring. Del. 541;

been entirely overturned in England.[1] Thus, for example, where the words of a statute[2] against larceny were "ram, ewe, sheep, or lamb," and the indictment was 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, the proof was that the animal stolen was a lamb, the majority of the judges held that the prisoner was rightly convicted.[4] This doctrine has been since followed as settled.[5]

§ 248. **Continued — How in Principle — How in United States.** — It is plain that this later English doctrine is the true one in legal principle. For, as we have already seen, under the common law inhibitions of crime overlie one another, and statutes are construed in the same way.[6] If the animal, for example, comes within the term employed in the statute and the indictment, this should be deemed sufficient, though it should be equally well described by some other term. No man can use any human language without suffering words sometimes to overlie one another in signification; the reason of which is, that no human language has been reduced to mathematical proportions. And surely we should not attribute to the lawmaker power over impossibilities; and infer, from the non-exercise of this power, that he meant to employ words in an unusual way. Better infer, in the cases under consideration, that the purpose was to make the entire meaning full and plain. In the United States this earlier English doctrine has

Rex *v.* Loom, 1 Moody, 160. For the same general doctrine, see also Rex *v.* Cook, 1 Leach, 4th ed. 105, 2 East P. C. 616; The State *v.* Plunket, 2 Stew. 11; Bush *v.* The State, 18 Ala. 415; Rex *v.* Beaney, Russ. & Ry. 416. See also Rex *v.* Gillbrass, 7 Car. & P. 444; Rex *v.* Paty, 2 East P. C. 1074, 1 Leach, 4th ed. 72, 2 W. Bl. 721; Rex *v.* Moyle, 2 East P. C. 1076; The State *v.* McLain, 2 Brev. 443.

[1] Reg. *v.* McCulley, 2 Moody, 34, 2 Lewin, 272; Reg. *v.* Spicer, 1 Den. C. C. 82, 1 Car. & K. 699. And see The State *v.* Godet, 7 Ire. 210.

[2] 7 & 8 Geo. 4, c. 29, § 25.

[3] Reg. *v.* McCulley, supra.

[4] Reg. *v.* Spicer, supra.

[5] Reg. *v.* Aldridge, 4 Cox C. C. 143.

[6] Ante, § 143.

been sometimes followed. Thus, in Texas, a statute provides, that, "if any person shall steal any horse, gelding, mare, colt, ass, or mule, he shall be punished," &c.; and it has been held, that an indictment charging the larceny of a "horse" under the statute is not supported where the proof shows 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."[1] In Delaware, the statute not making the sort of distinction we are considering, it was held, that proof of stealing a ram will support an indictment for stealing a sheep; but this was because the statute was not like the English one.[2] What is, on the whole, the present American doctrine, or whether any thing can be set down as such, it may not be easy to say.[3]

§ 249. **Exclusion by Implication — Express Mention — Remedy for Statutory Right — New Remedy.** — There is a maxim, that the express mention of one thing excludes all other things, — *Expressio unius est exclusio alterius*,[4] — sometimes applied in the interpretation of statutes. We have seen, that affirmative statutes do not repeal the prior law, by reason of repugnance;[5] and so the above maxim is not operative in such cases. But under circumstances of a different nature it is operative; as, for example, although generally the establishment of a new statutory right carries with it by necessary implication a remedy;[6] still, if the statute creating the right prescribes the remedy or means of enforcing the right, our maxim applies, and the statutory method excludes all others.[7] So, where the

[1] Jordt *v.* The State, 31 Texas, 571, 572.

[2] The State *v.* Tootle, 2 Harring. Del. 541.

[3] Crim. Proced. 2d ed. I. § 619. And see the American cases cited to the last section.

[4] Broom Leg. Max. 2d ed. 505, 515; Co. Lit. 210 *a*; Watkins *v.* Wassell, 20 Ark. 410.

[5] Ante, § 154–157.

[6] See ante, § 137.

[7] Thurston *v.* Prentiss, 1 Mich. 193; The State *v.* Loftin, 2 Dev. & Bat. 31; Smith *v.* Lockwood, 13 Barb. 209; Conwell *v.* Hagerstown Canal, 2 Ind. 588; The State *v.* Corwin, 4 Misso. 609; Rex *v.* Douse, 1 Ld. Raym. 672; Dudley *v.* Mayhew, 3 Comst. 9; Almy *v.* Harris, 5 Johns. 175; Lang *v.* Scott,

legislature by a declaratory act provides, that a thing before lawful may be done; and adds, that nothing in the act contained shall be construed to permit some other thing embraced in the general provision to be done; this is held to be an implied prohibition of such other thing, though it was before lawful.[1] On the other hand, if a statute merely prescribes a new remedy for an existing right, it is cumulative only, and the party may follow either it or the antecedent law at his election, unless the statute by direct words or necessary implication takes away the prior remedy.[2]

§ 250. **Remedy for Statutory Right, continued — Common Law.** — In other words the doctrine is, that, where an offence is created by statute, and the same statute prescribes the penalty, or the mode of procedure, or any thing else of the sort, only that which the statute prescribes can be followed.[3] But where the offence is at common law, statutory provisions not directly repugnant to the common law are cumulative, and either law may be followed.[4] And where a statute forbids a thing before lawful, but provides no penalty, the indictment for the offence

1 Blackf. 405; Bailey *v.* Bryan, 3 Jones, N. C. 357; Camden *v.* Allen, 2 Dutcher, 398; Victory *v.* Fitzpatrick, 8 Ind. 281; McCormack *v.* Terre Haute, &c. Railroad, 9 Ind. 283; Ham *v.* Steamboat Hamburg, 2 Iowa, 460; post, § 250. And see United States *v.* Dickey, 1 Morris, 412; People *v.* Stevens, 13 Wend. 341.

[1] The State *v.* Eskridge, 1 Swan. Tenn. 413.

[2] Coxe *v.* Robbins, 4 Halst. 384; Almy *v.* Harris, 5 Johns. 175; Colden *v.* Eldred, 15 Johns. 220; Farmers' Turnpike Road *v.* Coventry, 10 Johns. 389; Bearcamp River Co. *v.* Woodman, 2 Greenl. 404; Fryeburg Canal *v.* Frye, 5 Greenl. 38; Mayor, &c. of Baltimore *v.* Howard, 6 Har. & J. 383; Booker *v.* McRobert, 1 Call, 243.

[3] See cases cited to the last section. Also People *v.* Craycroft, 2 Cal. 243; 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.* Ives, 2 Show. 468; Reg *v.* Dye, 11 Mod. 174; Commonwealth *v.* Turnpike, 2 Va. Cas. 361; McElhiney *v.* Commonwealth, 10 Harris, Pa. 365; The State *v.* Meyer, 1 Speers, 305; The State *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, 11 Mod. 140, note; Hartley *v.* Hooker, Cowp. 523; Crofton's Case, 1 Mod. 34; Rex *v.* Buck, 2 Stra. 679; Rex *v.* Savage, 1 Ld. Raym. 347; The State *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 Railroad, 9 Fost. N. H. 146.

[4] People *v.* Craycroft, 2 Cal. 243; Rex *v.* Dixon, 10 Mod. 335; Gouch *v.* Stephenson, 13 Maine, 371.

is at common law.[1] So, where it prescribes no mode of prosecution, the common-law indictment lies.[2]

§ 251. **Continued.** — The doctrines of the last two sections are clear, as general propositions; but cases arise in which there is difficulty in applying them. Suppose a statute of to-day creates an offence; but, prescribing no mode of punishment, leaves it to be prosecuted according to the common law. Then suppose a statute of to-morrow prescribes a particular remedy. Evidently the remedy is cumulative, the same as if the offence had existed at the common law.[3] Yet again, suppose both statutes are passed together, — should this fact make a difference? There are cases which hold not, and that, if the act in one section creates an offence, and in another section prescribes the remedy, the remedy is cumulative.[4] And a book much esteemed by the legal profession lays down the doctrine, that, "where an offence is not so at the common law, but made an offence 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."[5] The distinction of the English courts seems to be, that, where the same section both creates the offence and affixes the consequence, only the statutory direction can be followed;[6] but, where the offence 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.[7] There may also be other distinctions which the English courts recognize, even more refined than this one.[8]

[1] Rex *v.* Robinson, 2 Bur. 799, 803; ante, § 38.

[2] Colburn *v.* Swett, 1 Met. 232; Elder *v.* Bemis, 2 Met. 599; The State *v.* Meyer, 1 Speers, 305; The State *v.* Helgen, 1 Speers, 310. Where a statute, in England, creates a penalty, the king may recover it by information filed by the attorney-general; and, if a moiety is given to a common informer, the king may recover the whole unless the informer brings his *qui tam* action. Rex *v.* Hymen, 7 T. R. 536.

[3] 1 Russ. Crimes, Grea. ed. 50.

[4] Attorney-General *v.* White, Comyns, 433, 436. But see Croftan's Case, 1 Vent. 63, 1 Mod. 34.

[5] 1 Saund. Wms. ed. (6th) 135, note.

[6] Attorney-General *v.* Radloff, 10 Exch. 84, 23 Law J. N. S. Exch. 240, 18 Jur. 555, 26 Eng. L. & Eq. 413.

[7] Reg. *v.* Buchanan, 8 Q. B. 883, 16 Law J. N. S. Q. B. 227, 10 Jur. 736; 1 Russ. Crimes, Grea. ed. 50, 51.

[8] In Rex *v.* Harris, 4 T. R. 202, 205, Ashurst, J. said: "It is a clear and established principle, that, when a new offence is created by an act of Parliament, and a penalty is annexed to it by a separate and substantive clause,

Technical room certainly there is for thus distinguishing between two things said in two separate sections and the same things said in one section; because refinements of this narrow sort have not unfrequently been adopted to cut the knot of difficulty concerning the interpretation of a statute. Still reason is against them.

§ 252. **Continued.** — Said a learned judge, in a Massachusetts case: "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."[1] This distinction, applied in the criminal law, might possibly subject to indictment a party who should violate any statute creating a particular crime, and prescribing a summary or other like mode of procedure, without negative words as to the procedure; though this consequence does not seem to be inevitable.[2] If a statute makes a thing a public nuisance, and directs in the same section how it shall be punished, probably the common-law right of abatement still attaches.[3]

§ 253. **Continued.** — The following view of this question is deemed to be just: The practitioner, obliged to adapt his process or defence nicely to the shades of distinction taken by courts in times past, will consult the cases themselves in respect of points presenting peculiar 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 offence was intended by the legislature to supersede the common-law remedies, which attach as of course to all offences.

it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause, on the ground of its being a misdemeanor." See also 1 Russ. Crimes, Grea. ed. 49 et seq.; ante, § 66, 67.

[1] Putnam, J. in Barden *v.* Crocker, 10 Pick. 383, 389.

[2] And see, to this point, The State *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 in Clifton's Case, 1 Mod. 34, which has perhaps been overruled. See also People *v.* Stevens, 13 Wend. 341; Renwick *v.* Morris, 7 Hill, N. Y. 575.

[3] See Renwick *v.* Morris, 7 Hill, N. Y. 575; Rex *v.* Gregory, 2 Nev. & M. 478, 5 B. & Ad. 455.

§ 254. **Effect of Statute on Rights of Action, &c.** — A thing done contrary to the command of a statute is generally in law void; and, if the statute merely imposes a penalty or a forfeiture, this is usually, not always, equivalent to a prohibition.[1] Of course, therefore, no cause of action can arise upon an undertaking forbidden by statute, whether the contract is *malum in se* or *malum prohibitum*.[2] The books are full of illustrations of this principle. But a marriage celebrated in a method different from the one enjoined is valid, even where the statute expressly provides a punishment for disobedience.[3]

§ 255. **Directory — Mandatory — Execution of Prisoner — Assessing Taxes — Time and Manner.** — There is a distinction made between statutes which are directory and those which are mandatory, — a distinction which, we have seen,[4] extends equally to constitutional provisions. When, therefore, a legislative act is such as is termed directory, it is held that commanding the thing to be done in a particular way or time does not prevent its being done, with equal effect, in another way or time.[5] Thus, 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.[6] So of a statutory direction to assessors when to assess taxes; and it seems to be a general principle, that, if a legislative enactment, without negative words, merely commands an officer or other person to do a thing in a certain time or manner, the naming of the time or manner will be construed as directory to him, and

[1] Hallet *v.* Novion, 14 Johns. 273, 290; Mitchell *v.* Smith, 1 Binn. 110; 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.

[2] Peck *v.* Burr, 10 N. Y. 294; Miller *v.* Post, 1 Allen, 434; Hathaway *v.* Moran, 44 Maine, 67.

[3] 1 Bishop Mar. & Div. § 283–289. Perhaps the rule in Massachusetts is different. Ib. § 285 and note. But see Parton *v.* Hervey, 1 Gray, 119.

[4] Ante, § 47.

[5] See, besides the other cases cited in this section, Striker *v.* Kelly, 7 Hill, N. Y. 9; Wiggin *v.* The Mayor of New York, 9 Paige, 16; McBee *v.* Hoke, 2 Speers, 138; The State *v.* Hill, 2 Speers, 150; Eustis *v.* Kidder, 26 Maine, 97; Rex *v.* Page, 12 Mod. 123; Rex *v.* Ingram, 1 Ld. Raym. 215; Steele *v.* The State, 1 Texas, 142; Dyches *v.* The State, 24 Texas, 266; McKune *v.* Weller, 11 Cal. 49.

[6] Seaborn *v.* The State, 20 Ala. 15; Rex *v.* Wyatt, Russ. & Ry. 230. See, on this subject, Reg. *v.* Hartwell, Jebb, 302; Reg. *v.* Hogg, 2 Moody & R. 380; Miller *v.* The State, 3 Ohio State, 475.

not as a limitation of his authority, provided no apparent harm would follow from such a construction, and there is nothing in the statute affirmatively showing a different intent.[1] In such cases, while the statute is merely directory as to the time, it may be imperative as to the thing itself.[2] So, although the laws require duties amounting to less than two hundred dollars to be paid in cash, yet a bond for duties less than that amount is valid.[3] And bonds, deeds, and other instruments, not following a form prescribed by an act of the legislature, may be good,[4] though they are by no means so always. So may an affidavit, not in statute form, be good.[5]

§ 256. **Continued.** — "But," says 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."[6] Thus, "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."[7] And care should always be taken not to carry the principle of holding a statute to be merely directory too far.[8]

[1] Pond *v.* Negus, 3 Mass. 230; Rex *v.* Leicester, 7 B. & C. 6; People *v.* Allen, 6 Wend. 486; People *v.* Peck, 11 Wend. 604; Merchant *v.* Langworthy, 6 Hill, N. Y. 646; Jackson *v.* Young, 5 Cow. 269; Ex parte Heath, 3 Hill, N. Y. 42; Colt *v.* Eves, 12 Conn. 243; Wan-kon-chaw-neek-kaw *v.* United States, Morris, 332, 335; Walker *v.* Chapman, 22 Ala. 116; People *v.* Cook, 14 Barb. 259; The State *v.* Click, 2 Ala. 26; McGuffie *v.* The State, 17 Ga. 497; Hart *v.* Plum, 14 Cal. 148; People *v.* Lake, 33 Cal. 487; Wheeler *v.* Chicago, 24 Ill. 105; St. Louis County Court *v.* Sparks, 10 Misso. 117.

[2] The State *v.* Harris, 17 Ohio State, 608; The State *v.* Lean, 9 Wis. 279.

[3] United States *v.* Linn, Crabbe, 307.

[4] Rex *v.* Lyon, Russ. &. Ry. 255; Rex *v.* Randall, Russ. & Ry. 195.

[5] The State *v.* Dayton, 3 Zab. 49.

[6] Dwar. Stat. 2d ed. 610; Davison *v.* Gill, 1 East, 64. And see Rex *v.* Loxdale, 1 Bur. 445.

[7] Smith Stat. & Const. Law, § 677.

[8] 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. It has been held, that an officer who omits to do a duty enjoined by a directory statute, where the omission does not vitiate the proceedings, may still be liable in damages to a third party injured by the neglect. Brown *v.* Lester, 13 Sm. & M. 392.

CHAPTER X.

STATUTES OF LIMITATIONS OF CRIMINAL PROSECUTIONS.

§ 257. **In England.** — The limitation of the time within which actions and prosecutions are to be brought is a creation of statute, and does not exist at the common law. In England, there have never been any general statutes of limitations of criminal prosecutions.[1] "So that," says Chitty,[2] "instances have frequently occurred in which parties have been convicted and punished many years after the crime had been forgotten.[3] And it has been repeatedly held that no length of time can legalize a public nuisance, although it may afford an answer to an action of a private individual."[4] Some of the English statutes creating crimes — as, for example, those against poaching — contain a limitation clause;[5] and there are special statutory limitations of some of the common-law offences.[6]

§ 258. **In United States.** — In most of our own States there are general statutes of limitations as respects crimes. There may be a State or two in which there are none. These statutes are expressed in different words, and the interpretations of them are not well defined. Such few principles as can be collected from the English and American decisions are the following.

§ 259. **Liberal, in Favor of Defendants — Time.** — We have already seen,[7] that criminal statutes are to be construed strictly as against defendants, and liberally in their favor. Statutes of limitations, the reader perceives, are for the ease of accused persons, as freeing them from prosecutions; therefore, within the rule just stated, they should be construed liberally. Thus, we have seen[8] that there are different methods of computing

[1] Reg. *v.* Hull, 2 Fost. & F. 16.

[2] 1 Chit. Crim. Law, 160.

[3] 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.

[4] 7 East, 199; 3 Camp. 227; 4 Esp. 109; Peake C. N. P. 91.

[5] Reg. *v.* Hull, supra.

[6] Archb. Crim. Pl. & Ev. 13th Lond. ed. 63, 64.

[7] Ante, § 196.

[8] Ante, § 105–111.

time; and, applying the rule of a liberal construction in favor of defendants, the Texas court held, that, where the statutory period was two years, and an offence was committed on the first day of January, 1855, an indictment on the first day of January, 1857, was too late.[1]

§ 260. **How Liberal, continued — The Particular Offence — Conspiracy — Penalty — Imprisonment.** — Yet, in spite of the principle just stated, a statute is not held to bar an offence not denoted by its words. Thus, if the limitation applies in terms to the substantive offence, it will not be extended by construction to embrace conspiracies to commit the offence.[2] And in this particular it is the same with an exception found in the statute of limitations as with the body of the act itself. Thus it was provided in North Carolina, that, "in all trespasses and other misdemeanors, except the offences of perjury, forgery, malicious mischief, and *deceit*, the prosecution shall commence within two years after the commission." And it was held, that a conspiracy to cheat and defraud does not fall within the exception. "This is a distinct offence from that of cheating or deceiving."[3] So a statute of South Carolina provided, that, in "every case where any penalty, fine, or forfeiture whatever" has been 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"; and it was held, that even the word "penalty," in this provision, refers only to a fine or forfeiture of money, and that this statute does not bar the prosecution for an offence the punishment for which is corporeal, — as, for instance, imprisonment or death, — or, as to the imprisonment, where the punishment is fine and imprisonment.[4]

§ 261. **Commencement of the Prosecution.** — Some of the statutes require that the indictment shall be found, and others

[1] The State *v.* Asbury, 26 Texas, 82. See People *v.* New York Central Railroad, 28 Barb. 284.

[2] 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.

[3] The State *v.* Christianbury, Busbee, 46, 47.

[4] The State *v.* Taylor, 2 McCord, 483; The State *v.* Thomas, 8 Rich. 295; The State *v.* Free, 2 Hill, S. C. 628; The State *v.* Fields, 2 Bailey, 554.

that the prosecution shall be commenced, within the statutory period. Thus, in England, prosecutions for the offence of night poaching were limited by Stat. 9 Geo. 4, c. 69, § 4, as follows: "The prosecution for every offence punishable upon indictment by virtue of this act shall be commenced within twelve calendar months after the commission of such offence." And it was held by Pollock, C. B. in a *nisi prius* case, that the issuing of a warrant for the apprehension of the offender is not a commencement of prosecution within this statute.[1] This is a negative ruling; and in the same negative way it is held, that the finding of an indictment is not essential to the commencement of prosecution, but it may be deemed to have been commenced before.[2] In a case at the assizes, Pollock, C. B. said: "I think the warrant of commitment must be taken in this case to show 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 there is a later case before all the judges from which 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] In principle, this would seem to be the true view.

[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 & 9 Will. 3, c. 26, § 9, provides, that no prosecution shall be made for any offence against that act, unless such *prosecution be commenced* within three months next after such offence 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 quantity 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

§ 262. **Proceedings erroneous, &c.** — Some of the statutes provide for cases in which the indictment is adjudged defective, or some other error makes a proceeding of no avail. In the absence of such a provision, suppose the issuing of the warrant, or the order of commitment to be the commencement of the proceeding against a defendant, then suppose an erroneous indictment to be found and quashed either on motion or on a plea in abatement, and another indictment to be thereupon found without an actual discharge of the defendant from custody, there is no difficulty in holding that the second indictment, the same as the first, is unobjectionable, even though the statutory period should have elapsed. So it has been held, in Alabama, where the statute expressly declares that "a prosecution may be commenced, within the meaning of this chapter, by the issue of a warrant, or by binding over the offender." [1] In North Carolina the court carried the doctrine to a point not so clear in legal principle, according to views of practice generally prevailing in the other States. There, by statute, "in all trespasses and other misdemeanors, except the offences 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," &c.[2] 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 this indictment is abated on a plea of misnomer, then another indictment 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 offence;

in *counterfeiting* the current money of this kingdom, viz. shillings,' &c. The assizes at Durham were holden on the 8th of August; so that more than three months had elapsed between the commission of the offence 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 offence 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.* The State, 38 Ala. 425.

[1] Foster *v.* The State, 38 Ala. 425.

[2] R. S. c. 35, § 8. The statute is not given in the report.

the second bill was a continuation and a part of the same proceeding, according to a well-settled principle." [1]

§ 263. **Past and Future Offences.** — The majority of the Texas court held, that statutes limiting criminal prosecutions do not apply to past offences, unless they are in terms clearly retrospective.[2] But, in the language of a learned Vermont judge, speaking of the limitations of civil actions, "when a statute of limitations is passed, it operates upon an antecedent as well as subsequent cause of action, unless by its terms it is restrained to the letter." [3] Now, from principles already developed,[4] it follows that the construction must be, at least, as favorable to the defendant in a criminal as in a civil cause; and the better doctrine is, that, in the absence of express words, a statute limiting the time for prosecuting crimes must be applied alike to past and to future ones.[5]

§ 264. **How take Advantage of Statute.** — It is not necessary for a defendant, relying on the statute of limitations, to plead it in bar. It devolves on the prosecuting power to show an offence within the statutory period.[6]

§ 265. **Reviving Prosecutions against which the Statute has run.** — According to a Texas case, decided in 1860, a statute will not be construed, where its words are not express, as

[1] The State *v.* Hailey, 6 Jones, N. C. 42, 43, referring to The State *v.* Johnston, 5 Jones, N. C. 221; The State *v.* Haney, 2 Dev. & Bat. 390; The State *v.* Tisdale, 2 Dev. & Bat. 159; The State *v.* Harshaw, 2 Car. Law Repos. 251. The principle mentioned is more fully stated in The State *v.* Johnston, supra, where it is held, that, if an indictment is found, and afterward another indictment against the same defendant for the same cause, the legal effect is simply to add a new count to the first indictment, and the two constitute one case. Whether this is so in other States we need not inquire; since, if it is so, it does not follow that the new indictment is a part of a proceeding already quashed. If it is, it is quashed also. It may be further observed of this case of The State *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 English 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.* Killminster, 7 Car. & P. 228. And it may be that some other judges will take the same view as did those of the North Carolina Court. See also The State *v.* Duclos, 35 Misso. 237.

[2] Martin *v.* The State, 24 Texas, 61.

[3] Cardell *v.* Carpenter, 42 Vt. 234, 236, Wilson, J.

[4] Ante, § 196, 259.

[5] United States *v.* Ballard, 3 McLean, 469. And see ante, § 84, 85.

[6] United States *v.* Smith, 4 Day, 121; Rex *v.* Phillips, Russ. & Ry. 369. See Commonwealth *v.* Ruffner, 4 Casey, Pa. 259.

intended to revive criminal prosecutions already barred by a statute of limitations. There can be no doubt of the soundness of this doctrine, at least in a sort of general way; but the words of the learned judge, who pronounced the opinion of the court, went further. He said: "The State, having neglected to prosecute within the time prescribed for its own action, lost the right to prosecute the suit. To give the 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."[1] Plainly, therefore, if, in a case in which the words of the legislature are express, the operation of a statute reviving lapsed rights of prosecution, is *ex post facto*, the statute is void as violating a constitutional provision.[2] In civil cases it has been held, and, it is believed, correctly, that, when the period of limitations has expired, the rights of the parties have become vested, and the legislature cannot then take away the vested right by removing the statutory bar.[3] But the question as respects the criminal prosecution is of a different sort, it has nothing to do with vested rights, but it concerns simply the provision forbidding *ex post facto* laws.

§ 266. **Continued.** — Now, an *ex post facto* law is one which makes punishable what was innocent when committed, or subjects a person who has committed a crime to a heavier penalty than was provided at the time of its commission.[4] A statute of limitations compels the State to prosecute the crime within a specified period, if at all, by withholding from the courts jurisdiction over the offence afterward. And it has already been decided, in cases of another class, that, if the legislature takes away the jurisdiction so that no prosecution can be had, it may revive the old or create a new jurisdiction, and then, though the right to prosecute had once lapsed, the prosecution may be carried on under the new law. This is something pertaining, not to the right, but to the remedy.[5] And a statute authorizing a prosecution after the period of limitation had

[1] The State *v.* Sneed, 25 Texas, Sup. 66.

[2] Ante, § 85, 185.

[3] Pleasants *v.* Rohrer, 17 Wis. 577, 579; Sprecker *v.* Wakeley, 11 Wis. 432. And see Cassity *v.* Storms, 1 Bush, 452; ante, § 178.

[4] Ante, § 185; Calder *v.* Bull, 3 Dall. 386, 390.

[5] Ante, § 176, 177, 180, 182.

lapsed, would seem to come within this principle. It pertains to the remedy. It does not punish an act innocent when committed, or add to the punishment which the law then prescribed. In some exceptional circumstances, such a statute would be eminently just, while in others it would be unjust; in none, it is believed, would it violate any provision of the Constitution of the United States, or of our States generally.

§ 267. **Continued — United States Statute — Suspension of Statute by the Rebellion.** — This question has been somewhat discussed in Congress;[1] and, in 1869, the following statute was passed: "That the time for finding indictments in the courts of the United States in the late rebel States for offences 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 be restored to representation in Congress: Provided, however, That the provisions hereof shall not apply to treason or other political offences."[2] It seems to the writer, that, while this act plainly "extends" the period of limitations where such period had not fully elapsed, and while Congress had the power to go further, grave doubts may be entertained whether by the true construction it applies to cases in which the period had elapsed — where the term had actually broken and ended — at the time of its enactment; though it is known to have been passed with special reference to a case of the latter sort, and was supposed to cover both classes of cases. This statute, it should be borne in mind, is not one of those statutes of limitations which are to be liberally construed for the ease of defendants;[3] but, being against liberty, its construction is to be strict.[4] The query is merely suggested; but, upon this branch of the question, the writer expresses no opinion. Then, suppose the view thus intimated should be maintained, the question would occur whether, at the date of this enactment, a particular case was barred. For

[1] For a very able statement of the question on the side which favors the legislative right, with many citations of authorities, see in the "Globe," the speech of Hon. William Lawrence, of Ohio, delivered January 4, 1867.

[2] Act of March 3, 1869, 15 Stat. at Large, 340, c. 148. And see act of June 11, 1864, 13 Stat. at Large, 123, c. 118.

[3] Ante, § 259.

[4] Ante, § 191–193, 196.

it has been decided that the effect of the late rebellion was to suspend the statute of limitations in circumstances in which judicial proceedings could not be carried on, — an illustration of the doctrine that all things bend to necessity.[1]

CHAPTER XI.

MEANING OF PARTICULAR WORDS AND PHRASES.

268–270. Introductory Views.
271–275. The Person acting.
276–305. The Time and Place.
306–318. The Thing done.
319–347. The Objects acted upon and the Instrumentalities.
348–350. The Proceedings.

§ 268. **Varieties of Things — Thoughts — Words.** — The immense variety of human things appears in nothing more conspicuous than in the variety of human thoughts. The inhabitants of our earth, a multitude whose numbers are beyond adequate comprehension, are continually shifting; yet, in all the unfathomed ocean of mind, no two individual minds are exactly alike, — no two thoughts, even of the same person, are identical in all their forms and proportions, but each thought differs from every other, — and all are moving as rapidly, the one of this instant succeeded by the one of the next, as the electric fluid leaps from the clouds. To convey these thoughts, as nearly infinite in number as finite things can be, each several mind has to use human language, while the words in each language are comparatively few. The consequence is, that each word has necessarily a great variety of meanings and shades of meaning, varying with the subjects to which it is applied, with the relations it sustains to other words in the same sentence or paragraph, with the particular development of the language at the time when it is used, with the mental

[1] United States *v.* Wiley, 11 Wal. 508. As to the doctrine of necessity, see Crim. Law, 4th ed. I. § 441–449; Crim. Proced. 2d ed. I. § 493 et seq.; ante, § 132.

conformation of the speaker, and with an immense variety of other things. The dictionaries give us only the leading significations. We may therefore state, that no man ever expressed with entire accuracy any one idea of his own mind, and that no two men ever understood any one expression of thought precisely alike.

§ 269. **Legal Meanings of Words.** — To obviate, as far as may be, this difficulty, existing in the language of the law as well as in other parts of our language, the judges, in pronouncing their opinions in causes depending before them, — holding to the familiar rule *stare decisis*, — have, in the construction of the terms and phrases employed, kept usually within the meanings ascertained in previous cases, and in this way have established what may be called legal meanings for various expressions and single words. The consequence is, that many of these have thus acquired a precise legal meaning, more or less broad than the popular one; or a particular precise meaning in one branch of jurisprudence, and another precise meaning, or the popular one, in another branch.[1] And we shall find our way through the later pages of this work and the works on the Criminal Law, and on Criminal Procedure, made more easy, if we here traverse, for a little while, this technical field. We shall look as well into the common as into the statutory criminal law; for we have already seen,[2] that words and phrases have usually the same signification in both. But writer and reader should alike proceed cautiously here; for, in the midst of the general flexibility of language, it is a bold and dangerous thing to say of any word or phrase, however technical, that such or such is its exact sense, neither more nor less, in every place where it may possibly be found. We shall not deem it wise, in this connection, to go over the entire technical language of the criminal law; for much of it is better explained when we discuss the particular subject. Some words and phrases, too, which might seem to demand an explanation here, are so modified by the matter to which they relate, and by the other words of the statutes in which they occur, that we could not do them full justice without devoting to them

[1] See ante, § 93–102, 204, 205, 242.

[2] Ante, § 242.

more space than we can spare; while, on the other hand, it will help the practitioner to be referred to the cases, which he may examine for himself.

§ 270. **How the Chapter divided.** — We shall consider the various words and phrases, employed concerning the various things, in the following order: 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. **Agents — Servants — Clerks, &c.**[1] — These words all admit of a broad signification, yet are often limited by their connection with other words in the statute, and by the subject to which they relate. Thus, it is a familiar principle in civil jurisprudence, that a man who assumes without authority to act as another's agent may be charged as such; but this rule is not applied to criminal statutes; at least, it is not generally; the agent must be one in fact.[2] So in the law of embezzlement, according to some of the cases, he must be an agent generally, not merely employed specially to do a single act in the particular matter;[3] yet he need not devote his whole time or any considerable part of it to his employer, or be regularly or constantly in his service.[4] But the various distinctions on this subject will be best considered in connection with the statutes themselves.[5]

[1] See Crim. Law, 4th ed. II. § 335, et seq.

[2] Rex *v.* Thorley, 1 Moody, 343. And see Morse *v.* The State, 6 Conn. 9; Crim. Law, 4th ed. II. § 351, 367.

[3] 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.

[4] 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.* Leach, 3 Starkie, 70.

[5] See Reg. *v.* Atkinson, 2 Moody, 278; Rex *v.* Hartley, Russ. & Ry. 139; Rex *v.* Squire, 2 Starkie, 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

§ 272. **Aider.** — The Statute 14 Eliz. c. 3, makes certain kinds of counterfeiting misprision of high treason, and then provides, that "the offenders, their procurers, *aiders*, and abettors," shall be punished in a way pointed out. And Mr. East remarks: "By aiders is meant such as aid in the fact, and not aiders of the offender after the fact."[1] The word is found also in some other of the old English statutes; but is seldom used in this country.[2] Lord Hale says, that, "in some acts of Parliament, *aiders*, being joined with procurers, counsellors, 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."[3] Whether the word ever includes accessories before the fact seems not to be distinctly laid down in the books; yet probably it never does.[4] The word also has some other legal meanings, not important to be here mentioned.

§ 273. **Distiller.** — The meaning of this word has been defined to be, "one whose occupation is to extract spirit by evaporation and condensation."[5] After the spirit has been once extracted, passing the liquor again through the still, to purify it and raise the proof, called rectifying it, seems not to be regarded as distillation. A rectifier of spirits was therefore held not to be within the United States statute of July 24, 1813, which imposes 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.[6]

v. Mellish, Russ. & Ry. 80; Rex *v.* Burton, 1 Moody, 237; Budd *v.* The State, 3 Humph. 483; Commonwealth *v.* Wyman, 8 Met. 247; Reg. *v.* Watts, 1 Eng. L. & Eq. 558, 2 Den. C. C. 14; The State *v.* Hart, 4 Ire. 246; The State *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.* Commonwealth, 8 Leigh, 743; Rex *v.* Jackson, 1 Moody, 119; Commonwealth *v.* Stearns, 2 Met. 343; Reg. *v.* Lovell, 2 Moody & R. 236.

[1] 1 East P. C. 160.

[2] See People *v.* Newberry, 20 Cal. 439.

[3] 1 Hale P. C. 376.

[4] See 1 Russ. Crimes, Grea. ed. 26.

[5] Webster Unabridged Dict.

[6] United States *v.* Tenbroek, 2 Wheat. 248, Pet. C. C. 180.

§ 274. **Negro — Mulatto — Person of Color — White — White Woman.** — A negro is a black man descended from the Southern African races. The word does not ordinarily include a mulatto.[1] A mulatto is "a person that is the offspring of a negro 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.[2] In South Carolina, the word "mulatto" is held to have a local meaning, more broad and more vague than this, "signifying, generally, 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.[3] And in Arkansas, the word is used in the same extended sense as in South Carolina.[4] We have no exact definition of the expression "person of color," in a general sense; but, in North Carolina, it is used in the statutes to mean one descended from a negro within the fourth degree inclusive, though an ancestor in the intervening generation was white.[5] Probably the more general use of the term is in a sense like that of the word "mulatto" in South Carolina.[6] The court of Maine has held, that a woman having one sixteenth part of Indian blood, the rest being white, is a white woman, within a statute prohibiting marriage between white persons and Indians, negroes, and mulattoes.[7] In Michigan, the Con-

[1] Felix *v.* The State, 18 Ala. 720; Dick *v.* The State, 30 Missis. 631. And see Heath *v.* The State, 34 Ala. 250; Ivey *v.* Hardy, 2 Port. 548.

[2] Thurman *v.* The State, 18 Ala. 276; Medway *v.* Natick, 7 Mass. 88.

[3] The State *v.* Davis, 2 Bailey, 558; The State *v.* Hayes, 1 Bailey, 275, 276. And see Johnson *v.* Boon, 1 Speers, 268. See Dean *v.* Commonwealth, 4 Grat. 541.

[4] Daniel *v.* Guy, 19 Ark. 121, 133, 134.

[5] The State *v.* Dempsey, 9 Ire. 384. In Connecticut, under a statute exempting from taxation "the personal and real estate of persons of color," it was held that a quadroon, or person of one fourth negro blood, was within the statute. And Storrs, C. J. observed: "According to the common, general, and indeed universal, acceptation of the phrase 'persons of color' in this community, it embraces, 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. We, therefore, adopt that construction of the act in question; and hold, that the exemption provided in it applies only to persons proved to be of such descent, and also having and disclosing visibly the peculiar and distinctive color of the African race." Johnson *v.* Norwich, 29 Conn. 407, 408. See also The State *v.* Melton, Busbee, 49; The State *v.* Chavers, 5 Jones, N. C. 11; People *v.* Hall, 4 Cal. 399.

[6] See The State *v.* Davis, supra.

[7] Bailey *v.* Fiske, 34 Maine, 77.

stitution having designated "*white* male citizens" as the voters, the court held to be white "all persons in whom white blood so far preponderates that they have less than one fourth of African blood"; and the majority were of opinion that those in whose veins there is a greater proportion of African blood are not white. Martin, C. J. dissenting from the last proposition, deemed that a preponderance of white blood makes a white man.[1]

§ 275. **Other Words.** — There are other words, the expositions of which would properly come within our present subdivision. But they are better explained in the other connections.

II. *The Time and Place.*

§ 276. **Daytime — Night Time.** — The law has many distinctions growing out of the division of time into night and day. For example, an attempt to commit felony in a dwelling-house, executed to the extent of breaking into the house, 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.[2] So, a thing is sometimes followed by special consequences, done in the day.[3] For the purpose of this distinction, the night in very ancient times was deemed to begin with the setting, and end with the rising, of the sun; but the common-law rule now is, and for a long period has been, that those portions of the morning and evening in which, while the sun is below the horizon, sufficient of his light is above for the features of a man to be reasonably discerned, belong to the day.[4] Light reflected from the moon is not to be taken into the account;[5] therefore it is not always day when one's face may be seen.[6] The law recognizes no middle space between day and night; but, where one begins, the other ends.[7]

[1] People *v.* Dean, 14 Mich. 406.

[2] 1 Hale P. C. 549, 550.

[3] 1 Hale P. C. 550, 551; 4 Bl. Com. 224.

[4] 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; Commonwealth *v.* Chevalier, 7 Dane Ab. 134; People *v.* Griffin, 19 Cal. 578.

[5] 1 Hale P. C. 551; 4 Bl. Com. 224; Bac. Ab. Burglary, D.; Thomas *v.* The State, 5 How. Missis. 20.

[6] Thomas *v.* The State, 5 How. Missis. 20; The State *v.* Bancroft, 10 N. H. 105, 107; 3 Inst. 63.

[7] The State *v.* Bancroft, 10 N. H. 105, 107; Rex *v.* Tandy, 1 Car. & P. 297.

The obvious propriety of furnishing, to person and property, a special protection in periods of repose and darkness, has caused the distinction between night and day to be adopted in many modern statutes; in construing which, the courts follow the common-law rule as to when each begins and ends.[1] But the difficulties in applying this rule — as, for instance, in determining how much of the light by which we discern objects comes from the moon — are so considerable, that it has been latterly, in England,[2] and in some of the United States,[3] modified and made more exact by statutes, which have fixed an hour for night, in law, to begin and close.

§ 277. **Dwelling-house — Mansion-house — House — Castle.** — The word "dwelling-house" is not precisely identical in signification with the word "house," as the two words are employed in legal writings; but the words "dwelling-house" and "mansion-house" are identical.[4] "House," in a deed or will, is equivalent to "messuage";[5] and it is sufficient to pass the land, "an acre or more,"[6] under and around it, with the minor buildings;[7] but in criminal law it has never been understood as extending to the soil. The words "dwelling-house" and "mansion-house" are the proper ones in indictments for burglary, where "house" will not do.[8] The latter word has a somewhat broader meaning, though the precise difference between it and dwelling-house is not apparent;[9] and it is the

[1] Ante, § 242; Trull *v.* Wilson, 9 Mass. 154; Rex *v.* Kemp, 1 Leach, 4th ed. 222.

[2] By 1 Vict. c. 86, § 4, in burglary, the night begins at nine and ends at six o'clock. 1 Russ. Crimes, Grea. ed. 821. Under the game laws, night begins one hour after sunset, and ends one hour before sunrise. 1 Deac. Crim. Law, 509. And see Reg. *v.* Polly, 1 Car. & K. 77.

[3] In Massachusetts, the same rule applies, in all criminal cases, as in England under the game laws. Stat. 1847, c. 13. And see Commonwealth *v.* Williams, 2 Cush. 582.

[4] Commonwealth *v.* Pennock, 3 S. & R. 199.

[5] Doe *v.* Collins, 2 T. R. 498, 502. And see 1 Chit. Gen. Pract. 167; Burrill Law Dict., and Bouv. Law Dict., House; Danvers *v.* Wellington, Hard. 173.

[6] Co. Lit. 5 *b*.

[7] Doe *v.* Collins, 2 T. R. 498; Shep. Touch. 90, 94; Rogers *v.* Smith, 4 Barr, 93; Bennet *v.* Bittle, 4 Rawle, 339, 342. See Steele *v.* Midland Railway, Law Rep. 1 Ch. 275; Marson *v.* London, &c., Railway, Law Rep. 6 Eq. 101.

[8] 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; Whart. Crim. Law, 2d ed. 526.

[9] The State *v.* Sutcliffe, 4 Strob. 372, 13 Law Reporter, 165; and see an article on this matter, 13 Law Reporter, 157; Daniel *v.* Coulsting, 7 Man. & G. 122; ante, § 213. But see Surman *v.*

proper word in indictments drawn upon the common law for arson.[1] The term "castle," sometimes met with in legal writings, is employed in these sections to denote the habitation in which a man's person and property are protected from seizure. 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*. In statutes against larceny from the dwelling-house, the term "dwelling-house" has the same meaning as in burglary.[2] But a legislative act may be so framed that the word in it will have a more enlarged or restricted signification.[3]

§ 278. **Dwelling-house, continued.** — A dwelling-house is the apartment, building, or cluster of buildings in which a man with his family resides. He need not so construct his habitation that all the shelter he requires will be under one roof; therefore the word "dwelling-house" embraces in law the entire congregation of buildings, main and auxiliary, used for abode. It includes, says Lord 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."[4] And, when a burglary is committed in one of these out-buildings, the indictment may lay the offence as done in the mansion-house.[5] But it is often a nice question, whether in law a particular structure is, in any sense, either in whole or in part, a dwelling-house. Let us look at some of the points which this question presents.

§ 279. **Continued.** — In the first place, not even the main structure is a dwelling-house, though built for one, unless it is at the time what is termed in the law inhabited.[6] And what

Darley, 14 M. & W. 181; Commonwealth *v.* Posey, 4 Call. 109; Powell *v.* Price, 4 C. B. 105.

[1] 1 Hale P. C. 567; 3 Chit. Crim. Law, 1st ed. 1126; Commonwealth *v.* Posey, 4 Call. 109.

[2] 2 East P. C. 633, 644; 2 Deac. Crim. Law, 768.

[3] Commonwealth *v.* Buzzell, 16 Pick. 153, 161; ante, § 269.

[4] 1 Hale P. C. 558.

[5] 1 Hale P. C. 557; 1 East P. C. 512; 3 Chit. Crim. Law, 1st ed. 1095.

[6] Rex *v.* Harris, 2 Leach, 4th ed. 701, 2 East P. C. 498; Rex *v.* Thompson, 2 Leach, 4th ed. 771, 2 East P. C. 498; The State *v.* Warren, 33 Maine, 30; Commonwealth *v.* Barney, 10 Cush. 478.

was once a dwelling-house may cease to be such, though no change is made in the structure.[1] If it is temporarily abandoned to a carpenter who is repairing it, the furniture being removed, and no one sleeping in it;[2] or, if the former tenant has left, and it is waiting for another tenant, the servant of the owner merely sleeping in it to protect some articles of furniture remaining there;[3] its character as a dwelling-house is suspended. And a building is not a dwelling-house, though finished and furnished for abode, and used for taking meals and other purposes, unless the person occupying it, or some one of his family or servants, sleeps in it.[4] Yet sleeping is not alone sufficient;[5] for, if a servant lodges in a warehouse merely to watch goods,[6] even though it is a building previously used for habitation,[7] this does not make it a dwelling-house. On the other hand, a structure does not lose its character as a dwelling-house by any temporary absence of its inhabitants, who have left it with intent to return.[8] And so a man may have two or more dwelling-houses;[9] and they will severally con-

[1] Hooker *v.* Commonwealth, 13 Grat. 763; The State *v.* Clark, 7 Jones, N. C. 167.

[2] Rex *v.* Lyons, 1 Leach, 4th ed. 185, 2 East P. C. 497; Rex *v.* Fuller, 1 Leach, 4th ed. 186, note.

[3] Rex *v.* Davies, 2 East P. C. 499, 2 Leach, 4th ed. 876; Nutbrown's Case, 2 East P. C. 496.

[4] Rex *v.* Martin, Russ. & Ry. 108; Rex *v.* Harris, 2 Leach, 4th ed. 701, 2 East P. C. 498. And see The State *v.* Warren, 33 Maine, 30. The doctrine of Commonwealth *v.* Brown, 3 Rawle, 207, seems, however, to be directly contrary to the text. The true view is, that, if the owner has abandoned his dwelling, and removed his furniture into a new house, this new house becomes his dwelling-house, after his family have taken possession of it, though by some chance they have not 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, Goldthwaite, J. observed: "At common law, any house was a dwelling or mansion in a burglarious sense, in which any person resided or dwelt; and, with reference to the offence 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."

[5] 2 East P. C. 497; Rex *v.* Turner, 6 Car. & P. 407.

[6] Rex *v.* Smith, 2 East P. C. 497, 2 Leach, 4th ed. 1018, note. And see Rex *v.* Brown, 2 East P. C. 501, 2 Leach, 4th ed. 1018, note.

[7] Rex *v.* Flannagan, Russ. & Ry. 187; Rex *v.* Davies, 2 East P. C. 499, 2 Leach, 4th ed. 876. 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.

[8] Nutbrown's Case, Foster, 76, 2 East P. C. 496; Vaux *v.* Brooke, 4 Co. 39 *b*; The State *v.* Meerchouse, 34 Misso. 344.

[9] Vaux *v.* Brooke, 4 Co. 39 *b*, 2 Leon. 83; Rex *v.* Stock, 2 Leach, 4th ed.

tinue to be such, though one is used but a small part of the year, or on particular occasions, as on the occasion of a fair.[1] Yet "a tent or booth in a fair or market" is not a dwelling-house,[2] because of the frailty of the structure;[3] but a loft over a coach-house and stable is such, when so used;[4] and such, we have seen,[5] may be a jail; and such are chambers in a college, and the inns of court.[6]

§ 280. **Continued — Part — Internal Communication.** — 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;[7] even though, according to some authorities, occupied by another person, for an entirely different purpose. And, if an offence is committed in the part not in use for habitation, the indictment may charge it to have been done in the mansion-house of him who dwells in the other part.[8] Yet, on the other hand, where one of two partners hired and occupied, as a dwelling-house, a part of a building; and the firm had the residue, using it for a warehouse, an internal communication existing between the two parts; the court held, that a conviction for burglary in the warehouse could not be sustained, where the indictment laid the offence as committed in the dwelling-house of the one partner.[9] This decision seems opposed to the above doctrine; for evidently the question was not merely concerning the form of the indictment, since the offence could not have been laid as done in the dwelling-house of the firm that had no dwelling-house. But neither can this decision be overturned, except by force of the principle, not without existence in legal reason, that every dwelling-house must be understood to extend to the outer wall of the building in which it is located, and to which also there is an internal communication.[10] Indeed, this would seem to be

1015, Russ. & Ry. 185; Rex *v.* Westwood, Russ. & Ry. 495.

[1] Rex *v.* Smith, 1 Moody & R. 256.

[2] 1 Hale P. C. 557.

[3] 1 Russ. Crimes, Grea. ed. 798.

[4] Rex *v.* Turner, 1 Leach, 4th ed. 305, 2 East P. C. 492.

[5] Ante, § 207.

[6] 1 Gab. Crim. Law, 177; 1 Hale P. C. 522, 523, 556.

[7] Rex *v.* Stock, 2 Leach, 4th ed. 1015, Russ. & Ry. 185, 2 Taunt. 339; Rex *v.* Smith, 2 East P. C. 497.

[8] Rex *v.* Witt, 1 Moody, 248; Rex *v.* Sefton, Russ. & Ry. 202; Rex *v.* Carrell, 1 Leach, 4th ed. 237, 2 East P. C. 506.

[9] Rex *v.* Jenkins, Russ. & Ry. 244.

[10] See, as shedding some light on this question, Rex *v.* Ball, 1 Moody, 30;

the true doctrine.[1] If there is no internal communication, the parts are to be regarded as distinct buildings; certainly, if occupied by different persons; probably, if by the same person.[2]

§ 281. **Continued — Chimney — Shutter-box — Fence, &c. —** The chimney is a part of the dwelling-house, according to the better opinion;[3] but any thing outside the building, belonging not to the freehold, as a shutter-box, is not such.[4] And a door in the outward fence of the curtilage, opening into no building, but into the yard only, is not a portion of the mansion, to make the felonious breaking of it burglary; even though the premises are so situated, that, when one is within the area, there is no obstruction to his entering the domicile.[5]

§ 282. **Continued — How in Principle. —** If we look at these points in a philosophical way, provided any thing can be called philosophical which concerns a mere question of technical law, we shall find the following view to be more exact than can be given on a sole statement of points adjudged. The place in which a man and his family live, whether large or small, under one roof or many roofs, is his dwelling-house. If under one of his roofs are apartments of any sort not occupied by him, they are no more his place of abode than if they were under a separate roof. But suppose there is an internal communication from the rooms he uses to such apartments; then, if those apartments are not the dwelling-place of the other person who occupies them, they are his dwelling-place in a certain sense. Because the internal communication creates the exact hazard which would be created by a vacant room opening into the public way, on the one side, and into his rooms, on the other side. If the apartments are used for dwelling by the person

Rex *v.* Davis, Russ. & Ry. 322; Rex *v.* Bennett, Russ. & Ry. 289; Stedman *v.* Crane, 11 Met. 295.

[1] But see Dale *v.* The State, 27 Ala. 31. See Cole *v.* The State, 9 Texas, 42.

[2] Rex *v.* Egginton, 2 B. & P. 508, 2 East P. C. 494, 666, 2 Leach, 4th ed. 913; The State *v.* Toole, 29 Conn. 342; post, § 285.

[3] Rex *v.* Brice, Russ. & Ry. 450. And see 1 Hale P. C. 552; 1 Gab. Crim. Law, 170.

[4] Rex *v.* Paine, 7 Car. & P. 135; Commonwealth *v.* Trimmer, 1 Mass. 476; Reg. *v.* Howell, 9 Car. & P. 437.

[5] Rex *v.* Bennett, Russ. & Ry. 289; Rex *v.* Davis, Russ. & Ry. 322.

occupying them, then, as they are such person's dwelling-house, they cannot be that of his neighbor.[1]

§ 283. **Continued — Out-buildings.** — Let us again suppose a person's dwelling-house to be surrounded by other buildings, whether dwelling-houses or not, — of course these other buildings are no part of his dwelling-house; but likewise nothing can be a part of it which is not used as such. And on this principle all out-buildings not used for purposes connected with abode are without the dwelling-house. In like manner, if there are rooms under the roof which shelters the abode, not used for purposes connected with it, they also are no part of the dwelling-house. And the conclusion is a broad one, that the abode extends only to buildings and rooms used either directly or indirectly for the purposes of habitation;[2] with this single exception, that, where the walls of the dwelling enclose other premises connected with the rooms lived in, by an internal communication, these other premises, while not the abode of another person, even though occupied by another, are parts of the dwelling-house with which they so connect.

§ 284. **Continued — What Out-buildings — Public Passage-way dividing.** — We are next more minutely to inquire on authority, what buildings, separate from the main mansion-house, constitute in law a part of it. No separate building does, which is divided from the principal structure by a public passage-way or road, however narrow;[3] or by intervening land, occupied by another person;[4] though, if the separate building is sufficiently inhabited, it may be a dwelling-house of itself.[5] 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. **Continued — Same Enclosure, &c.** — A separate build-

[1] As to this last point, upon authority, see post, § 287.

[2] As to this point, on authority, see post, § 285, 286.

[3] Rex *v.* Westwood, Russ. & Ry. 495; Commonwealth *v.* Estabrook, 10 Pick. 293; Rex *v.* Garland, 2 East P. C. 493, 512, 1 Leach, 4th ed. 144; 1 Hawk. P. C. Curw. ed. p. 134, § 23. And see The State *v.* Jenkins, 5 Jones, N. C. 430.

[4] Powell *v.* Price, 4 C. B. 105. See, however, Rex *v.* Walters, 1 Moody, 13.

[5] Rex *v.* Westwood, Russ. & Ry. 495.

ing within the same enclosure with the dwelling-house is to be regarded as a part of it, if reasonably near to it, and occupied by the same person; even though, according to the English authorities, it is used for a totally different purpose; as a warehouse, goose-house, shop, or store.[1] But if it is let to another person, by whom it is occupied, — as, for instance, for a shop, — it ceases to be a part of the dwelling-house, even though under the same roof, having no internal communication.[2] And Lord Hale seems to have considered, that to make a separate outbuilding a portion of the mansion, it must be held under the same title with the mansion;[3] but this distinction has small foundation in principle, and it is not favored by later writers.[4] There are some American authorities which hold, contrary to the foregoing doctrine, yet according to what we have seen[5] to be true principle, that separate buildings, used, like stores and shops, for purposes entirely distinct from habitation, are not to be regarded as belonging to the dwelling-house, though standing within the same enclosure.[6] So in England, since 1827, Stat. 7 & 8 Geo. 4, c. 29, § 13, has made provision, "that no building, although within the same curtilage with the dwelling-house and occupied therewith," shall be deemed part of it, in burglary and certain aggravated larcenies, unless there is "a communication between such building and dwelling-house, either immediate, or by means of a covered and enclosed passage leading from the one to the other."[7] It is not clear how far this statute alters the law in cases where the two apart-

[1] 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, 4th ed. 357, 2 East P. C. 508; Rex *v.* Walters, 1 Moody, 13; People *v.* Parker, 4 Johns. 424, 1 Deac. Crim. Law, 185; Pond *v.* People, 8 Mich. 150.

[2] Ante, § 280; Rex *v.* Gibson, 1 Leach, 4th ed. 357, 2 East P. C. 508.

[3] 1 Hale P. C. 559.

[4] 2 East P. C. 494; 1 Gab. Crim. Law, 178, note.

[5] Ante, § 283.

[6] The State *v.* Langford, 1 Dev. 253; Armour *v.* The State, 3 Humph. 379; The State *v.* Ginns, 1 Nott & McCord, 583. And see Commonwealth *v.* Sanders, 5 Leigh, 751. A New York case holds, that burglary may be committed in a shop under the same roof with the place used for abode, and nearly surrounded by rooms so used, though it has no communication with them without going out of doors. People *v.* Snyder, 2 Parker, 23. On principle, the physical thing which protects the abode is not the enclosure around the cluster of buildings; for instance, the fence; but the walls of the building itself.

[7] So in Ireland, by Stat. 9 Geo. 4, c. 55. See 1 Gab. Crim. Law, 178.

ments are under one roof.[1] In Maine, by statute, "any house, prison, jail, or other permanent edifice, usually occupied by any person or persons by lodging therein at night, shall be deemed a dwelling-house of any such persons, although such occupants may, for a time, be absent, leaving furniture or goods, with an intention of returning; but 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;"[2] and there are, perhaps, like provisions in some of the other States.

§ 286. **Continued — No Enclosure — "Curtilage."** — Where there is no common enclosure, the question of what belongs to the dwelling-house is more involved. The enclosure is not absolutely essential:[3] where there is none, the decision concerning what out-houses are parcel turns mainly on proximity and use. A store twenty feet away, with no fence, was held not to be protected as part of the mansion;[4] and perhaps we may conclude as a question of authority, certainly as one of principle,[5] that no separate structure, not tributary in its use to purposes of habitation, will be so protected, unless within an enclosure.[6] But the privy,[7] barn, carriage-house, wood-shed, 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 unenclosed, if situated at a reasonable distance, and with nothing intervening.[8] The out-buildings, according to the English books, must be simply within the *curtilage* of the dwelling-house.[9] This word "curtilage" is defined by an American court to mean "a space necessary and convenient, and habitually used for the family purposes,

[1] 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.

[2] R. S. c. 155, § 12.

[3] The State *v.* Twitty, 1 Hayw. 102; The State *v.* Wilson, 1 Hayw. 242; The State *v.* Shaw, 31 Maine, 523; Pond *v.* People, 8 Mich. 150.

[4] People *v.* Parker, 4 Johns. 424; The State *v.* Ginns, 1 Nott & McCord, 583.

[5] Ante, § 283.

[6] And see Anonymous, J. Kel. 84.

[7] Castle's Case, 1 Hale P. C. 558.

[8] See ante, § 284. And see The State *v.* White, 4 Jones, N. C. 349.

[9] 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.

the carrying on of domestic employments; it includes the garden, if there be one, and need not be separated from other lands by a fence."[1]

§ 287. **Continued — Separate Families — Lodgers.** — Where there are separate families in a house, each part is regarded as the mansion-house of the family occupying it;[2] and the same rule applies where the entire building is let to lodgers.[3] The separate door, leading to each tenement, is to be deemed the outer door of the occupant's dwelling-house.[4] But if the owner lets to lodgers some of his rooms, retaining for habitation the residue, the whole is considered in law as the dwelling-house of the owner.[5] Still, in burglary, the separate room of a guest at a hotel has been deemed to be his dwelling-house.[6] It is, of course, not so with the room of an ordinary lodger in a private house, especially where no particular room has been assigned to him.[7] We are here, however, approaching a question of pleading, which does not belong to the present discussion.[8]

§ 288. **Continued — General View.** — These views as to the meaning of the word "dwelling-house" may seem too much extended; but the question often arises, and the authorities upon it are unfortunately not all clear. It is by no means solely a question of statutory interpretation; it enters widely into the common law of crimes; indeed, it is principally one of the common law.

§ 289. **House — Prison — Jail, &c.** — The word house includes,

[1] The State *v.* Shaw, 31 Maine, 523. And see Reg. *v.* Gilbert, 1 Car. & K. 84; People *v.* Taylor, 2 Mich. 250. See, however, Commonwealth *v.* Barney, 10 Cush. 480.

[2] Stedman *v.* Crane, 11 Met. 295; Rex *v.* Bailey, 1 Moody, 23. See also Langdon *v.* Fire Department, 17 Wend. 234; Dale *v.* The State, 27 Ala. 31.

[3] Rex *v.* Trapshaw, 1 Leach, 4th ed. 427, 2 East P. C. 506, 780; Rex *v.* Rogers, 1 Leach, 4th ed. 89, 2 East P. C. 506. But a mere sleeping in a room does not make it a dwelling-house at all. Ante, § 279.

[4] Mason *v.* People, 26 N. Y. 200.

[5] Rex *v.* Ball, 1 Moody, 30; Lee *v.* Gansel, Cowp. 1, 8. And see, as sustaining the same point, Anonymous, J. Kel. 83, 84; Rex *v.* Taylor, Russ. & Ry. 418.

[6] The State *v.* Clark, 42 Vt. 629.

[7] Markham *v.* The State, 25 Ga. 52.

[8] See, as to who shall be alleged to be the possessor of the dwelling-house, 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, 4th ed. 537, 2 East P. C. 504; The State *v.* Curtis, 4 Dev. & Bat. 222; Crim. Proced. 2d ed. II. § 137–139.

as we have seen,[1] whatever the word "dwelling-house" or "mansion-house" does, and something more; and it is the proper term in indictments for arson. There are statutes against arson, however, which employ the term "dwelling-house";[2] and the same term must therefore be used in indictments under them.[3] How much broader the word "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, but not yet actually so used.[5] If, however, it were not finished for use,[6] or were not built for habitation,[7] it would not be deemed in law a house; and, if it were finished, whether it would be arson to burn it, before persons had slept within its walls, is a question upon which the books appear not to have distinctly enlightened us.[8] Perhaps, however, the doctrine is, that actual occupancy is essential.[9] So the burning of a barn with hay and grain in it, though not parcel of the mansion-house, is arson at common law;[10] but we have no decisions that the word "house," in the indictment, would alone sufficiently describe such a barn, and it seems it would not.[11] A prison or common jail also, we have already seen,[12] is, when inhabited, both a dwelling-house and a house.[13] In arson, as in burglary, the word "house" "extends, at common law, not only to the very dwelling-house, but to all out-houses which are parcel thereof,

[1] Ante, § 277.

[2] People *v.* Cotteral, 18 Johns. 115; Reg. *v.* Fletcher, 2 Car. & K. 215; Commonwealth *v.* Barney, 10 Cush. 478; People *v.* Orcutt, 1 Parker C. C. 252.

[3] The State *v.* Sutcliffe, 4 Strob. 372.

[4] Ante, § 279.

[5] Daniel *v.* Coulsting, 7 Man. & G. 122.

[6] Elsmore *v.* St. Briavells, 8 B. & C. 461, 2 Moody & R. 514, explained in Daniel *v.* Coulsting, 7 Man. & G. 122; Reg. *v.* England, 1 Car. & K. 533; The State *v.* McGowan, 20 Conn. 245; 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.

[7] Reg. *v.* England, 1 Car. & K. 533.

[8] See, however, the State *v.* McGowan, Elsmore *v.* St. Briavells, Daniel *v.* Coulsting, and Surman *v.* Darley, supra.

[9] The State *v.* Wolfenberger, 20 Ind. 242. The statutory word here was "dwelling-house."

[10] 1 Hale P. C. 567; Sampson *v.* Commonwealth, 5 Watts & S. 385; Rex *v.* Reader, 4 Car. & P. 245.

[11] Hiles *v.* Shrewsbury, 3 East, 457. As to a school-house, see Wallace *v.* Young, 5 T. B. Monr. 155.

[12] Ante, § 207, 279.

[13] Rex *v.* Donnavan, 1 Leach, 4th ed. 69, 2 East P. C. 1020; ante, § 207, note.

though not adjoining thereto, nor under the same roof."[1] One method of determining whether 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.[2] Probably, however, the distinctions mentioned under the word "dwelling-house" apply fully in these cases of out-buildings, considered as to whether they belong to the "house"; though the point seems not quite clear.

§ 290. **Castle.**[3] — What are the nature and extent of the habitation in which a man and his goods are ordinarily protected from seizure[4] is not well defined; but we may conclude that the habitation is the same as the dwelling-house in burglary.[5] An old case decides, that a barn without the curtilage, not parcel of the mansion-house, may be broken open by the officer; but the judges, the report adds, were all agreed, that if it had been parcel it could not have been broken.[6] Though this case has been partly misunderstood by Viner[7] and some others,[8] we may infer from it,[9] from the reason of the law, and from the fact of the rule in burglary having been referred to as furnishing a parallel in other particulars,[10] that the habitation is the same in both. Thus, whatever would be a breaking in burglary, as lifting the latch of a door with no other fastening,[11] or obtaining an entrance by falsehood and craft,[12] is a breaking here; and the same protection continues during the temporary absence of the occupant.[13] But there is one difference; for burglary may be committed in breaking *inside* doors

[1] 2 East P. C. 1020; Hiles *v.* Shrewsbury, 3 East, 457; 4 Bl. Com. 221. And see The State *v.* Sandy, 3 Ire. 570; The State *v.* Terry, 4 Dev. & Bat. 185; The State *v.* Stewart, 6 Conn. 47; Chapman *v.* Commonwealth, 5 Whart. 427.

[2] Gage *v.* Shelton, 3 Rich. 242.

[3] See Crim. Law, 4th ed. II. § 653, 654; Crim. Proced. 2d ed. I. § 194–207.

[4] 4 Bl. Com. 223; Curtis *v.* Hubbard, 1 Hill, N. Y. 336, 4 Hill, N. Y. 437; 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.

[5] Ante, § 277–287.

[6] Penton *v.* Brown, 1 Keb. 698, Sid. 186.

[7] 19 Vin. Ab. 432.

[8] Burton *v.* Wilkinson, 18 Vt. 186, 189.

[9] Haggerty *v.* Wilbur, 16 Johns. 287.

[10] Lee *v.* Gansel, Cowp. 1; Curtis *v.* Hubbard, 1 Hill, N. Y. 336.

[11] Curtis *v.* Hubbard, 1 Hill, N. Y. 336, 4 Hill, N. Y. 437; People *v.* Hubbard, 24 Wend. 369.

[12] Parke *v.* Evans, Hob. 62; post, § 312.

[13] Curtis *v.* Hubbard, 4 Hill, N. Y. 437.

after an entry lawfully made;[1] while, if an officer with a writ is properly in the castle, he is entitled after demand to force open inner doors.[2] 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.[3]

§ 291. **Out-house.** — This word is sometimes found in statutes against arson, larceny, and house-breaking. An out-house is a building subservient to, yet distinct from, the principal mansion-house, located either within or without the curtilage. The term, therefore, includes all those minor erections which contribute to the purpose of habitation, whether in law a part of the dwelling-house or not;[4] but none that are either not contributory or too remote.[5] And though a rude structure, as a thatched pigsty, may be an out-house, yet the structure must be in some sense a complete building.[6] And there are statutes in which the word seems to have taken a meaning more broad than above stated. Thus, it having been made an offence in Alabama to play at cards in any "out-house where people resort"; the court decided, that an unoccupied storehouse, constituting one of a continuous line of buildings fronting on the street, was within the statute.[7]

[1] 1 Hawk. P. C. Curw. ed. p. 131, § 6.

[2] Lee *v.* Gansel, Cowp. 1, 6, 7; Broom Leg. Max. 2d ed. 325; Stedman *v.* Crane, 11 Met. 295; The State *v.* Thackman, 1 Bay, 358, Hubbard *v.* Mack, 17 Johns. 127; Williams *v.* Spencer, 5 Johns. 352.

[3] See, as to these rules, De Graffenried *v.* Mitchell, 3 McCord, 506; Walker *v.* Fox, 2 Dana, 404; Curtis *v.* Hubbard, 1 Hill, N. Y. 336; The State *v.* Thackman, supra; Platt *v.* Brown, 16 Pick. 553; Keith *v.* Johnson, 1 Dana, 604; Oystead *v.* Shed, 13 Mass. 520; Ilsey *v.* Nichols, 12 Pick. 270.

[4] The State *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 *v.* Stallion, 1 Moody, 398; Reg. *v.* Janes, 1 Car. & K. 303, 2 Moody, 308. And see Jones *v.* Hungerford, 4 Gill & J. 402; Hiles *v.* Shrewsbury, 3 East, 457.

[5] 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; The State *v.* Bailey, 10 Conn. 144, overruling the State *v.* O'Brien, 2 Root, 516. In the State *v.* Brooks, 4 Conn. 446, 448, 449, one of the judges, however, after saying, "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."

[6] Reg. *v* Janes, 2 Moody, 308, 1 Car. & K. 303; Rex *v.* Ellison, 1 Moody, 336; Rex *v.* Stallion, 1 Moody, 398; Rex *v.* Parrot, 6 Car. & P. 402.

[7] Swallow *v.* The State, 20 Ala. 30. And see Wheelock *v.* The State, 15

§ 292. **Building.** — The word "building" does not require the structure to be entirely finished.[1] And the observation has been made, that "the question, whether the state of the structure and its progress towards completion be such as to constitute a building, is a question of fact, to be submitted to the jury under proper instructions of the court."[2]

§ 293. **Warehouse.** — This word, in its popular acceptation, signifies an apartment or building for the temporary deposit of goods; and the same, according to the better opinion, is its legal meaning.[3] Therefore a cellar, in which are put goods intended for removal and sale, has been held to be a warehouse.[4]

§ 294. **Storehouse.** — Of a similar meaning to warehouse is the word "storehouse." In North Carolina it was held to include a building in which goods are kept by a retail dealer for sale.[5] The Alabama court decided, that the upper room in a house of two rooms, one above the other, accessible only by a flight of steps leading to it on the outside, and used as a sleeping-apartment by one of two proprietors of the house, who jointly retailed spirituous liquors in the lower room, was within the statutory prohibition of gaming at a storehouse for retailing spirituous liquors.[6]

§ 295. **Shop — Store.** — The words "shop" and "store" are nearly alike in meaning; indeed, they seem to have been

Texas, 260; The State *v.* Norton, 19 Texas, 102, 205. As to what is a "stable," see Rex *v.* Haughton, 5 Car. & P. 555, Reg. *v.* Cooley, 2 Moody & R. 475; an "erection," Reg. *v.* Whittingham, 9 Car. & P. 234; a "cottage," Rex *v.* Pattle, 1 Stra. 405; "premises," Swan *v.* The State, 11 Ala. 594; The State *v.* Black, 9 Ire. 378; Downman *v.* The State, 14 Ala. 242; "appurtenances," Commonwealth *v.* Easterbrook, 10 Pick. 293; "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.* Cooley, 2 Moody & R. 475.

[1] Commonwealth *v.* Squire, 1 Met. 258; Rex *v.* Worrall, 7 Car. & P. 516; Reg. *v.* Manning, Law Rep. 1 C. C. 338; Stevens *v.* Gourley, 7 C. B. N. S. 99.

[2] Commonwealth *v.* Squire, supra. See further, as to what is a building, Rex *v.* Norris, Russ. & Ry. 69; Rex *v.* Parker, 1 Leach, 4th ed. 320, note, 2 East P. C. 592; Rex *v.* Hickman, 1 Leach, 4th ed. 318, 2 East P. C. 593; Langdon *v.* Fire Department, 17 Wend. 234; Commonwealth *v.* Horrigan, 2 Allen, 159.

[3] See Owen *v.* Boyle, 22 Maine, 47; Allen *v.* The State, 10 Ohio State, 287; Wilson *v.* The State, 24 Conn. 57.

[4] Reg. *v.* Hill, 2 Moody & R. 458. Contra, Rex *v.* Godfrey, 2 East P. C. 642, 1 Leach, 4th ed. 287.

[5] The State *v.* Sandy, 3 Ire. 570.

[6] Johnson *v.* The State, 19 Ala. 527.

sometimes regarded as equivalents for each other, signifying a place where goods are kept for sale.[1] But the New Hampshire court held, that they are not exactly synonymous, observing: "We usually understand by the word 'store' a place where goods are exhibited for sale; but we do not always mean a store when we use the word 'shop.'"[2] Accordingly a blacksmith's shop has been held to be a shop.[3] And the Connecticut court has even decided, that the cabin of a vessel may be "a *shop* wherein goods, wares, and merchandise are deposited"; but this opinion has been disapproved of by some of the judges, and probably if the question were new it would not now be so held.[4]

§ 296. **Junk-shop.** — A junk-shop has been judicially defined to be "a place where odds and ends are purchased or sold." Therefore one who deals largely in buying, keeping in his storehouses, and shipping for sale, old metals, old ropes, rags, and other odds and ends, without a license, is properly convicted of keeping a junk-shop without license, within the meaning of a city ordinance prohibiting such act.[5]

§ 297. **Inn — Tavern — Hotel — House of Entertainment.** — There is some old learning from which a distinction may be drawn between an inn and a tavern, and between each of these and a hotel. But, although "inn" is the more technical and exact legal word, yet "hotel," "inn," and "tavern" seem, in modern usage, both English and American, to signify substantially the same thing; all three being, in statutes, equivalents for one another.[6] Whether they can be used as equivalents in

[1] Barth *v.* The State, 18 Conn. 432; Rex *v.* Stone, 1 Leach, 4th ed. 334, 2 East P. C. 643; Reg. *v.* Sanders, 9 Car. & P. 79. 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. People *v.* Marks, 4 Parker, 153.

[2] The State *v.* Canney, 19 N. H. 135. And see Commonwealth *v.* Lindsey, 10 Mass. 153; Commonwealth *v.* McMonagle, 1 Mass. 512.

[3] Reg. *v.* Carter, 1 Car. & K. 173, overruling Reg. *v.* Sanders, supra.

[4] The State *v.* Carrier, 5 Day, 131; Rex *v.* Humphrey, 1 Root, 63. See also Wilson *v.* The State, 24 Conn. 57. And see Wiltshire *v.* Baker, 11 C. B. N. S. 237. As to the meaning of the words "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.

[5] City Council *v.* Goldsmith, 12 Rich. 470.

[6] Hall *v.* The State, 4 Harring. Del. 132, 140; Overseers Crown Point *v.* Warner, 3 Hill, N. Y. 150, 156, 157; Bouv. Law Dict. Tavern; Webster Dict. Hotel.

pleading may perhaps be a different question.[1] It has also been held in Georgia, that the words "tavern" and "house of entertainment," as employed in the act of 1791, are synonymous; meaning the same as inn at common law.[2] An inn is a place for the general entertainment of all travellers and strangers who apply, paying a suitable compensation. It may be, but need not, for the accommodation also of their horses and carriages.[3] Yet a coffee-house is not an inn;[4] neither is a house for private lodgers;[5] nor one for entertaining company occasionally,[6] as at a watering-place during a portion of the year.[7] A man, to be a tavern-keeper, need not sell intoxicating liquor; though, on this question, the Ohio court was divided,[8] and the majority of the South Carolina judges once decided the other way.[9] A sign is not essential to an inn.[10]

§ 298. **Public Place.** — In some of the States there are statutes against gaming at "*any public place*." The words of the Alabama act are: "If any person shall play, at any tavern or inn, or store 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, at any game or games," &c.[11] And the question has been often discussed, what is the meaning of the term "public place." Evidently the relation which these words sustain to the other words of the same statute may have some influence to settle their meaning.[12] And the rule of interpretation already mentioned,[13] requiring the general terms to be so limited as not to include the specific, — stated by an American court to be, that, "when a generic term employed in

[1] And see Jones *v.* Osborne, 2 Chit. 484.

[2] Bonner *v.* Welborn, 7 Ga. 296.

[3] Thompson *v.* Lacey, 3 B. & Ald. 283; Dickerson *v.* Rogers, 4 Humph. 179; Rex *v.* Ivens, 7 Car. & P. 213; Fell *v.* Knight, 8 M. & W. 269; Kisten *v.* Hildebrand, 9 B. Monr. 72; Story Bailm. § 475; 2 Kent Com. 595.

[4] Pitt *v.* Laming, 4 Camp. 73, 76.

[5] Parkhurst *v.* Foster, 1 Salk. 387, Carth. 417.

[6] The State *v.* Mathews, 2 Dev. & Bat. 424.

[7] Bonner *v.* Welborn, 7 Ga. 296; Kisten *v.* Hildebrand, 9 B. Monr. 72.

[8] Curtis *v.* The State, 5 Ohio, 324.

[9] The State *v.* Chamblyss, Cheves, 220. See The State *v.* Hix, 3 Dev. 116; The State *v.* Cloud, 6 Ala. 628.

[10] Parker *v.* Flint, Holt, 366.

[11] Coleman *v.* The State, 13 Ala. 602. The language of the statute as stated in the later case of Windham *v.* The State, 26 Ala. 69, differs somewhat, though not materially, from this.

[12] Ante, § 245 et seq.

[13] Ante, § 247.

a statute is succeeded by one more definite in its meaning, it is necessary in an indictment predicated upon such statute that the latter term should be used," [1] — has been applied to the provision now under consideration. So that a highway, being specifically mentioned, is not included in the more general term of "public place." [2] The same result, let us observe, might seem also to follow from the use of the word "other." But a neighborhood road, not being a highway, may, under the other requisite circumstances, be a public place.[3] In considering whether a particular locality is a public place or not, the courts look at it in respect to the manner in which it was used at the time of the alleged offence.[4] Thus, if a village storehouse to which people resort for the purchase of goods, or a shop in which medicines are sold, is locked up at night, it then ceases to be a public place within the statute, though it was such during the day.[5] And the general principle seems to be, that the place must be one to which people are at the time privileged to resort, without an invitation.[6] There must also 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.[7] On the other

[1] The State *v.* Plunket, 2 Stew. 11. This rule would seem to have been latterly discarded in England. Reg. *v.* McCulley, 2 Moody, 34, 2 Lewin, 272. And see post, § 326.

[2] Bush *v.* The State, 18 Ala. 415; S. P. Windham *v.* The State, 26 Ala. 69; McCauley *v.* The State, 26 Ala. 135. An enclosed lot, ninety feet from a street, from which it is visible, is, at common law, a public place wherein an affray may be committed. Said A. J. Walker, C. J.: "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." Carwile *v.* The State, 35 Ala. 392, 393. As to a highway being a public place, see further The State *v.* Weekly, 29 Ind. 206.

[3] Mills *v.* The State, 20 Ala. 86.

[4] Sewell *v.* Taylor, 7 C. B. N. S. 160.

[5] Commonwealth *v.* Feazle, 8 Grat. 585; Clarke *v.* The State, 12 Ala. 492; Winsor *v.* Commonwealth, 4 Leigh, 680. And see Roquemore *v.* The State, 19 Ala. 528. Houses of public worship are, ordinarily and *prima facie*, to be regarded as public places for posting notices of the call of a town meeting for assessing taxes. Scammon *v.* Scammon, 8 Fost. N. H. 419.

[6] Clarke *v.* The State, supra; Roquemore *v.* The State, supra; Burdine *v.* The State, 25 Ala. 60; Sherrod *v.* The State, 25 Ala. 78.

[7] Commonwealth *v.* Vandine, 6 Grat. 689; Bythwood *v.* The State, 20 Ala. 47. See also Smith *v.* The State, 23 Ala. 39. In Alabama, a privy belonging to and in the same enclosure with a school-house is not, *in vacation*, a pub-

hand, any place may be made public by a temporary assemblage;[1] and the exclusion of a few persons is not alone sufficient to 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 that assemble there."[3] A steamboat, for example, is a public place.[4]

§ 299. **Public House.** — Similar to the definition of public place is that of the words "public house." Thus, in Alabama it is held, that the office of a justice of the peace is a "public house" within the meaning of the statute against gaming. "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."[5] And where a house consists of two rooms, front and back, with an open space intended for a door between them, and the front room is used as a magistrate's office, the back room is also within the prohibition of the statute, although only used by the partners of a dissolved firm for the occasional settlement of their outstanding accounts.[6] Likewise a storehouse in which dry goods only are sold is a public house within the meaning of this statute, though the playing is done by night, when the doors and windows are closed, and no person other than the players is present.[7] There are various other illustrations of the matter, but it need not be here minutely traced.[8]

lic house, public place, or an out-house where people resort, within Code, § 3243. McDaniel *v.* The State, 35 Ala. 390.

[1] Campbell *v.* The State, 17 Ala. 369. See Taylor *v.* The State, 22 Ala. 15.

[2] Campbell *v.* The State, supra.

[3] Coleman *v.* The State, 20 Ala. 51.

[4] Coleman *v.* The State, 13 Ala. 602. For further illustrations of what is a public place, see Farmer *v.* Commonwealth, 8 Leigh, 741; Walker *v.* Commonwealth, 2 Va. Cas. 515; Flake *v.* The State, 19 Ala. 551; Shihagan *v.* The State, 9 Texas, 430; Purcell *v.* Commonwealth, 14 Grat. 679.

[5] Burnett *v.* The State, 30 Ala. 19.

[6] Burnett *v.* The State, supra; Huffman *v.* The State, 29 Ala. 40. See also Arnold *v.* The State, 29 Ala. 46.

[7] Skinner *v.* The State, 30 Ala. 524. And see Huffman *v.* The State, 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 bedroom, 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.

[8] Moore *v.* The State, 30 Ala. 550;

§ 300. **Plantation.** — This word, occurring in the statutes of some of the States, has been defined to mean, as in common parlance, "any body of land consisting of one or several adjoining tracts, on which is a planting establishment." [1]

§ 301. **Bridge.** — Precisely how far the legal character of a bridge requires that water flow under it may not be entirely clear; but the water need not flow during all seasons of the year. Especially if there is one structure having several arches, the whole structure may be deemed in law a bridge, though under some of the arches the water passes only at flood times.[2] In New Jersey the court held, that the word "bridge," as used in a statute of the State, includes, not only the erection across the stream, but its abutments also; so finished that travellers may safely pass thereon.[3]

§ 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 public may have rights over it, or it may be purely private property; may arise from streams, or constitute the outlet of a lake; bear the appellation of river, or be known by some other word, — these particulars not being material to its legal character as a river.[4]

Wilson *v.* The State, 31 Ala. 371; Smith *v.* The State, 37 Ala. 472; Reddett *v.* The State, 17 Texas, 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 § 3243 of the Code, prohibiting gaming. Bentley *v.* The State, 32 Ala. 596. Where, upon the trial of an indictment for unlawfully playing cards in a tavern, it appeared that the room in which the game took place was a part of the house in which the tavern was kept, but had been let by the month for a shoe-shop, and was not under the control of the landlord, it was held, that the defendants could not be convicted under the North Carolina Rev. Code, § 75, c. 34. The State *v.* Keisler, 6 Jones, N. C. 73.

[1] The State *v.* Blythe, 3 McCord, 363. See also Sanderlin *v.* The State, 2 Humph. 315.

[2] 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.

[3] Sussex *v.* Strader, 3 Harrison, 108. Said Dayton, J. in this case: "The term, *a bridge*, conveys to my mind the idea of a passage-way, by which travellers and others are enabled to pass safely over a stream or other obstruction. A structure of stone or wood which spans the width of a stream, but is wholly inaccessible at either end, (whatever it may be in architecture,) does not meet my ideas of what is meant in law and common parlance by a bridge." p. 112.

[4] Webster Dict. River; Bouv. Law Dict. River; The State *v.* Gilmanton, 14 N. H. 467. As to what is a "navi-

§ 303. **Navigable River — Navigable Waters of the United States.** — It is a familiar doctrine of the English common law that rivers are deemed "navigable" as far up as the tide ebbs and flows, and no further. To this extent — that is, as far as the tide rises and falls — a river is navigable, even though the water is not brackish, and up it there is no current.[1] In this country, the doctrine is usually much extended, and it may be stated in the language of Field, J. sitting in the Supreme Court of the United States, as follows: "Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide; and, from this circumstance, tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers 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 point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when 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. 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 the doctrine thus laid down, Grand River, in Michigan, was held to constitute a portion of the

gable stream," see Munson *v.* Hungerford, 6 Barb. 265.

[1] People *v.* Tibbetts, 19 N. Y. 523.

"navigable waters of the United States."[1] This, also, is the doctrine of various State tribunals.[2]

§ 304. **High Seas.** — The words "high seas" seem to admit of some contraction and expansion of meaning, according to the connection in which they are employed. In an English case, a British vessel, having crossed the ocean, and being 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 on the high seas.[3] Under the statutes of the United States, however, so extended a meaning has not been given to this term: it includes 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; though not, on our own coast, when within such boundaries.[4] And the Supreme Court of the United States has held, under our statutes, that an American vessel off the before-mentioned Whampoa, said in the case to be on the river Tigris thirty-five miles from its mouth, is not on the high seas.[5] The same, in the Circuit Court for the District of Massachusetts, was held of the waters of a bay entirely landlocked and enclosed by reefs;[6] also, of an enclosed dock in a foreign port, Story, J. observing: "The admiralty 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."[7] But an open roadstead is deemed a part of the high seas.[8] And there appears to be a sense in which, relating to matters other than those we are here discussing, the word "sea" comprehends all waters extending inland as far as the tide flows.[9]

[1] The Daniel Ball, 10 Wal. 557, 563.

[2] See, for example, McManus *v.* Carmichael, 3 Iowa, 1; Tyler *v.* People, 8 Mich. 320; Depew *v.* Trustees, &c. 5 Ind. 8.

[3] Rex *v.* Allen, 7 Car. & P. 664, 1 Moody, 494.

[4] United States *v.* Pirates, 5 Wheat. 184, 200; United States *v.* Smith, 1 Mason, 147; United States *v.* Ross, 1 Gallis. 624; United States *v.* Grush, 5 Mason, 290; Johnson *v.* Merchandise, 2 Paine, 601.

[5] United States *v.* Wiltberger, 5 Wheat 76.

[6] United States *v.* Robinson, 4 Mason, 307.

[7] United States *v.* Hamilton, 1 Mason, 152.

[8] United States *v.* Pirates, 5 Wheat. 184, 200; United States *v.* Ross, 1 Gallis. 624. See United States *v.* Davis, 2 Sumner, 482.

[9] Thackarey *v.* The Farmer, Gilpin, 524, 1 Curt. Com. § 38. As to the meaning of the words "beyond seas,"

§ 305. **Sea-shore.** — "The sea-shore," said Parsons, C. J. "must be understood to be the margin of the sea, in its usual and ordinary state. Thus when the tide is out, low-water mark is the margin of the sea; and, when the sea is full, the margin is high-water mark. The sea-shore is, therefore, all the ground between the ordinary high-water mark and low-water mark." [1]

III. *The Thing done.*

§ 306. **Utter — Uttering.** [2] — These words occur frequently in the law of forgery, counterfeiting, and the like; meaning, substantially, to offer. If one offers another a thing, — as, for instance, a forged instrument or a piece of counterfeit coin, intending it shall be received as good, — he utters it, whether the thing offered is accepted or not. It is said, that the offer need not go as far as a tender.[3] But, to constitute an uttering, there must be a complete attempt to do the particular act the law forbids; [4] though there may be a complete conditional uttering, as well as any other, which will be criminal.[5] In an English case the majority of the judges held, that, where a man gave his servant forged stamps to be delivered to another person in another county (the fact being, that the servant was himself innocent in the matter), the act of uttering the stamps might be deemed to have been done at the place where the servant took them.[6] This point is doubtful on principle; because

see Campbell *v.* Rankins, 2 Fairf. 103; Mason *v.* Johnson, 24 Ill. 159.

[1] Storer *v.* Freeman, 6 Mass. 435, 439; 3 Kent Com. 431. And see Commonwealth *v.* Charlestown, 1 Pick. 180, 182.

[2] See Crim. Law, 4th ed. II. § 565; Crim. Proced. 2d ed. II. § 425.

[3] Reg. *v.* Welch, 2 Den. C. C. 78, 1 Eng. L. & Eq. 588, Temp. & M. 409, 15 Jur. 136; 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; Rex *v.* Martin, 1 Moody, 483, 7 Car. & P. 549; United States *v.* Mitchell, Bald. 366; Reg. *v.* Radford, 1 Den. C. C. 59; People *v.* Brigham, 2 Mich. 550. Said Tilghman, C. J. in Commonwealth *v.* Searle, 2 Binn. 332, 339, "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.

[4] See and compare Reg. *v.* Loughran, 3 Crawf. & Dix C. C. 333; Rex *v.* Collicott, Russ. & Ry. 212, 4 Taunt. 300; Reg. *v.* Heywood, 2 Car. & K. 352; The State *v.* Beeler, 1 Brev. 482.

[5] Reg. *v.* Cooke, 8 Car. & P. 582; Rex *v.* Birkett, Russ. & Ry. 86.

[6] Rex *v.* Collicott, Russ. & Ry. 212, 4 Taunt. 300.

the master did not mean the servant should receive as for himself the stamps, and so they were no more put off to him than if he had been an inanimate object controlled by the master. At the same time, there seems to be ground for considering the act of delivering the forged stamps to the servant as an indictable attempt to cheat the other person; though hardly amounting to an uttering.

§ 307. **Put off.**[1] — 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 also. Therefore, where counterfeit coin had been bargained away and counted out, but the transfer was not complete when the guilty person was arrested, the court held, that it had not been put off.[2]

§ 308. **Passing.** — "Passing" a paper is putting it off in payment or exchange.[3] There must be a receiving of it by the person to whom it is passed.[4] If there is, at the same time, an agreement to take back the thing passed, on its proving not to be good, still the passing is complete.[5] But a mere pledge of the thing has been held, by the majority of the Tennessee judges, not to be a passing.[6] Perhaps this last point may be doubtful on principle.

§ 309. **Show forth in Evidence.** — These words in a statute refer to a judicial proceeding, in which the thing shown forth in evidence is offered; and they are not, therefore, equivalent to the words utter and publish.[7]

§ 310. **Burn — Burning.** — The word "burn" enters into the definition of arson at common law; and it occurs in many statutes. It means to consume by fire. If the wood is blackened, but no fibres are wasted, there is no burning; yet the wood need not be in a blaze.[8] And the burning of any part,

[1] See Crim. Law, 4th ed. II. § 275, 566.

[2] Rex *v.* Wooldridge, 1 Leach, 4th ed. 307, 1 East P. C. 179. And see Rex *v.* Giles, 1 Moody, 166; Rex *v.* Palmer, Russ. & Ry. 72, 1 New Rep. 96, 2 Leach, 4th ed. 978.

[3] United States *v.* Mitchell, Bald. 366.

[4] Ante, § 306, note.

[5] Perdue *v.* The State, 2 Humph. 494.

[6] Gentry *v.* The State, 3 Yerg. 451.

[7] The State *v.* Britt, 3 Dev. 122; The State *v.* Stanton, 1 Ire. 424. As to *having in possession*, see Commonwealth *v.* Whitmarsh, 4 Pick. 233; Commonwealth *v.* Morse, 2 Mass. 128; Rex *v.* Rowley, Russ. & Ry. 110.

[8] Reg. *v.* Russell, Car. & M. 541; Reg. *v.* Parker, 9 Car. & P. 45; Rex *v.* Stallion, 1 Moody, 398.

however small, completes the offence, the same as of the whole.[1] Thus, if the floor of the house is charred in a single place, so as to destroy any of the fibres of the wood, this is a sufficient burning in a case of arson.[2]

§ 311. **Set Fire to.**[3] — These words have not been minutely defined, but they mean substantially, or, at least, nearly, the same as burn.[4] There need not be a flame visible,[5] yet there must be some consumption of the wood.[6] A different doctrine, however, has been held under a statutory provision in Vermont. There a statute having provided a special punishment for any person who should "wilfully and maliciously set fire, with intent to burn, to the dwelling-house of another," the court held, that, to justify a conviction under this statute, there need not be proof of any portion of the building having been actually burned. It is sufficient if the fire was applied to, or put immediately in contact with, the building, with intent to burn it, though such intent failed to be carried into execution. The judges admitted that this decision was contrary to the English doctrine, but observed: "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 offence intended to be covered by the statute was something short of an actual burning." And it was deemed that the words themselves "may as reasonably and fairly be understood the same as *put fire to*, or *place fire upon*, or *against*, or *put fire in connection with*," as actually to burn. Thus, the court considered, the language and intent of the statute could be brought into harmony.[7]

§ 312. **Break — Breaking.** — We speak of breaking and entering a dwelling-house, being a part of the definition of bur-

[1] Commonwealth *v.* Van Shaack, 16 Mass. 105; The State *v.* Mitchell, 5 Ire. 350.

[2] Reg. *v.* Parker, supra; The State *v.* Sandy, 3 Ire. 570; Commonwealth *v.* Betton, 5 Cush. 427; People *v.* Cotteral, 18 Johns. 115; People *v.* Butler, 16 Johns. 203.

[3] See Crim. Proced. 2d ed. I. § 613.

[4] 2 East P. C. 1020; Commonwealth *v.* Van Shaack, 16 Mass. 105. It has been held, that the words "set fire to" are not a legal equivalent for "burn," in an indictment. Howell *v.* Commonwealth, 5 Grat. 664. To the like effect see Mary *v.* The State, 24 Ark. 44, 47; Cochrane *v.* The State, 6 Md. 400, 405.

[5] Rex *v.* Stallion, 1 Moody, 398.

[6] Rex *v.* Taylor, 1 Leach, 4th ed. 49, 2 East P. C. 1020.

[7] The State *v.* Dennin, 32 Vt. 158, 164, 165.

glary at common law; of an officer's having no right to break into a man's castle to serve process on him;[1] and the word is frequently found, in like connections, in statutes. It does not convey to the legal mind the idea of force and violence: the mere lifting of a latch, and so opening a door not otherwise fastened;[2] or pushing upward or lowering a window-sash, which is held by only a wedge or a pulley weight;[3] or raising a trap-door meant to be kept down merely by its own gravitation;[4] or procuring by craft,[5] or by threats and intimidation,[6] a person within the house to open the door; is, in legal contemplation, a breaking. And where the door had no lock, latch, or other fastening, but fitted closely within the casing, and force was required to push it open, the pressing open of this door was held to be a breaking.[7] So the removal of a portion of the building, however small, as a pane of glass, or any part of a shutter, is sufficient.[8] The Massachusetts court held, that cutting and tearing down a netting of twine, nailed at the top, bottom, and sides of a window so as to cover it, and entering the house at the window, are enough in burglary; though the window had been left otherwise open by the occupant of the house. "It makes no difference," said the judge, "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

[1] Ante, § 277, 290.

[2] J. Kel. 67; Rex *v.* Gray, 1 Stra. 481; Reg. *v.* Wheeldon, 8 Car. & P. 747; The State *v.* Wilson, Coxe, 439; Curtis *v.* Hubbard, 1 Hill, N. Y. 336, 4 Hill, N. Y. 437. And see The State *v.* Newbegin, 25 Maine, 500; ante, § 290.

[3] Rex *v.* Haines, Russ. & Ry. 451; Rex *v.* Hall, Russ. & Ry. 355. And see Rex *v.* Robinson, 1 Moody, 327; Rex *v.* McKearney, Jebb, 99; Rex *v.* Bailey, Russ. & Ry. 341, 1 Moody, 23; Reg. *v.* Bird, 9 Car. & P. 44.

[4] Rex *v.* Russell, 1 Moody, 377; Rex *v.* Brown, 2 East P. C. 487, 2 Leach, 4th ed. 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.* Commonwealth, 7 Grat. 641; Roscoe Crim. Ev. 341.

[5] Park *v.* Evans, Hob. 62; Rex *v.* Hawkins, 1 East P. C. 485; Ducher *v.* The State, 18 Ohio, 308; Rex *v.* Bigley, 1 Crawf. & Dix C. C. 202. But see The State *v.* Henry, 9 Ire. 463.

[6] Rex *v.* Swallow, 1 Russ. Crimes, Grea. ed. 792.

[7] Finch *v.* Commonwealth, 14 Grat. 643.

[8] Rex *v.* Perkes, 1 Car. & P. 300; Reg. *v.* Bird, 9 Car. & P. 44; Anonymous, Anderson, 115; Gibbon's Case, Foster, 107; Rex *v.* Bailey, Russ. & Ry. 341, 1 Moody, 23; Rese *v.* Davis, Russ. & Ry. 499; Rex *v.* Hughes, 1 Leach, 4th ed. 406, 2 East P. C. 491.

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."[1] But if a door or window is open a little way, it is not breaking the house to push it further open.[2] And the thing displaced must be a part of the freehold.[3] As the chimney, however, is not intended to be shut at all, an entrance there is a breaking, though nothing is moved.[4] Yet it is no breaking to walk into an open door or window.[5]

§ 313. **Forcibly Break.** — In Ohio, under a statute making it criminal to "forcibly break and enter" a building, actual force has been held not to be necessary; but a breaking at common law, such as our last section describes, is sufficient.[6]

§ 314. **Wound — Wounding.** — A wound is a breach of the skin, or of the skin and flesh, produced by external violence.[7] The word occurs in several statutes, English and American; and in some of them its meaning seems to be somewhat modified by the connection in which it stands, and the subject to which it is applied. Thus the words of Stat. 7 Will. 4 & 1 Vict. c. 85, § 4, as also of the former Stat. 9 Geo. 4, c. 31, § 12, are "stab, cut, or wound"; and it has been 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;[8] and that, therefore, a wound in-

[1] Commonwealth *v.* Stephenson, 8 Pick. 354, opinion by Parker, C. J.

[2] Rex *v.* Smith, 1 Moody, 178, Car. Crim. Law, 3d ed. 293; Commonwealth *v.* Steward, 7 Dane Ab. 136. The majority of the Scotch judges held, that it is not house-breaking to enter by means of the key left in the door locked on the outside. Alston's Case, 1 Swinton, 433.

[3] Commonwealth *v.* Trimmer, 1 Mass. 476; Rex *v.* Paine, 7 Car. & P. 135; ante, § 281.

[4] Rex *v.* Brice, Russ. & Ry. 450; The State *v.* Boon, 13 Ire. 244.

[5] The State *v.* Boon, supra; Rex *v.* Lewis, 2 Car. & P. 628; Commonwealth *v.* Steward, 7 Dane Ab. 136; Anonymous, J. Kel. 70; The State *v.* Wilson, Coxe, 439.

[6] Ducher *v.* The State, 18 Ohio, 308. The passing of a toll-gate against the keeper's consent, refusal having been given by him on account of the non-payment of toll, is a "*forcible passing*," within the meaning of a statute on this subject. Camden Turnpike *v.* Fowler, 4 Zab. 205. 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.

[7] In The State *v.* Leonard, 22 Misso. 449, 451, it is said: "In criminal cases, the definition of a wound is an injury to the person by which the skin is broken."

[8] See ante, § 245.

flicted with the teeth, as in biting off the finger or nose, is not within the statute.[1] But the kind of instrument is immaterial, provided it really produces a wound. A blow from a hammer,[2] from the but-end of a gun,[3] or from a bludgeon,[4] or a kick with a shoe,[5] parting the skin, is as good in law as a cut from a sharp instrument; nor is it any objection that the instrument, instead of inflicting the wound directly, falls on some other thing, as the hat of the party injured, and the latter breaks or cuts the skin.[6] Yet oil of vitriol, thrown on a person's face, is not sufficiently an instrument to bring the wound within the statute.[7] The injury need not extend below the skin, and there need not be effusion of blood; yet the entire skin must be divided, a separation of only the cuticle or upper membrane being insufficient.[8] But if the internal skin, as that within the mouth, is broken, it is the same as the external.[9] Nothing, it seems, will stand in the stead of this parting of the skin; for, where a man's person was bruised, and his collar-bone fractured, this was held not to be a wounding.[10] But under Stat. 9 Geo. 1, c. 22, § 1, providing a punishment for those who should "unlawfully and maliciously kill, maim, or *wound* any cattle," &c., it was held that driving a nail into the frog of a horse's foot was a wounding, — "which word 'wound,'" the judge said, "appears to be used as contradistinguished from a permanent injury, such as maiming."[11]

[1] Jenning's Case, 2 Lewin, 130; Elmsley's Case, 2 Lewin, 126; Rex *v.* Stevens, 1 Moody, 409; Rex *v.* Harris, 7 Car. & P. 446.

[2] Reg. *v.* Smith, 8 Car. & P. 173; Rex *v.* Withers, 1 Moody, 294, 4 Car. & P. 446; Rex *v.* Hughes, 2 Car. & P. 420.

[3] Rex *v.* Sheard, 2 Moody, 13, 7 Car. & P. 846.

[4] Rex *v.* Payne, 4 Car. & P. 558.

[5] Rex *v.* Briggs, 1 Moody, 318, 1 Lewin, 61.

[6] Reg. *v.* Sheard, 2 Moody, 13, 7 Car. & P. 846.

[7] Rex *v.* Murrow, 1 Moody, 456; Henshall's Case, 2 Lewin, 135. And see 1 Russ. Crimes, Grea. ed. 731.

[8] Reg. *v.* McLoughlin, 8 Car. & P. 635; Rex *v.* Beckett, 1 Moody & R. 526; Commonwealth *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.

[9] Reg. *v.* Smith, 8 Car. & P. 173; Reg. *v.* Warman, 1 Den. C. C. 183.

[10] Rex *v.* Wood, 4 Car. & P. 381.

[11] Heywood's Case, 2 East P. C. 1076, 1077. According to the report of this case by Russell and Ryan, (Rex *v.* Heywood, Russ. & Ry. 16,) the sole question submitted to the judges was, whether an injury not permanent is within the statute. Besides, as the injury here was to a part where nature has provided no skin, or where perhaps the hoof may be deemed the skin, the decision is not probably in conflict with the general doctrine; yet perhaps the particular wording of this statute re-

§ 315. **Cut — Cutting — Stab — Stabbing.** — The words cut and stab, we have seen,[1] are used in the English statutes together. They "relate only to such wounds as are made by an instrument capable of stabbing or cutting; stabbing being properly 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."[2] Though the instrument must be of a kind capable of cutting or stabbing, this need not be the purpose for which it was made. Thus a blow from the sharp claw of a hammer,[3] or the sharpened point of an iron crow,[4] may inflict a cut; but neither from the blunt end of a hammer,[5] nor from a square iron bar producing a contused or lacerated gash,[6] nor from the scabbard of a sword,[7] nor from the handle of a windlass,[8] — does the blow inflict a cut. The New Jersey court once held, that, if the nose is bitten off, it is cut off, within the statute of the State;[9] but this decision is not reconcilable with the English doctrine.[10] Under the English statute of 1 Jac. 1, c. 8, § 2, providing a punishment for any one who "shall stab or thrust any person," &c., "the killing," says Hawkins, "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."[11]

§ 316. **Maim — Maiming.**[12] — The word "maim" implies a permanent injury.[13] Such is its signification under a statute

quired the term "wound" to be construed as meaning something different from what it does in the other statutes.

[1] Ante, § 314.

[2] 1 Russ. Crimes, Grea. ed. 728; ante, § 298; Rex *v.* McDermot, Russ. & Ry. 356. See, however, ante, § 247, 248; post, § 326.

[3] Rex *v.* Atkinson, Russ. & Ry. 104, Russ. Crimes, Grea. ed. 728.

[4] Rex *v.* Hayward, 1 Russ. Crimes, Grea. ed. 729, Russ. & Ry. 78.

[5] Rex *v.* Atkinson, supra.

[6] Rex *v.* Adams, 1 Russ. Crimes, Grea. ed. 728.

[7] Rex *v.* Whitfield, 1 Russ. Crimes, Grea. ed. 728.

[8] Anonymous, 1 Russ. Crimes, Grea. ed. 728.

[9] The State *v.* Mairs, Coxe, 453.

[10] See Rex *v.* Harris, 7 Car. & P. 446; ante, § 314.

[11] 1 Hawk. P. C., Curw. ed., p. 90, § 8.

[12] See Crim. Law, 4th ed. II. § 969 et seq.

[13] The State *v.* Briley, 8 Port. 472.

making it indictable to "kill, maim, or wound any cattle";[1] and the same appears to be its general legal meaning.[2] At the common law, a maim, or mayhem, is such an injury as renders a man less able, in fighting, to defend himself or annoy his adversary;[3] but the word "maim" is not always to be understood in so technical a sense in statutes. In Massachusetts, the legislature having made it a misdemeanor to cut off the ear with intent to maim, the court observed, that the word "maim" in the statute was used in the popular sense of mutilate, and not as synonymous with the technical word mayhem.[4] And in Arkansas, the common law of maim is somewhat changed by a statute which provides, that maiming shall 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."[5] In some other States, also, there are statutory definitions of the offence of mayhem.[6] The English judges have held, that pouring acid into the eye of a mare, and thereby blinding her, is a maiming within Stat. 7 & 8 Geo. 4, c. 30, § 16, which makes it felony to "unlawfully and maliciously kill, maim, or wound any cattle."[7]

§ 317. **Slit the Nose.**[8] — These words are answered by any division, perpendicular or transverse, of the flesh or gristle.[9]

§ 318. **Grievous Bodily Harm.** — "Grievous bodily harm 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";[10] much less need they put the life in hazard.[11] For example, to cut the private parts of a female child, and thus enlarge them, for the time, the

[1] Roscoe Crim. Ev. 375, 376; Reg. *v.* Jeans, 1 Car. & K. 539; ante, § 314. And see Baker *v.* The State, 4 Pike, 56.

[2] The State *v.* Briley, 8 Port. 472, where the same meaning was given to the word "disabling," in the statute.

[3] 1 Hawk. P. C., Curw. ed., p. 107, § 1, 2; Roscoe Crim. Ev. 785.

[4] Commonwealth *v.* Newell, 7 Mass. 245, 249.

[5] Baker *v.* The State, 4 Pike, 56.

[6] The State *v.* Briley, 8 Port. 472; The State *v.* Simmons, 3 Ala. 497. As to the word "disfiguring," see The State *v.* Smith, Cheves, 157.

[7] Rex *v.* Owens, 1 Moody, 205.

[8] See Crim. Law, 4th ed. II. § 971; Crim. Proced. 2d ed. II. § 855.

[9] Rex *v.* Carroll, 1 Leach, 4th ed. 55, 1 East P. C. 394.

[10] Archb. New Crim. Proced. 264.

[11] 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.

wound being neither deep nor dangerous, and the hymen not being ruptured, is a grievous bodily harm.[1]

IV. *The Objects acted upon and the Instrumentalities.*

§ 319. **Tool — Instrument — Implement.** — These words are generally found together in statutes. In meaning they are nearly alike, but probably not exactly so;[2] and they denote some inanimate thing, which ordinarily can be handled and used with the hands. A game-cock, therefore, being a live animal, is not an implement of gaming.[3] And a printing-press with the types and forms is not a tool, within statutes specifying what property of a debtor is exempt from attachment.[4] Neither is a mill-saw worked by water-power;[5] nor are cart-wheels, and other parts or the whole of vehicles drawn by horses or by oxen;[6] nor are the moulds of a paper manufacturer;[7] nor is a portable machine, of the kind used in factories for spinning and manufacturing cloth, even though propelled by the hand;[8] nor, it has been held, is a peg-machine, used by a single person, and operated by hand power,[9] — a tool within these statutes. 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 for coinage,[11] as also a mould,[12] has been held to be such tool or instrument, within the English statutes; in which statutes, however, the meaning of these words may perhaps be enlarged by the connection in which they are used. So, the English judges unanimously held that a collar, as it was called, employed for marking the edge of a counterfeit coin, the process being to force the coin through the collar by machinery, is an edger, edging tool, instrument, or engine.[13] Of course, if the statute speaks of an instrument *for*

[1] Rex *v.* Cox, Russ. & Ry. 362.

[2] See Atwood *v.* De Forest, 19 Conn. 513; Coolidge *v.* Choate, 11 Met. 79.

[3] Coolidge *v.* Choate, supra.

[4] Buckingham *v.* Billings, 13 Mass. 82; Danforth *v.* Woodward, 10 Pick. 423; Spooner *v.* Fletcher, 3 Vt. 133. Contra, Patten *v.* Shepard, 4 Conn. 450.

[5] Batchelder *v.* Shapleigh, 1 Fairf. 135.

[6] Daily *v.* May, 5 Mass. 313.

[7] Burbank *v.* Reed, cited 2 Vt. 406.

[8] Kilburn *v.* Deming, 2 Vt. 404.

[9] Knox *v.* Chadbourne, 28 Maine, 160.

[10] The State *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, 4th ed. 90, 1 East P. C. 170.

[13] Rex *v.* Moore, 1 Moody, 122, 2 Car. & P. 235.

a particular purpose, it is not within the act unless the possessor of it intends to employ it for the purpose; yet there is no need the instrument should be adapted only for that use. Keys, therefore, are instruments of house-breaking, or not, according to the intent of the person having them.[1] But these words are all probably somewhat elastic, to be compressed and enlarged by the accompanying words, and the subject to which they relate. And the word "instrument," for example, has sometimes in law a meaning different entirely from the one now under consideration; as where we speak of an instrument in writing.

§ 320. **Deadly Weapon — Dangerous Weapon.** — A deadly weapon is one likely to produce death or great bodily injury.[2] The question, whether a particular weapon is deadly or not is one of law for the court, not of fact for the jury.[3] Upon an indictment, under a statute of the United States, for robbing the mail and putting in jeopardy the life of the mail-carrier, it

[1] 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.

[2] The State *v.* Jarrott, 1 Ire. 76, 87.

[3] The State *v.* Collins, 8 Ire. 407; The State *v.* Cæsar, 9 Ire. 391; The State *v.* Craton, 6 Ire. 164. Such is the general proposition; but the question is often a complicated one of law and fact. Thus, Curtis, J. left it to the jury, under directions from the court, to determine whether a belaying-pin was a "dangerous weapon," as actually used. He said: "I think, as actually used, the weapon must have been dangerous to life. Thus a small pistol, when loaded, is undoubtedly a dangerous weapon; and, if pointed toward a person within striking distance, with a present intention of discharging it, an assault with a dangerous weapon is committed. But if not loaded, and used only to push or strike with, a small pistol could not be considered a weapon dangerous to life. So the thing said to be used by the defendant may, in the hand of a strong man, be capable of endangering life by a blow on the head; but not dangerous to life if the arm or leg be struck with it. And if it be so, then an assault on a person by striking at, or attempting to strike at, his head with this instrument, being within striking distance, would be an assault with a dangerous weapon; while an attempt to strike his arm with it would not be such an assault. 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 when 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; and it must be left for them to decide whether the assault, if committed, was with a dangerous weapon." United States *v.* Small, 2 Curt. C. C. 241, 243. See also The State *v.* Jarrott, 1 Ire. 76; Rex *v.* Grice, 7 Car. & P. 803; The State *v.* Dineen, 10 Minn. 407.

was considered that a sword or pistol in the hand of the robber, through terror of which the robbery is effected, is a "dangerous weapon," though the sword is not drawn or the pistol not pointed.[1] And a pistol may be regarded as a dangerous weapon, even without proof of its having been loaded.[2]

§ 321. **Offensive Weapon.** — These words occur in several present and repealed English statutes, which forbid the doing of certain things, "armed with fire-arms or other offensive arms or weapons,"[3] "carrying offensive arms or weapons,"[4] "with an offensive weapon or instrument,"[5] and other like expressions. No exact definition has been given to the words "offensive weapon"; yet they are understood to include, not only guns, pistols, daggers, and instruments of war; together with bludgeons, properly so called, clubs, and other things used only as weapons;[6] but also heavy walking-sticks, crutches, and the like, which latter are deemed offensive weapons or not, according to the intent with which the person uses or carries them.[7] On the other hand, a common horsewhip;[8] bats, being long poles employed by smugglers with which to convey away tubs of spirits;[9] and large sticks, some three feet long, with knobs at the ends, and with some prongs, the natural growth of the timber;[10] have severally been held not to be offensive weapons: the impression indeed seems to have prevailed, that, to be offensive, they must be what the law calls dangerous.[11]

§ 322. **Loaded Arms.** — A pistol loaded with gunpowder and ball, yet having its touch-hole so plugged that it cannot possibly be fired, is not "loaded arms" within the English statute of 9 Geo. 4, c. 31, § 11 and 12;[12] the words of which are, — "shall, by drawing a trigger, or in any other manner, attempt

[1] United States *v.* Wood, 3 Wash. C. C. 440.

[2] United States *v.* Wilson, Bald. 78.

[3] 9 Geo. 2, c. 35, § 10; 6 Geo. 4, c. 108, § 56.

[4] 3 & 4 Will. 4, c. 53, § 60.

[5] 7 Geo. 2, c. 21.

[6] Cosan's Case, 1 Russ. Crimes, Grea. ed. 119, 1 Leach, 4th ed. 342, note.

[7] Rex *v.* Palmer, 1 Moody & R. 70; Rex *v.* Johnson, Russ. & Ry. 492, 2 East P. C. 488, 1 Russ. Crimes, Grea. ed. 120; Rex *v.* Fry, 2 Moody & R. 42; ante, § 219.

[8] Rex *v.* Fletcher, 1 Leach, 4th ed. 23, 342, note, 2 Stra. 1166.

[9] Rex *v.* Noakes, 5 Car. & P. 326.

[10] Rex *v.* Ince, 1 Leach, 4th ed. 342, note.

[11] And see 1 Russ. Crimes, Grea. ed. 119, 120; Rex *v.* Grice, 7 Car. & P. 803.

[12] Rex *v.* Harris, 5 Car. & P. 159.

to discharge any kind of loaded arms at any person." And where one sent to another a tin box, with three pounds of gunpowder in it, and two detonators to ignite the gunpowder when the box should be opened, intending to destroy the person opening the box, — the court held, that this was not an attempt to discharge loaded arms at him.[1]

§ 323. **Weapon drawn.** — A snead has been deemed a weapon drawn;[2] so also has a pot, thrown at another.[3]

§ 324. **Destructive Matter.** — Boiling water is destructive matter, within Stat. 7 Will. 4 & 1 Vict. c. 85, § 5, making it felony, under circumstances, to "cast or throw upon, or otherwise apply to, any person any corrosive fluid or other destructive matter."[4]

§ 325. **Words employed in Statutes against Forgery, Larceny, &c., to designate Classes of Written Instruments.** — There are many English and American statutes, existing and repealed, relating to various subjects in the criminal law, particularly to larceny, receiving stolen goods, and forgery, wherein such words as "deed," "bill of exchange," "promissory note," "order for the payment of money," and the like, are found. Thus Stat. 11 Geo. 4 & 1 Will. 4, c. 66, § 3, makes it felony to forge, &c., "any will, testament, codicil, or testamentary writing; or any bill of exchange, or any promissory note for the payment of money; or any indorsement on, or assignment of, any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange; or any undertaking, warrant, or order for the payment of money, with intent," &c. And § 10 makes it felony to forge, &c., any "deed, bond, or writing obligatory; or any court roll or copy of any court roll relating to any copyhold or customary estate; or any acquittance or receipt either for money or goods, or any accountable receipt either for money or goods, or for any note, bill, or other security for payment of money; or any warrant, order, or request for the delivery or transfer of goods, or for the delivery of any note, bill, or other security for payment of money,

[1] Rex *v.* Mountford, 7 Car. & P. 242, 1 Moody, 441.

[2] Keat's Case, Skin. 666, 668.

[3] 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." Ib. p. 256.

[4] Reg. *v.* Crawford, 2 Car. & K. 129, 1 Den. C. C. 100,

with intent," &c. These sections are cited as specimens of the enactments now under consideration.

§ 326. **Continued.** — We have seen,[1] that, according to some decisions, while a ewe is a sheep if the statute employs only the word "sheep," yet, if it has both words, in the alternative, the word "sheep" is not to extend so far in meaning as to include the ewe; the law as laid down by an American court being, that the more general terms are not to comprehend the more specific.[2] But this principle is not universal; it seems to have been greatly qualified or wholly discarded in England;[3] and, if we allow it any existence, we cannot easily define its exact limits. It has not had much influence in the interpretation of the statutes mentioned in our last section; 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 particular writing may be equally well described by any one of the alternative words of the statute.[4] Where, however, one section provided a particular penalty for passing counterfeit bank-bills; and another section a different penalty for passing counterfeit promissory notes; it was held, that, although the words "promissory notes" would, on general principles, include bank-bills, yet they could not be so construed here, otherwise the two sections would be repugnant to each other.[5] It may be further observed, concerning the statutes we are considering, that they comprehend as well written securities issued under the laws of foreign States and countries, if of current value in the locality where the offence is committed, as domestic.[6]

[1] Ante, § 247; Rex *v.* Cook, 1 Leach, 4th ed. 105, 2 East P. C. 616.

[2] Ante, § 298, 314, 315.

[3] Reg. *v.* McCulley, 2 Moody, 34, 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.

[4] 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, 1 Leach, 4th ed. 226; Reg. *v.* Smith, 2 Moody, 295; Reg. *v.* Gilchrist, Car. & M. 224; The State *v.* Wilkins, 17 Vt. 151; The State *v.* Wilson, 3 Brev. 196; Reg. *v.* White, 9 Car. & P. 282.

[5] The State *v.* Ward, 6 N. H. 529. For the same principle, see also People *v.* Howell, 4 Johns. 296. And see ante, § 168.

[6] Commonwealth *v.* Hensley, 2 Va. Cas. 149; Cummings *v.* Commonwealth, 2 Va. Cas. 128; People *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

§ 327. **Order for the Payment of Money — Order for the Delivery of Goods.**[1] — An order is a written direction, addressed by 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 in fact under such obligation, commanding him how to appropriate the fund or thing. This definition substantially describes the order according to what appears to be the English rule, yet the American cases differ somewhat from the English. According to this definition, and according to the decisions of all the tribunals, there are two kinds of orders; namely, such as are orders on their face; and such as, not being on their face orders, may be shown to be orders by averment and proof.

§ 328. **Continued.** — If a writing has on its face 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.[2] Whether particular words are sufficient, within this branch of the definition, may be a question nice and delicate. The tests are, that there must be apparently a drawer; that he must appear to have a disposing power over the fund or the goods; that there must appear to be a person drawn upon, apparently under obligation to obey;[3] and there must appear to be a person to whom the delivery or payment is to be made,[4] sufficient to exclude uncertainties of meaning in this respect,[5] though there is doubt whether the payee need

Rex *v.* Goldstein, 7 Moore, 1, 3 Brod. & B. 201, 10 Price, 88, Russ. & Ry. 473; Rex *v.* Dick, 1 Leach, 4th ed. 68, 2 East P. C. 925; Lewis *v.* Commonwealth, 2 S. & R. 551; ante, § 205; post, § 340.

[1] See Crim. Law, 2d ed. II. § 525, 797; Crim. Proced. 2d ed. II. § 473.

[2] Rex *v.* Lockett, 1 Leach, 4th ed. 94, 2 East P. C. 940; Reg. *v.* Carte, 1 Car. & K. 741; Rex *v.* Clinch, 1 Leach, 4th ed. 540, 544; People *v.* Way, 10 Cal. 336. And see Rex *v.* Froud, 3 Moore, 645, 7 Price, 609, 1 Brod. & B. 300, Russ. & Ry. 389; 2 Russ. Crimes, Grea. ed. 520; Reg. *v.* Illidge, 2 Car. & K. 871, 875.

[3] Rex *v.* Baker, 1 Moody, 231; Rex *v.* Clinch, 1 Leach, 4th ed. 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; 2 Russ. Crimes, Grea. ed. 516, 519, 520, 522.

[4] 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.

[5] People *v.* Farrington, 14 Johns. 348.

be mentioned by name.[1] The writing need not concern commercial transactions;[2] and if the payee purports to be merely the agent of the drawer, to convey the thing drawn to him, this is no objection.[3] 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 a writing in the following words, — "Messrs. Wilkins & Co., Bankers, Please to advance the bearer, Samuel Richards, the sum of two hundred and fifty pounds, and place the same to my account. Morgan Thomas," — was held not to be an order, where the external proof failed to show it such.[6]

§ 329. **Continued.** — The following instruments have been held to be orders as appearing such on their face: "Mr. Johnson, Sir, Please to pay to James Jackson 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."[7] So, "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.[8] So, "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."[9] But the following instruments

[1] And see Reg. *v.* Gilchrist, Car. & M. 224, 2 Moody, 233. It is sufficient made payable to bearer. People *v.* Brigham, 2 Mich. 550. It need not, in New York, be addressed to any one. Noakes *v.* People, 25 N. Y. 380.

[2] Rex *v.* Graham, 2 East P. C. 945, 2 Russ. Crimes, Grea. ed. 514; ante, § 206.

[3] The State *v.* Nevins, 23 Vt. 519.

[4] Rex *v.* Willoughby, 2 East P. C. 944; Rex *v.* Shepherd, 2 East P. C. 944, 1 Leach, 4th ed. 226; People *v.* Howell, 4 Johns. 296; Russ. Crimes, Grea. ed. 515.

[5] Reg. *v.* Taylor, 1 Car. & K. 213.

[6] Reg. *v.* Williams, 2 Car. & K. 51. And see Evans *v.* The State, 8 Ohio State, 196; Carberry *v.* The State, 11 Ohio State, 410.

[7] Reg. *v.* Carter, 1 Car. & K. 741, 1 Den. C. C. 65. Sadler was, however, proved to be a customer of the bank, yet the decision seems not to have depended upon this fact.

[8] Rex *v.* Jones, 1 Leach, 4th ed. 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.

[9] Reg. *v.* Gilchrist, Car. & M. 224, 2 Moody, 233. For further cases in which the writing was held to be an order, see Rex *v.* McIntosh, 2 East P. C. 942, 956, 2 Leach, 4th ed. 883, 2 Russ. Crimes, Grea. ed. 515, 516; Rex *v.* Bamfield, 1 Moody, 416; Reg. *v.* Anderson, 2 Moody & R. 469; Reg. *v.*

have been held not to be orders on their face: "Mr. Thomas, Sir, You will please to pay the bearer, for Richard Power, 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 the fund.[1] So, "Please to send 11*l.* by bearer, as I am so ill I cannot wait on you."[2] So, "Mr. Jefferys, 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 paid for. Witness my hand, George May."[3] So, "Mr. Fisher, 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."[4]

§ 330. **Continued.** — Thus stands the English doctrine; but from the few reported cases in this country we may infer, that perhaps the American courts generally will give, as some of them have given, the word "order" a more liberal interpretation. Thus, in Massachusetts, the following writing was held to be an order for the delivery of goods, although it affirmatively appeared that the person purporting to be the drawer had no goods in the hands of the drawee: "Mr. Parker, Sir, deliver my son one pair of walking-shoes, and charge the same to me. Yours, James Fisher." The court was aware that this decision was contrary to the English adjudications; but said, that in favor of life these 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."[5] And a similar conclusion appears to have been arrived at in

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.

[1] Rex *v.* Baker, 1 Moody, 231.

[2] Rex *v.* Ellor, 1 Leach, 4th ed. 323, 2 East P. C. 938.

[3] Rex *v.* Mitchell, 2 East P. C. 936.

[4] Reg. *v.* Roberts, 2 Russ. Crimes, Grea. ed. 522. For other illustrations, see Rex *v.* Rushworth, Russ. & Ry. 317, 2 Russ. Crimes, Grea. ed. 517, and see note; Reg. *v.* Curry, 2 Moody, 218.

[5] Commonwealth *v.* Fisher, 17 Mass, 46. See ante, § 199.

Connecticut,[1] New York,[2] South Carolina,[3] and Georgia.[4] The Tennessee court, however, held, that the statute against passing "any forged paper, knowing it to be forged," is not violated where the order is not shown to have been drawn by one who has an interest in the goods therein mentioned.[5] But in a later case the court of this State decided, that an indictment will lie for obtaining goods by a false pretence, where the pretence used is an order for goods in which the drawer has no interest.[6] The interpretation which renders an apparent interest or right in the drawer unnecessary is in accordance with opinions expressed even by some English judges.[7]

§ 331. **Continued.** — If there is not sufficient on the face of an instrument to make it an order, the defect may sometimes be supplied by averment and proof, as already mentioned.[8] It is not easy to lay down, in a word, how extensively such deficiencies may thus be filled up, and how little need be embraced in the writing, where there is no lack of extrinsic facts; for the decisions have not been so numerous as to indicate an exact rule.[9] Yet something on this point will be attempted a few sections further on,[10] in connection alike with this word and the words "warrant" and "request."

§ 332. **Warrant for the Payment of Money — Warrant for the Delivery of Goods.** — In one case it is said, and in others assumed, that in the statutes under consideration the words "warrant" and "order" are synonymous;[11] but later decisions indicate that warrant is to be taken in a somewhat larger sense than order. Like the word "order," it implies, accord-

[1] The State *v.* Cooper, 5 Day, 250.

[2] People *v.* Shaw, 5 Johns. 236. And see People *v.* Farrington, 14 Johns. 348.

[3] The State *v.* Holley, 1 Brev. 35. As to Vermont, see The State *v.* Nevins, 23 Vt. 519.

[4] Hoskins *v.* The State, 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.

[5] Walton *v.* The State, 6 Yerg. 377.

[6] Tyler *v.* The State, 2 Humph. 37.

[7] Sir Sidney Stafford Smythe, in Rex *v.* Mitchell, 2 East P. C. 936, 937.

[8] Ante, § 327.

[9] See Reg. *v.* Atkinson, Car. & M. 325; Reg. *v.* Vivian, 1 Den. C. C. 35.

[10] Post, § 335.

[11] Rex *v.* Mitchell, 2 East P. C. 936; Rex *v.* Clinch, 1 Leach, 4th ed. 540, 544, 2 East P. C. 938, 940.

ing to some English adjudications, that the drawer has a disposing power over the fund or goods; which disposing power must appear, either on the face of the writing, or by averment and proof.[1] Yet other and more recent decisions indicate, that this disposing power is not essential;[2] 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 payment 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."[3] That the American courts will generally adopt the latter opinion appears probable from what we have already seen in respect to the word "order."[4] But the broad difference, which may or may not include this one, between a warrant and an order, is, that, while a writing to be an order must *direct* or *command* the thing to be done, implying an obligation on the part of the drawee to obey,[5] to be a warrant it need only *authorize* the doing, without implying any obligation of obedience.[6] To illustrate this distinction, we may refer more at large to the following case, mentioned a few sections back:[7] In an indictment for forgery, the writing was described as a warrant and order; and it was necessary, therefore, that it should appear to be both. The words of it were, "Messrs. Wilkins & Co., Bankers, Please to advance the bearer, Samuel Richards, the sum of two hundred and fifty pounds, and place the same to my account. Morgan Thomas." As these words were not sufficient, without external evidence, to make the writing an order, or even perhaps a warrant, proof was introduced that the supposed drawer had a deposit account, not a drawing one, with the bankers named; that is,

[1] Rex *v.* Mitchell, supra; Rex *v.* Clinch, supra; Reg. *v.* Thorn, 2 Moody, 210, Car. & M. 206.

[2] Reg. *v.* Vivian, 1 Car. & K. 719; Reg. *v.* Rogers, 9 Car. & P. 41; Reg. *v.* Roberts, 2 Russ. Crimes, Grea. ed. 522, note; Reg. *v.* Dawson, 1 Eng. L. & Eq. 589, 2 Den. C. C. 75, Temp. & M. 428.

[3] Reg. *v.* Vivian, supra. In Reg. *v.* Thorn, supra, some of the judges said, that, if this question were *res integra*, they should so hold.

[4] Ante, § 330; The State *v.* Holley, 1 Brev. 35.

[5] Ante, § 327, 328.

[6] Reg. *v.* Williams, 2 Car. & K. 51; Reg. *v.* Dawson, supra; Rex *v.* Crowther, 5 Car. & P. 316.

[7] Ante, § 328.

though he had funds in their hands, he was not authorized to draw checks; upon which the court was of opinion, that the instrument was a warrant, but not an order.[1]

§ 333. **Continued.** — The following was held to be a warrant from Luke Lade, who kept cash with Molineux & Co., bankers, for the payment of money to John Smith: "To Molineux & Co. Pay to my order, two months after date, to Mr. John Smith, 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 John Smith with his address appeared.[2] So a letter of credit,[3] a bill of exchange,[4] an order sent in England from one post-office to another,[5] and generally whatever may be described by the word "order,"[6] are warrants.[7]

§ 334. **Request for the payment of Money — Request for the delivery of Goods.** — Request is a broader word than either warrant or order; and it seems not to demand much observation.[8] The following was held to be a request: "Please to let bearer, William Goff, have spillshoul and grafting tools for me."[9] Of course it is not of consequence, in these cases, that the person who purports to make the request should appear to have, or have in fact, any interest in, or control over, the fund or goods. Nor need the writing be sufficient in words to charge the drawer.[10] On the other hand, if it purports to charge him, it will not on that account be the less a request.[11]

§ 335. **Order — Warrant — Request.** — Let us now inquire how far any defect of form in these several writings may be cured by oral evidence.[12] If a request omits the name of the person to whom it is intended to be addressed, this omission

[1] Reg. *v.* Williams, 2 Car. & K. 51.

[2] Reg. *v.* Smith, 1 Car. & K. 700, 1 Den. C. C. 79.

[3] Reg. *v.* Raake, 8 Car. & P. 626, 2 Moody, 66.

[4] Rex *v.* Willoughby, 2 East P. C. 581.

[5] Reg. *v.* Gilchrist, Car. & M. 224.

[6] Ante, § 332; Rex *v.* Beard, Jebb, 9.

[7] 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.

[8] For a full statement of English cases under this word, see 2 Russ. Crimes, Grea. ed. 526–531.

[9] 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.

[10] Rex *v.* Thomas, 2 Moody, 16, 7 Car. &. P. 851.

[11] Reg. *v.* White, 9 Car. & P. 282; Reg. *v.* Walters, Car. & M. 588.

[12] Ante, § 327, 331.

may be filled up by proof;[1] and so of a warrant,[2] and so of an order.[3] Likewise evidence may be admitted of the course of dealing between the parties, whereby the writing gains a meaning of which it would otherwise come short.[4] In this way the following paper, — "August 3, 1839 — one 16-in. helmet scoop, one 4-qt. kettle — James Hayward," — was interpreted to be a request for the delivery of goods.[5] And where the course of dealing between two persons was, that one of them should make a list of names, with a sum against each name, on sight of which list the other, upon the credit of the first, should furnish the several individuals mentioned with goods to the amounts specified, — the writing, so illumined by extrinsic evidence, was held to be a request, though without the evidence it would come short.[6] Where also the course of dealing at a bank is, that a depositor who takes an accountable receipt for his money draws out the money, with interest, on indorsing his name on the face of the receipt, it, with his name thus indorsed, is deemed an order for the payment of money.[7] So the fact that there is a fund, and that the drawer has a disposing power over it, may be shown in evidence, to make an instrument an order, where these particulars do not sufficiently appear on its face.[8] These are illustrations of a general doctrine; but how far the doctrine will be carried by the courts is not certain. Evidently it has limits. In cases of the sort now under consideration, the extrinsic matter must appear by averment in the indictment, as well as by proof at the trial.[9]

§ 336. **Promissory Note.** — This well-known mercantile security requires little explanation here. It has been defined to be "a written promise, by one person to another, for the payment

[1] Rex *v.* Carney, 1 Moody, 351; Reg. *v.* Pullbrook, 9 Car. & P. 37; Rex *v.* Cullen, 5 Car. & P. 116, 1 Moody, 300.

[2] Reg. *v.* Rogers, 9 Car. & P. 41.

[3] Reg. *v.* Snelling, Dears. 219, 23 Law J. N. S. M. C. 8, 17 Jur. 1012, 22 Eng. L & Eq. 597.

[4] Reg. *v.* Walters, Car. & M. 588; Rex *v.* Cullen, 1 Moody, 300, 5 Car. & P. 116; Reg. *v.* Pullbrook, 9 Car. & P. 37; Reg. *v.* Atkinson, Car & M. 325; Reg. *v.* Rogers, 9 Car. & P. 41; post, § 342.

[5] Reg. *v.* Pullbrook, 9 Car. & P. 37.

[6] Reg. *v.* Walters, Car. & M. 588.

[7] Reg. *v.* Atkinson, Car. & M. 325.

[8] Reg. *v.* Vivian, 1 Den. C. C. 35; Reg. *v.* Williams, 2 Car. & K. 51. See, for a further illustration, Reg. *v.* Illidge, Temp. & M. 127, 13 Jur. 543, 18 Law J. N. S. M. C. 179, 1 Den. C. C. 404.

[9] Carberry *v.* The State, 11 Ohio State, 410; post, § 341, 342.

of money at a specified time, absolutely and at all events."[1] The instrument need not be negotiable[2] to be a promissory note, even within the meaning of the words in criminal statutes; as in the statutes against forgery.[3] And the following writing; namely, "Due J. F. one dollar on settlement this day," &c., — was held in New York to be a note for the payment of money.[4] A bank-bill, whether of our own State or of any other, is a promissory note;[5] though, of course, every promissory note is not a bank-bill.[6] But the reader will find this instrument best described in works treating of bills and notes.[7]

§ 337. **Bank-bill — Bank-note.** — These two terms are identical in meaning.[8] And we have just seen that the term "promissory note" includes a bank-note. But the term "bank-note" does not include every sort of promissory 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," &c.; and it was held that none of these terms include promissory notes or commercial paper, other than bank-notes. "The phrase 'bank bill or note' means bank-bill or bank-note."[9]

§ 338. **Bill of Exchange — (Acceptance — Indorsement, in Note).** — Similar in legal effect to a promissory note is a bill

[1] 3 Kent Com. 74. A written promise on condition is not a promissory note. Corbett *v.* The State, 24 Ga. 287.

[2] Story Bills, § 60; Bates *v.* Butler, 46 Maine, 387; Sibley *v.* Phelps, 6 Cush. 172; People *v.* Bradley, 4 Parker C. C. 245.

[3] Rex *v.* Box, Russ. & Ry. 300, 6 Taunt. 325.

[4] People *v.* Firch, 5 Johns. 237.

[5] Hobbs *v.* The State, 9 Misso. 845; Commonwealth *v.* Paulus, 11 Gray, 305; Commonwealth *v.* Woods, 10 Gray, 477; Commonwealth *v.* Thomas, 10 Gray, 483; Reg. *v.* McDonald, 12 U. C., Q. B. 543. Contra, Culp *v.* The State, 1 Port. 33.

[6] The State *v.* Wilson, 3 Brev. 196. And see The State *v.* Wilkins, 17 Vt. 151; The State *v.* Ward, 6 N. H. 529; ante, § 326; The State *v.* Tillery, 1 Nott & McCord, 9; The State *v.* Cassados, 1 Nott & McCord, 91.

[7] The reader may like to examine the following cases, in addition to those already cited to this section, decided under the criminal law. Rex *v.* Elliott, 2 East P. C. 951; Wilcox's Case, 2 Russ. Crimes, Grea. ed. 497; Rex *v.* Clark, Russ. & Ry. 181, 2 Leach, 4th ed. 1036; Rex *v.* Treble, 2 Leach, 4th ed. 1040, 2 Taunt. 328, Russ. & Ry. 164; Butler *v.* The State, 22 Ala. 43. An indorsement of a promissory note is a "contract." Poage *v.* The State, 3 Ohio State, 229.

[8] The State *v.* Hays, 21 Ind. 176.

[9] The State *v.* Stimson, 4 Zab. 9, 29. See also, on the subject of this section, The State *v.* Watson, 4 Ind. 595; Rex *v.* Sadi, 2 East P. C. 601.

of exchange; being "a written order or request by one person to another for the payment of money at a specified time, absolutely and at all events."[1] Like a promissory note,[2] it is generally negotiable, not necessarily so.[3] For further information concerning this mercantile security, the reader should consult the books of commercial law, and some matter he may find, by referring to the index, in the author's work on the Criminal Law.[4]

§ 339. **Undertaking for the Payment of Money.** — This phrase is somewhat broader in meaning than the term "promissory note."[5] While, therefore, every promissory note is undoubtedly an "undertaking for the payment of money," every "undertaking" of this sort is not a promissory note. Thus, if one in writing guarantees another against loss by a third person, not exceeding a certain sum, this writing, though plainly not a promissory note, is an "undertaking for the payment of money."[6] It is not necessary that the consideration should appear on the face of the instrument; therefore the following paper has been held to be such undertaking: —

"November 21st, 1870.

I. O. U. thirty-five pounds.
35*l*.

ARTHUR CHAMBERS,
GEORGE WICKHAM."[7]

§ 340. **Securities — (Book of Accounts — Deed, in the Note).** — There are statutes containing such words as "securities for

[1] 3 Kent Com. 74.

[2] Ante, § 336.

[3] Story Bills, § 3, 60.

[4] For decisions in the criminal law as to what is a bill of exchange, see 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; People *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, 4th ed. 883; Warner *v.* Commonwealth, 1 Barr, 154. 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; The State *v.* Morton, 27 Vt. 310. As to what is an "indorsement," see Rex *v.* Arscott, 6 Car. & P. 408; Rex *v.* Bigg, 1 Stra. 18. What a "draft for the payment of money," Rex *v.* Pooley, 3 B. & P. 311, Russ. & Ry. 31.

[5] Reg. *v.* Reed, 1 Moody, 62, 8 Car. & P. 623, 2 Lewin, 185; Reg. *v.* Stone, 1 Den. C. C. 181, 2 Car. & K. 364; The State *v.* Humphreys, 10 Humph. 442; Reg. *v.* Thorn, Car. & M. 206.

[6] Reg. *v.* Reed, supra; Reg. *v.* Joyce, Leigh & C. 576.

[7] Reg. *v.* Chambers, Law Rep. 1 C. C. 341.

money," "valuable securities," "securities and effects," &c. The meaning of these terms will be sufficiently obvious; but the reader may like to see in a note [1] a reference to some of the cases. Where a prisoner was indicted for stealing a certificate of a foreign railway company, described in the indictment as a "valuable security" (which were the words of the statute), the conviction was sustained. The principal objection, which was overruled, was, that the qualifying statutory words, "in the funds of any body corporate, company, or society, or to any deposit in any savings bank," did not extend to a foreign corporation.[2]

§ 341. **Receipt for Money — Receipt for Goods.** — A receipt is a written acknowledgment, by the maker, of something delivered him from another. Like orders, warrants, requests, and undertakings, receipts are of two kinds, — such as are receipts on their face, and such as may be shown to be receipts by averment and proof. To make the writing sufficient in itself, no exact form of words is necessary, only the idea must be conveyed to common apprehension. The expression, "Received the contents above, by me, Stephen Withers," written below a bill of parcels; [3] or even "settled 4*l*. Samuel Hughes"; [4] or "paid sadler," Sadler being shown to be a person's name, though written with a small *s*, [5] — constitutes a receipt, without the aid of other proof; and so the words, "Received from Mr. Bendon, due to Mr. Warman, 17*s*. Settelled," no signature being added below, have been held to be Mr. Bendon's receipt, there being evidence of its having been uttered as such.[6] On

[1] 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, 4th ed. 958; Reg. *v.* Heath, 2 Moody, 33; Rex *v.* Bakewell, 2 Leach, 4th ed. 943; Reg. *v.* Greenhalgh, Dears. 267, 25 Eng. L. & Eq. 570. What a "book of accounts," Commonwealth *v.* Williams, 9 Met. 273. What a "deed," Rex *v.* Fauntleroy, 1 Moody, 52, 2 Bing. 413, 1 Car. & P. 421.

[2] Reg. *v.* Smith, Dears. 561, 7 Cox C. C. 93, 33 Eng. L. & Eq. 569. See ante, § 326.

[3] Testick's Case, 2 East P. C. 925. And see Reg. *v.* Vaughan, 8 Car. & P. 276; Rex *v.* Russel, 1 Leach, 4th ed. 8.

[4] Rex *v.* Martin, 7 Car. & P. 549, 1 Moody, 483, overruling Rex *v.* Thompson, 2 Leach, 4th ed. 910.

[5] 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.

[6] Reg. *v.* Inder, 2 Car. & K. 635. So the entry of money by the cashier in

the other hand, the following writing, "*William Chinnery*, Esq., paid to × *tomson*, the som of 8 pounds, *feb.* 13, 1812," was held to come short; because it was an assertion, not an acknowledgment, that Chinnery had paid the money.[1] And an acknowledgment seems not to be sufficient when it is only in the form of a recital, introductory to something else.[2] So the writing must show what sum, or at least that a sum, was received, and from whom;[3] and, where there is a scrip receipt for money paid on stock subscribed to a bank, and the blank for the subscriber's name is not filled up, it is not in law a receipt.[4] The word "settled," at the foot of a bill of parcels, is not alone sufficient to show the bill to have been intended for a receipt, unless averments to this effect are contained in the indictment.[5]

§ 342. **Continued.** — Where an instrument is not on its face sufficiently full to be a receipt, the defect may be supplied by showing a course of dealing between the parties in which it is understood to be and treated as such. This extrinsic matter must appear both by averment and proof.[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 supplied by extrinsic evidence, the authorities do not define; but, while the doctrine may go further[8] than above expressed in this section, it no doubt has limits.[9]

the bank-book of a creditor is an accountable receipt. Rex *v.* Harrison, 1 Leach, 4th ed. 180, 2 East P. C. 926. For another illustration, see Rex *v.* Rice, 6 Car. & P. 634.

[1] Rex *v.* Harvey, Russ. & Ry. 227.

[2] Reg. *v.* West, 2 Car. & K. 496, 1 Den. C. C. 258; Clark *v.* Newsam, 5 Railw. Cas. 69, 1 Exch. 131.

[3] Yet see, as to an order, ante, § 329, note.

[4] Rex *v.* Lyon, 2 Leach, 4th ed. 597, 2 East P. C. 933.

[5] Rex *v.* Thompson, 2 Leach, 4th ed. 519. See also, on the general subject, The State *v.* Martin, 9 Humph. 55; People *v.* Hoag, 2 Parker, 36; 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; People *v.* Loomis, 4 Denio, 380; Commonwealth *v.* Williams, 9 Met. 273; Reg. *v.* Inder, 1 Den. C. C. 325; Rex *v.* Hope, 1 Moody, 414; Reg. *v.* Pringle, 2 Moody, 127; Kegg *v.* The State, 10 Ohio, 75.

[6] Rex *v.* Hunter, 2 Leach, 4th ed. 624, 2 East P. C. 928, 977.

[7] Reg. *v.* Cooper, 2 Car. & K. 586.

[8] See Rex *v.* Barton, 1 Moody, 141, and some cases mentioned in the last section.

[9] See ante, § 335.

§ 343. **Acquittance.** — This word is in some statutes employed in connection with the word "receipt"; but it requires no separate explanation.[1]

§ 344. **Goods — Chattels.** — In the books of the law, these words are usually, not always, found together; thus, "goods and chattels." They are nearly alike in import; though chattels is the more technical word, and, in pure legal phrase, the more appropriate. Perhaps, also, it is the more extensive in meaning. Each of these words, in its largest sense, signifies all a man's property other than real estate; yet the word "goods" seems to be quite variable, and sometimes to embrace much less.[2] But in the criminal law, particularly in statutes against larceny, neither of these words has been often, or ever, understood to have the full meaning thus indicated. The general doctrine here is, that neither word comprehends *choses in action;* as bank-notes,[3] mortgage-deeds,[4] and the like.[5] And where the words of a statute against larceny were "any goods and chattels," a dog was held not to be within these descriptive terms; because dogs are not subjects of larceny at the common law.[6] It seems, also, that these words do not include any thing which circulates as money; or, rather, it has been so held under some English statutes, where perhaps the question really depended on the relation the words bore to others in the enactment.[7] And in a statute against larceny of "any goods, wares, or mer-

[1] Rex *v.* Martin, 7 Car. & P. 549; The State *v.* Martin, 9 Humph, 55; People *v.* Hoag, 2 Parker, 36; Reg. *v.* West, 1 Den. C. C. 258, 2 Car. & K. 496; Clark *v.* Newsam, 5 Railw. Cas. 69, 1 Exch. 131; Reg. *v.* Atkinson, 2 Moody, 215.

[2] See Bouv. Law Dict. and Burrill Law Dict. *voc.* Goods, Chattels, respectively, and the authorities there cited; 2 Bl. Com. 385.

[3] The State *v.* Calvin, 2 Zab. 207; Commonwealth *v.* Swinney, 1 Va. Cas. 146; Rutherford *v.* Commonwealth, 2 Va. Cas. 141; Rex *v.* Hill, Russ. & Ry. 190; Rex *v.* Morris, 1 Leach, 4th ed. 468, 2 East P. C. 748; Rex *v.* Sadi, 1 Leach, 4th ed. 468, 2 East P. C. 748; The State *v.* Jim, 3 Murph. 3.

[4] Reg. *v.* Powell, 14 Eng. L. & Eq. 575, 2 Den. C. C. 403.

[5] And see The State *v.* Foster, 3 McCord, 442.

[6] Findlay *v.* Bear, 8 S. & R. 571.

[7] 2 East P. C. 643, 748; Rex *v.* Guy, 1 Leach, 4th ed. 241, 2 East P. C. 748; Rex *v.* Davidson, 1 Leach, 4th ed. 242, note. And see the observations of Story, J. in United States *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 certain persons, the property in money and securities for money is not thereby transferred. Rex *v.* Beacall, 1 Car. & P. 310, 454. In Ohio, the doctrine of the text seems not to be followed. Hall *v.* The State, 3 Ohio State, 575.

chandise, 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; the reason appearing to be, that, as this word stood connected in the clause with "wares or merchandise," the latter limited its meaning.[1] Yet, on the other hand, there is reason for the opinion, that "goods and chattels" embrace all coin, though circulating as money, which would be the subject of larceny at common law; and, in the United States Circuit Court for the District of Massachusetts, it was decided, that the term "personal goods" in the act of Congress of 1790, c. 36, § 16, should be so construed. The court in this case even intimated, contrary to what we have just 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*, as promissory notes.[2] With the exceptions already pointed out, the words under discussion seem to include every thing of a personal nature. Thus oats, rye, and corn, the produce of a man's farm, and lying in his barn, are "goods, wares, and merchandise";[3] the luggage of a passenger going to a steamboat is "goods and merchandise";[4] and a railroad passenger ticket is a "chattel";[5] as are also sheep, fowls, and other animals.[6]

§ 345. **Continued.** — But the words "goods and chattels," in these criminal statutes, may include, not only coin, but *choses in action* also, as promissory notes, bank-bills, and the like, when there are other words or other statutes which, on all being taken together,[7] fairly require such interpretation. Thus, 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

[1] Rex *v.* Leigh, 1 Leach, 4th ed. 52; Rex *v.* Grimes, 1 Leach, 4th ed. 53, note, 2 East P. C. 647, Foster, 79, note. And see ante, § 245.

[2] United States *v.* Moulton, 5 Mason, 537. And see Rex *v.* Dean, 2 Leach, 4th ed. 693, 2 East P. C. 749; Rex *v.* Mead, 4 Car. & P. 535.

[3] The State *v.* Brooks, 4 Conn. 446.

[4] Rex *v.* Wright, 7 Car. & P. 159.

[5] Reg. *v.* Boulton, 1 Den. C. C. 508, 2 Car. & K. 917, 13 Jur. 1034.

[6] 2 East P. C. 748. Asses and pigs have been held to be "cattle," within Stat. 9 Geo. 1, c. 22. Rex *v.* Chapple, Russ. & Ry. 77; Rex *v.* Whitney, 1 Moody, 3.

[7] Ante, § 82, 86, 123.

within the latter act;[1] yet substantially a contrary doctrine was laid down in New Jersey in an exceedingly well considered and ably reasoned case,[2] and there may be grave doubts whether the latter is not the true view.[3] In England, the halves of county bank-notes, sent in a letter, are held to be goods and chattels;[4] and a bank-note is within the words "money, goods or chattels, wares or merchandises," of Stat. 12 Anne, stat. 1, c. 7, § 1, concerning stealing from a dwelling-house;[5] but the Virginia court denied that such note was to be included under words similar to those last mentioned.[6] On the whole, these terms are not so well defined in the criminal law as we might wish they were; the cases are at several points conflicting; and the careful practitioner will not advise in a matter of doubt, without first making a particular examination, both of the decisions at large and of the statute law of his own State.

§ 346. **Money.** — The word "money" means, in these statutes, only that which is a legal tender.[7] It does not, therefore, include bank-bills, though they pass current;[8] neither does it include United States treasury warrants,[9] nor county claims,[10]

[1] Rex *v.* Crone, Jebb, 47. And see Anonymous, 1 Crawf. & Dix C. C. 152. See People *v.* Kent, 1 Doug. Mich. 42; Hall *v.* The State, 3 Ohio State, 575.

[2] The State *v.* Calvin, 2 Zab. 207.

[3] See the various cases cited to the last section.

[4] Rex *v.* Mead, 4 Car. & P. 535.

[5] Rex *v.* Dean, 2 Leach, 4th ed. 693, 2 East P. C. 646, 749.

[6] Commonwealth *v.* Swinney, 1 Va. Cas. 146, 151. And see Rex *v.* Hill, Russ. & Ry. 190.

[7] 1 East P. C. 147, 149. And see Hale *v.* The State, 8 Texas, 171; Colson *v.* The State, 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.

[8] The State *v.* Jim, 3 Murph. 3; Rex *v.* Hill, Russ. & Ry. 190; Commonwealth *v.* Swinney, 1 Va. Cas. 146, 151; McAuly *v.* The State, 7 Yerg. 526; Johnston *v.* The State, Mart. & Yerg. 129; Johnson *v.* The State, 11 Ohio State, 324. But a bank-note is a "valuable thing." Rex *v.* Robinson, 2 Leach, 4th ed. 749, 2 East P. C. 1110, 1114. As to the meaning of the word "bank-note," in a statute, see Pomeroy *v.* Commonwealth, 2 Va. Cas. 342. Bank-notes are not properly described as "lawful money." Thus, in Tennessee, 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.* The State, 5 Yerg. 160.

[9] Williams *v.* The State, 12 Sm. & M. 58.

[10] Tucker *v.* The State, 16 Ala. 670.

nor orders of a railroad company on its treasurer,[1] nor mere promissory notes,[2] nor bills of exchange.[3] But the Maryland court held, that the deposit of a note of the bank of Virginia, as a wager or bet, is a deposit of "money" within the Maryland act of 1838, c. 392.[4] Some other distinctions are stated in the work on the Criminal Law.[5]

§ 347. **Jewelry.** — This word occurs in a Massachusetts statute against peddling certain enumerated articles. The court once observed, that the legislature "intended to employ it as a generic term, of the largest import, including all articles under the genus"; and, without undertaking to define its meaning, adjudged plain gold rings and ear-knobs to be included within the term as used in the statute.[6]

V. *The Proceedings.*

§ 348. **Conviction — Attaint.** — The word conviction ordinarily signifies the finding of the jury, by verdict, that the prisoner is guilty. When it is said, there has been a conviction, or one is convict, the meaning usually is, not that sentence has been pronounced, but only that the verdict has been returned.[7] So a plea of guilty by the defendant constitutes a conviction of him.[8] Lord 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."[9] Yet the word conviction, when it stands in such a connection with

[1] Grammond *v.* The State, 10 Ohio, 510. And see Robinson *v.* The State, 6 Wis. 585.

[2] The State *v.* Foster, 3 McCord, 442; Tate *v.* The State, 5 Blackf. 174.

[3] Rex *v.* Major, 2 East P. C. 1118.

[4] Doyle *v.* Commissioners of Baltimore County, 12 Gill & J. 484. And see Rex *v.* Dean, 2 Leach, 4th ed. 693, 2 East P. C. 646, 649.

[5] Crim. Law, 4th ed. II. § 592.

[6] Commonwealth *v.* Stephens, 14 Pick. 370.

[7] 4 Bl. Com. 362; United States *v.* Gibert, 2 Sumner, 19, 40. And see The State *v.* Valentine, 7 Ire. 225; Commonwealth *v.* Williamson, 2 Va. Cas. 211; Skinner *v.* Perot, 1 Ashm. 57; The State *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*; York *v.* Dalhousen, 9 Wright, Pa. 372; Burgess *v.* Boetefeur, 8 Scott, N. R. 194; The State *v.* Anderson, 5 Harring. Del. 493.

[8] People *v.* Goldstein, 32 Cal. 432.

[9] Co. Lit. 390 *b*.

other words as to indicate a secondary or unusual meaning, sometimes denotes the final judgment of the court.[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 relative to 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. **Conclusion.** — There are various other terms which have been expounded by the courts, more or less connected with the criminal law; but they are explained in other places in the present volume, and in the author's volumes on the Criminal Law and on Criminal Procedure. The reader will find them by consulting the indexes.

[1] Dwar. Stat. 2d ed. 683; Keithler *v.* The State, 10 Sm. & M. 192.

[2] The State *v.* White, 13 La. An. 573.

[3] Holthouse Law Dict., Conviction.

[4] Ex parte Seymour, 14 Pick. 40.

[5] Commonwealth *v.* Evans, 16 Pick. 448.

BOOK II.

THE EFFECTS OF SOME PARTICULAR COMMON-LAW DOCTRINES UPON THE STATUTES.

CHAPTER XII.

THAT CRIME CANNOT EXIST WHERE THERE IS NO CRIMINAL MIND.

§ 351. **General Doctrine.** — The discussions thus far, in the present volume, have shown, that the common law is not to be understood as having been displaced by a statute, unless the statute displacing it is, in its express words or necessary effect, plain and unequivocal.[1] Within this proposition is embraced the minor one that, where a statute is drawn in general terms, no act within these terms is to be punished unless it proceeded from what the common law regards as a criminal mind.[2] What is a criminal mind, according to the doctrines of the common law, is a question which was fully discussed in a series of chapters in the author's work on the Criminal Law.[3] In the present connection, it is necessary only to state and illustrate the doctrine in very general terms; adding, perhaps, a few special points upon which judicial decision is not harmonious, or is particularly liable to err.

§ 352. **Insanity.** — A most obvious proposition is, that, if a man is insane, and so is not capable of having a criminal mind, he can no more be held guilty of a statutory offence than of an offence at the common law. The criminal law,

[1] See ante, § 4–7, 88, 114, 119, 123, 131, 141, 144, 155–162.

[2] Ante, § 131, 132.

[3] Crim. Law, 5th ed. I. § 204–208, 285–429, 628–643.

as it respects insanity, presents some nice questions, among which are questions somewhat antagonistically settled by the different common-law tribunals;[1] but, whatever the doctrines may be, it has never been disputed that they apply to statutory and common-law offences alike.

§ 353. **Infancy.** — Moreover, as respects the incapacity which springs from immature years, the rule and the reason of the law are the same. Mere minority is never any excuse for crime; neither is the added fact that the parent commands it, even, it appears, in the extreme case where he is also present while, in obedience to the command, the criminal act is done. But if a child is under seven years of age, he is conclusively presumed to be incapable of having the criminal will which is essential in every crime; between seven and fourteen, he is deemed to be *prima facie* incapable; after fourteen, immaturity of years ceases to be any excuse; though, like any other person, he may be affirmatively shown to be incapable.[2] And it was never pretended that this doctrine is different when applied to statutory crimes, from what it is when applied to crimes at the common law.

§ 354. **Coverture.** — The doctrines of the last section are, in substance, doctrines of natural reason as well as of law; but the limitations — namely, the periods of seven and fourteen years, made fixed and exact — pertain merely to technical rule. And under the title Coverture the doctrines are still more technical; but their precise nature and limits are best seen in the work on Criminal Law.[3] If the wife is not deemed to be guilty of a common-law crime, when what is done is in the presence of her husband and by his command, so neither is she held, in these circumstances, to be guilty of a statutory offence.

§ 355. **Intent where there is Capacity — Mistake of Fact.** — In the cases mentioned in the preceding sections, there is no crime, because, by a rule of the common law, there can be none where the criminal mind is wanting. But the reason why it is wanting in these cases is, that, either in consequence of a

[1] Crim. Law, 5th ed. I. § 374 et seq.

[2] Crim. Law, 5th ed. I. § 355, 367 et seq.

[3] Crim. Law, 5th ed. I. § 356–366.

technical rule, or by force of a natural fact, it is impossible the criminal mind should exist; since that cannot be for whose existence there is no capacity. But there may be a capacity for the criminal intent, while yet no crime is committed, even though the outward fact of what otherwise were crime transpires. It is so where one, having a mind free from all moral culpability, is misled concerning facts. If, in such a case, he honestly believes certain facts to exist, and, though they do not, acts as he would be legally justified in acting if what he erroneously believes to be were real, he is justified in law, the same as he is in morals.[1] The books are full of illustrations of this doctrine; and the reader perceives that, in reason, it must govern statutory crimes, the same as crimes at the common law.

§ 356. **Mistake of Fact, continued — Polygamy.** — That the doctrine of the last section does apply to statutory crimes the same as to crimes at the common law is, in most of our States, firmly and consistently maintained. But the books contain a few cases, principally Massachusetts ones, in which there is a real or apparent inroad upon this doctrine, not much to be commended. Thus, as leading in the error, which has since been permitted to sit undisturbed in the jurisprudence of this State, the Revised Statutes of Massachusetts provided, that, "if any person who has a former husband or wife living shall marry another person," except, among other instances, when the husband or wife of the person marrying shall have "remained absent for the space of seven years together, the party marrying again not knowing the other to be living within that time;" and, upon this, a case for polygamy came before the court in a manner calculated to confuse, working out therefore this its natural result. It is plain enough that this statute, truly construed, forbids a married party to presume the death of the other who may be away, and to marry again on the strength of such presumption, when the absence has been less than seven years; while, on the other hand, if the absence has extended to seven years, and the absent one is not known to the other to be living within that time, the latter may then lawfully marry,

[1] Crim. Law, 5th ed. I. § 303.

whatever be his real belief as to the life or death of the other. But this exception has no relation to a case in which, on independent information and special grounds, a husband or wife is really believed to be dead. Suppose, for example, a husband, intending to entrap his wife, goes out ostensibly on a sail with confederates, and they come back and represent that he is drowned, while he secretly escapes abroad; she believes the statement, administers on his effects, and at the end of a year marries. Then he returns, and procures her indictment for polygamy. On a just consideration, the common-law rule, and not the statutory one, prevails, and she should be acquitted. But the case which came before the Massachusetts court was presented in such a muddled way that the distinction between these two classes did not appear: a man left home in the morning, saying he should return to breakfast, but did not; and the wife, between three and four years afterward, believing him to be dead, married again. The judge at the trial instructed the jury, that the woman's ignorance that her husband was alive, and her honest belief that he was dead, furnished no defence. This instruction was held to be right; while still the case was continued to enable the woman to procure a pardon, which she did, and, on her pleading it, she was discharged.[1] The direction to the jury, it is submitted, should have been, to consider whether, on grounds independent of mere absence, from which death could be inferred only after it had continued seven years, the defendant having used due care and made due inquiry, had, considering all the circumstances, reason to believe and did believe that her husband was dead. At all events, the broad doctrine of the Massachusetts court, while it is contrary to fundamental principles of the criminal law, is in conflict likewise with the Scotch common law,[2] and with what has been ruled in England on a statute in like terms. "The law," observed Martin, B. sitting in the trial of an English cause, "says seven years shall elapse before it may be presumed that the first husband is dead. In this case seven years had not elapsed, and beyond

[1] Commonwealth *v.* Mash, 7 Met. 472.

[2] McDonald's Case, 1 Broun, 238; 1 Alison Crim. Law, 535, 536, 541.

the prisoner's own statement there was the mere belief of one witness. Still the jury are to say if upon such testimony she had an honest belief that her first husband was dead; if they believed she had, then the prisoner would not be guilty of the offence charged in the indictment."[1]

§ 357. **Continued — Adultery.** — When a court begins to slide, no one can tell where it will bring up. Adultery is a statutory crime in Massachusetts, as it is also in some of the other States. There a woman separated from her husband on account of his misconduct; among the rest, he was of dissipated habits; and she read in the newspapers of the death of a man, bearing his exact name, in a drunken row, and believed the person to be her husband. She thereupon represented herself to be a widow, and, eleven years after she last saw or heard from him, she married a man who believed her honest representation that she was a widow. But, though the court held, that, had the first husband left her, and then had the other facts transpired, the man who entered into the second marriage would be innocent;[2] yet, under the facts as above stated it decided, that, as she left him though for his fault, reliance could not be placed on the presumption of death arising out of lapse of time, and the man who married her committed adultery by his cohabitation.[3] Decisions like this, in which some vain and technical distinction is brought in to convict for felony a man who has violated neither any law of morals, nor any statutory provision expressly fitting his case, whom also the principles of the common law pronounce to be innocent, produce a strain on the public respect for law, which, it is submitted, our tribunals should pause long before they make. If a court, in such a case, cannot by zigzag motions get out of meshes of technicalities which the prosecuting officer may have drawn around it, let resort be had to the plain method laid down by Baron Parke, when he said, "The guilt of the accused must depend on the circumstances as they appear to him."[4] Plainly this Massachusetts decision is, like the other, contrary to the general doctrine as held elsewhere.

[1] Reg. *v.* Turner, 9 Cox C. C. 145.

[2] Commonwealth *v.* Thompson, 6 Allen, 591.

[3] Commonwealth *v.* Thompson, 11 Allen, 23.

[4] Crim. Law, 5th ed. I. § 303, refer-

§ 358. **Continued — Selling Adulterated Milk — Intoxicating Liquors — Carelessness.** — If a statute forbids the sale of milk which is adulterated, or of intoxicating liquor unless the seller has a license, and the words of the statute are general and unqualified, it is plain and sound doctrine that the indictment need not allege, and the prosecuting power need not prove on the trial, the seller's knowledge of the adulteration in the one case, or the intoxicating quality in the other.[1] The analogies connected with the law of the intent sufficiently establish this doctrine. Thus, according to constant practice, the indictment does not allege that the defendant was, when he committed the criminal act, of sound mind, or was more than seven years old, or was not a married woman acting in the presence and by command of her husband; neither is it customary to produce against the defendant, in the first instance, proof of these things. If they are to appear in the case, they are to be set up by the defendant in his defence.[2] But the question whether or not the defendant is to be permitted to rely on the principles of the common law for his exculpation, when they will avail him, is altogether of another sort. Some Massachusetts cases, in which the court seems to have been drifting in the same direction it commenced in the polygamy case first above cited, would appear to hold, that, in this class of statutory crimes, the defence of an honest mind is of no avail. Thus, where one was charged with selling intoxicating liquor without license, it was held that the judge at the trial properly refused to let him prove that he bought the liquor for non-intoxicating, and honestly believed it to be such. And Hoar, J. said: "Where the act is expressly prohibited, without reference to the intent or purpose, and the party committing it was under no obligation to act in the premises, unless he knew that he could do so lawfully, if he violates the law he incurs the penalty. The salutary rule that every man is conclusively presumed to know the law is sometimes productive of hardship in particular cases. And the hardship is no greater,

ring to Reg. *v.* Thurborn, 1 Den. C. C. 387, 389.

[1] Commonwealth *v.* Smith, 103 Mass. 444; Commonwealth *v.* Farren, 9 Allen, 489; Commonwealth *v.* Boynton, 2 Allen, 160.

[2] See, however, as to the extent and the limits of this doctrine, Crim. Proced. 2d ed. I. § 521–525.

where the law imposes a duty to ascertain a fact." [1] The like doctrine has been applied, by this court, to the selling of adulterated milk contrary to a statute which in general terms provides a fine for one who "sells or keeps or offers for sale adulterated milk;" though the facts of the cases, setting aside the *dicta*, seem only to have carried the doctrine to the proper and just extent, that the Commonwealth need not allege and need not prove a knowledge by the defendant of the adulteration.[2] In one case it was observed, with much apparent and perhaps real pertinence, that "the act of selling, without knowledge, was regarded as an act of criminal carelessness." [3] Now, the true doctrine, as a practitioner might expect it to be held by an intelligent court sitting out of Massachusetts, is this: mere proof by the defendant, that he did not know of the intoxicating quality of the liquor or of the adulteration of the milk, would not necessarily be adequate in defence; for, if on all the facts, as they should appear from the evidence produced on the one side and on the other, the jury should be satisfied the defendant was lacking in good faith, or did not care, or was wilfully blind, or was negligent in his examinations and inquiries on the question of adulteration or the intoxicating quality, he would be responsible, though in a certain sense he was mistaken. And the reason is, that carelessness or negligence, for example, is criminal,[4] as well as the more specific intent to violate the law. But further the general doctrine does not go. According, therefore, to the general doctrine, as elsewhere held, and according to sound reason, a prohibition of a thing, in mere unlimited words, no more implies a legislative intention to overturn the principle of the common law that a defendant must be judged by the facts as he honestly believes them to be, than to overturn the principle that, to be responsible, he must be of sound mind.

[1] Commonwealth *v.* Boynton, supra. One very obvious remark here is, that the statute under discussion did not impose a duty to ascertain a fact. It was in general terms, and said nothing on the subject. I submit, then, that it should be construed according to the common law, and with it, and not as overturning it.

[2] Commonwealth *v.* Farren, supra; Commonwealth *v.* Nichols, 10 Allen, 199.

[3] Commonwealth *v.* Smith, supra, by Chapman, C. J.

[4] Crim. Law, 5th ed. I. § 313 et seq.

§ 359. **Continued — Abduction — Intent to commit a Civil or Moral Wrong.** — The view thus represented to be the true one may be further illustrated by some English decisions against the abduction of females under sixteen years of age. Stat. 24 & 25 Vict. c. 100, § 55, provides, that "whosoever shall unlawfully take, or cause to be taken, 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, shall be guilty of misdemeanor; and, being convicted thereof, shall," &c. And the earlier statute of 9 Geo. 4, c. 31, § 20, was in the same terms. Under this provision it has on two several occasions been 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 defence.[1] 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.[2] Now, in the cases under consideration, the man meant to commit the civil and moral wrong of taking away an

[1] Reg. *v.* Robins, 1 Car. & K. 456; Reg. *v.* Ollifer, 10 Cox C. C. 402.

[2] Crim. Law, I. § 323–334.

infant girl from under lawful guardianship; and, though he might have supposed he should succeed in dodging 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. Consequently, under this same English statute, where one promised a father on his death-bed to take care of an infant daughter, and after the father's death took the girl 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's 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.[1] And even in a more recent case, where a man met in the street a girl going to school, and there enticed her away, not knowing or inquiring whether she had parents or not, but having no reason to believe her to be a prostitute, the Court for Crown Cases Reserved, not without some hesitation, held, that the prisoner was wrongly convicted. But the opinion leaves it doubtful whether the decision was based on the ground, that the prisoner was ignorant of the real facts; or on the ground that, as the girl was found in the street, the taking was not out of the parental possession.[2] In point of just doctrine, however, it is

[1] Reg. *v.* Tinkler, 1 Fost. & F. 513.

[2] Reg. *v.* Hibbert, Law Rep. 1 C. C. 184. Bovill, C. J. said: "There is no statement of any finding of fact that the prisoner knew, or had reason to believe, that the girl was under the lawful care or charge of her father, mother, or of any other person. Still less is there any statement that the prisoner knew that she was under the care of

difficult to say that a girl is not legally in her father's possession when she is on her way to school. And, from other cases, it seems also to be the doctrine of the English courts that she is.[1]

§ 360. **Particular and General Intent.** — The reader perceives, that, according to what is set down in the foregoing sections as being the better exposition, the class of statutes there mentioned, though they require an evil intent to make an act which externally falls within them criminal, do not require a particular intent to do the exact evil thing which they forbid; for, as we saw, it is the ordinary common-law rule, that, to constitute a crime, the evil act and the evil intent need not be the natural and ordinary accompaniments of each other.[2] But a statute is sometimes so drawn as to specify the intent necessary; and, when it is, the case must, of course, be brought within its terms. Sometimes, also, its general words, when it is construed, as it ought to be, by the common law, are such as to produce the like result. Thus, as already observed,[3] "whatever is newly created by statute draws to itself the same qualities and incidents as if it had existed at the common law." The consequence of which is, that, if, for example, a statute should make it larceny to steal an article which was

her father, as charged in this indictment. In some cases, as, for instance, if the girl were a girl of the town, there would be a probability that the person taking her away had no reason to believe that he was taking her out of the possession of her father or other person. In other cases, again, the surrounding circumstances might be such as to satisfy a jury that he had knowledge that he was taking the girl from the possession of those who lawfully had charge of her. In the absence, however, of any finding of fact on this point, the conviction cannot be supported. The decision at which we have arrived is quite in accordance with Reg. *v.* Green, 3 Fost. & F. 274, where the facts resembled those of the present case. Martin, B. there said: 'There must be a taking out of the possession of the father; here the prisoners picked up the girl in the streets, and, for any thing that appeared, they might not have known that the girl had a father. The essence of the offence was the taking of the girl out of the possession of the father. The girl was not taken out of the possession of any one. . . . The act of the prisoners was scandalous, but it was not any legal offence.' Under these circumstances, therefore, the conviction must be quashed." p. 185.

[1] Reg. *v.* Mankletow, Dears. 159, where Jarvis, 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." p. 165. And see Reg. *v.* Burrell, Leigh & C. 354.

[2] Crim. Law, 5th ed. I. § 323 et seq.

[3] Ante, § 139.

not the subject of larceny at the common law, the offence would be committed only when the specific intent existed which is necessary in common-law larcenies. As, therefore, there are various common-law offences which can exist only in connection with some specific intent,[1] so likewise there are various statutory ones. This part of the subject, however, does not require further elucidation.

§ 361. **Conclusion.** — The result of the whole matter is, that, in construing or administering the statutes, we are obliged constantly to keep in mind the common-law principles and be guided by them. And though most of these principles are in a general way brought to view in this volume, those who would obtain exact knowledge of them should study them in the work on the Criminal Law.

CHAPTER XIII.

HOW FAR THE COMMON-LAW RULES GOVERN THE STATUTORY CRIMINAL ACT.

§ 362. **How Act differs from Intent.** — The peculiar doctrines of the last chapter grow in the main out of the fact, that most of our statutes are silent as to the intent, while they make specific mention of the act. We saw, that, if a statute is express as to the intent, its terms are not then subject to be controlled by the common law.[2] But as a crime is always composed of the two united elements of act and intent,[3] if, from a statute drawn in the more common form, what is said of the act were taken away, there would be nothing left. Indeed it is the general plan of our criminal legislation to define, or, at least, to forbid, particular acts; leaving the question of intent to be determined in each case by the rules of the common law.

§ 363. **Meaning of Statutory Terms — "Robbery."** — Still

[1] Crim. Law, 5th ed. I. § 335.
[2] Ante, § 360.
[3] Crim. Law, 5th ed. I. § 204–208.

there is constant occasion to refer to the common law to ascertain the meaning of a statute in respect of the act. For we have seen, that, if a statute employs a word or phrase which has already been used in the common law or in another statute, and has there acquired by construction an established meaning, it is to be understood in the meaning previously determined.[1] Thus, there are no common-law crimes against the United States;[2] yet the acts of Congress, instead of minutely defining particular crimes, often make it penal, for example, to commit "robbery," or "larceny," or "arson," and so on, employing words of a well known common-law meaning. In such a case, the court looks to the common law to ascertain the nature and limits of the offence; and a "robbery" under the statute differs in no respect from a robbery purely at the common law.[3]

§ 364. **Continued — Blending of Common Law and Statutes.** — The principle brought to view in the last section is expanded widely in the adjudications. And the consequence is, that, since laws operate together and not singly, and "all provisions of law, statutory and common, at whatever several dates established, are to be construed together, as contracting, expanding, and attenuating one another into one harmonious system of jurisprudence,"[4] there is in perhaps all cases of statutory crime a greater or less mingling of common-law principles with the statutory words. Indeed, there is no place where the principles of the common law prevail, not even within the jurisdiction of the United States courts, or in States where they have no common-law crimes, where statutory crime, pure and simple, and as an existence entirely separate from the common law, is known. The statute may be the strong swimmer, that boasts of being moved by no current, and of possessing all force in its own arm; still, around it in all its extent, and in all its parts, and constantly bearing it up, is the ever-present ocean of the common law. Further illustrations of these views will best appear in other connections.

[1] Ante, § 6-8, 96-99, 242, 269.

[2] Crim. Law, 5th ed. I. § 199.

[3] United States *v.* Jones, 3 Wash. C. C. 209; United States *v.* Wilson, Bald. 78. And see Burk *v.* The State, 27 Ind. 430, 442; The State *v.* Taylor, 29 Ind. 517.

[4] Ante, § 123.

CHAPTER XIV.

THE COMMON-LAW PROCEDURE MINGLING WITH THE STATUTORY.

§ 365. **General View.** — It is competent, of course, for the legislature to abolish the common-law procedure altogether; except that it cannot provide, as a substitute, any thing contrary to constitutional rights. And, as we have seen,[1] the new procedure may be applied to offences already committed. But legislation taking from the government the right to conduct a criminal cause according to the forms and rules of the common law is not much in vogue among us. There are many statutes rendering it unnecessary to follow those forms and rules in particulars which the statutes mention; but, in general, the procedure may be according to the common-law methods if the prosecuting power pleases. On the other hand, there are many statutes taking from prisoners particular common-law rights; then, it is plain, they have only such rights left them as the statutes permit. Indeed, the course of criminal legislation among us has been for many years directed mainly to two points: first, so to shape the laws as to render it unnecessary for the States' attorneys to possess any legal knowledge, in order that the office may be bestowed as a reward for caucus services in politics; secondly, to take away the power of prisoners to object to what has been wrongly done against them. Mixed up with this sort of legislation, is some of real value, where rules which were merely technical, and nothing else, have been abolished.

§ 366. **Statutory Procedure aided by the Common Law.** — Again, where the common-law procedure has been to a greater or less extent superseded by statutes, "the old rules are," as observed in an Indiana case, "continued in force, not inconsistent with the criminal code, and so far as they may operate in aid thereof."[2] In fact, as the common or unwritten law is

[1] Ante, § 175 et seq.

[2] Worden, J. in Walker *v.* The State, 23 Ind. 61, 62.

an emanation from God himself, more or less shaped, indeed, and bent by human hands, it is impossible that any legislation should escape from its influence, any more than from the power of the Deity, its Author. The statute must be construed by the common law and in harmony with it, and by the common law must its defects be supplied. But all this appears in the earlier chapters of the present volume.

§ 367. **Conclusion.** — The result of all is, that, while the present volume treats of "Statutory Crimes," it is necessarily occupied to a very great extent with the principles of the common law; indeed, unless these pages were to be filled with the bare recitations of statutory provisions which each practitioner will find in the statute books of his own State already before him, there is nothing left for them except to show how the statutes and the unwritten law operate the one upon the other, in general, and in particular instances.

BOOK III.

FORM OF THE INDICTMENT OR COMPLAINT.

CHAPTER XV.

FUNDAMENTAL DOCTRINES.

§ 368. **Scope of the Chapter.** — It is proposed, in this chapter, to direct the attention of the reader to some fundamental principles, regulating the indictment or complaint, of such a nature that they cannot be dispensed with, whatever statutory provisions or judicial usages may exist on the subject.

§ 369. **Written Accusation — Constitutional Guaranties.** — In all our States, and under the government of the United States, there are constitutional guaranties securing to defendants the right to be protected against criminal prosecutions except on written accusations of crime. These guaranties are expressed in different words; but, in substance, they come to this, that, unless there is made against the defendant a written charge, setting out the offence for which he is to be prosecuted, the prosecution cannot be carried on.[1]

§ 370. **What enters into Punishment.** — And in another connection we saw, that, within this doctrine, it becomes necessary to set out in the indictment all such facts as the law makes essential elements in the punishment to be inflicted.[2] To illustrate: where a statute made it criminal to keep intoxicating liquors with the intent to sell them, and thereupon a defendant was charged with having such liquors "intended for sale," not

[1] Crim. Proced. 2d ed. I. § 95–112. [2] Crim. Proced. 2d ed. I. § 77–88.

showing that the intent was the defendant's, the allegation was held to be insufficient, notwithstanding another statute had in express words undertaken to make it adequate. To suffer a statute to give validity to this form, where one of the elements of the crime was imperfectly stated, would violate constitutional rights; for, by the statute creating the crime, the penalty was not incurred unless the defendant intended to sell the liquors.[1] The books contain many illustrations of this sort; showing it to be no uncommon occurrence for the courts to pronounce an indictment to be void, which is drawn exactly in a form authorized by the legislature, and declared by the legislative act to be sufficient.[2]

§ 371. **Continued.** — It is obvious that the rule thus stated is the leading one as to the limits of the legislative power to control the form of the indictment. The indictment, or the information, or the complaint before the magistrate, as the case may require, must set out, not only such facts as constitute a crime, but all which necessarily enter into the particular criminal compound to which the law attaches the particular punishment to be inflicted. If, for example, what is charged against a defendant is such as authorizes a term of imprisonment, this may be inflicted, and the indictment will be good for it; but the court cannot, when the defendant is convicted, proceed further and sentence him to be hung.[3] To do so would violate the constitutional guaranty precisely the same as it would to inflict punishment without any written accusation whatever.

§ 372. **Continued — Homicide.** — Precisely what is the legislative capacity to abridge the forms of the indictment which the common law has established is a question not made plain by adjudication. As to the doctrine of the last two sections, there is no question; and the rule there stated should be carefully noted; and, whatever the legislature may undertake, that rule should be followed by the pleader. It does not require a setting out of the evidence by which the criminal fact is to

[1] The State *v.* Learned, 47 Maine, 426; Crim. Proced. 2d ed. I. § 103.

[2] For another example, see Byran *v.* The State, 45 Ala. 86.

[3] Crim. Proced. 2d ed. I. § 80, 102; II. § 589, and the accompanying discussions.

be made to appear, but it does require an allegation of the fact itself. Thus, to state a case not well understood by the courts, if the law makes three grades in the punishment of felonious homicides; namely, one punishment for such as are simply felonious, called manslaughter; another for such as are committed with "malice aforethought," called murder; and still another for such as are committed with "deliberately premeditated malice aforethought," called murder in the first degree, — the words "malice aforethought" are essential in an indictment for murder, and the words "*deliberately premeditated* malice aforethought" are essential in an indictment for murder in the first degree. Then, whatever statutory directions as to the form of the indictment may exist, the court cannot without violating the Constitution sentence a prisoner to the punishment provided for murder, unless the indictment charges the killing to have been of "malice aforethought," or to the penalty provided for murder in the first degree unless the indictment charges also that the malice aforethought was "deliberately premeditated."[1] At the same time, this particular rule of the indictment does not require the evidence, or the means or manner of the killing, to be set out; and how much of these, or whether any thing, must be alleged, depends on other considerations.

§ 373. **Facts descriptive of the Crime.** — To these other considerations, then, let us now for a moment turn. It is evident that an indictment may, in brief and curt terms, state all the facts which the law makes essential to the punishment, yet furnish the prisoner with no such information concerning the transaction aimed at as natural justice demands. Therefore the common law has its provisions on this subject also, and something which seems to bear on this subject appears likewise in our constitutions. What these allegations are, as required by the common law, the author has stated in detail in his work on Criminal Procedure, and they need not be repeated here.[2] And our constitutional guaranties have come very near to affirming the common-law rules on this subject, as to the substantial

[1] Crim. Law, 5th ed. I. § 797; Crim. Proced. 2d ed. I. § 80, 102; II. § 562–609; Bishop First Book, § 401 and note, 455.

[2] Crim. Proced. 2d ed. I. § 499–592.

allegations, and rendering them irrepealable. For example, as elsewhere observed,[1] the Constitution of Mississippi provided, that, "in all criminal prosecutions, the accused shall have the right to demand the nature and cause of the accusation against him;" and, when the "act to suppress trade and barter with slaves" declared it unnecessary to set out in the indictment the name of the slave, or of his owner, or the kind and quality of the produce bought and sold, it was held to be in this respect unconstitutional. Thus we have the doctrine, that our constitutions are not satisfied when the indictment sets out, as it should, every element which enters into the punishment, unless it also sets out such particulars of the transaction as are reasonably necessary to enable the prisoner to enter on his defence.

§ 374. **Indictments on Statutes.** — Now, these various doctrines apply, as the reader perceives, to indictments drawn upon statutes, the same as to those which are framed upon the common law. In the work on Criminal Procedure[2] is a chapter explaining how indictments upon statutes are to be framed; but, it should be remembered, that the discussions in that chapter, and in the opinions of judges and the works of other authors on the same subject, relate to what the indictment on the statute should contain *in addition* to what is required in the common-law indictment. For when we proceed upon a statute, we follow the common-law rules, the same as when we proceed to procure a conviction for a common-law offence.

[1] Crim. Proced. 2d ed. I. § 104.

[2] Crim. Proced. 2d ed. I. § 593 et seq.

CHAPTER XVI.

PRACTICAL DIRECTIONS FOR DRAWING INDICTMENTS ON STATUTES.

375. Introduction.
376, 377. Formal Parts.
378–383. Substantial Parts.
384–393. Practical Illustrations.

§ 375. **How the Chapter divided.** — We shall consider, I. The Formal Parts; II. The Substantial Parts; III. Illustrations showing the Practical Workings of the Rules.

I. *The Formal Parts.*

§ 376. **General View.** — The formal parts of indictments, on statutes and for common-law crimes, were stated in the work on Criminal Procedure. In most, and perhaps in all, of our States, there are statutes rendering unnecessary various allegations which were required by the common law. Thus, in Maine: "No indictment or complaint shall be quashed, nor judgment thereon arrested or affected by reason of the omission or misstatement of the title, occupation, estate, or degree of the accused; of the name of the city, town, or county, of his residence, or of the words 'feloniously,' 'force and arms,' 'against the peace,' or 'contrary to the form of the statute;' if such omission or misstatement does not tend to his prejudice."[1] Still, in spite of this provision, a practitioner might choose to insert these formal parts, for they would do no harm, and in some cases might prevent the question being raised whether their omission tended, in the particular instance, to the defendant's prejudice. But things of this sort a prudent prosecuting officer will settle once for all, and insert what he thinks advisable in printed forms kept ready for use.

§ 377. **"Against Form of Statute."** — In the work on Criminal Procedure were considered the questions, when these words must, under the common-law rules, be inserted, and when

[1] Maine R. S. of 1871, c. 131, § 12.

they need not be; and when, if they are necessary, they must be in the singular form and when in the plural.[1] There are not many States in which these questions are now of practical importance. Where they are of importance, the practitioner will be aided by keeping in mind the following distinction: If the case is one requiring this conclusion, its omission is absolutely fatal; but, if the conclusion is not required, as, if the indictment is drawn upon the common law, then its presence will be mere surplusage, which will do no harm.[2] Therefore, if there is doubt, the conclusion should be inserted. And if there is doubt whether the conclusion should be in the singular or in the plural, the counts may be doubled, the one set being in the one form and the other in the other form.

II. *The Substantial Parts.*

§ 378. **General View — Follow Statute.** — In the work on Criminal Procedure, the indictment upon statutes was pretty fully discussed.[3] We have already seen,[4] that, where the common-law rules respecting indictments are not modified by statutes, an indictment upon a statute must conform to those rules the same as one drawn on the common law. This suggestion will, therefore, prepare the reader not to be misled by a rule often announced in very broad terms, namely, that an indictment upon a statute is sufficient if it follows the statutory words creating and defining the offence.[5] Now, this rule

[1] Crim. Proced. 2d ed. I. § 429, 601–605, 773; II. § 99, 155, 499, 950, 1014.

[2] Crim. Proced. 2d ed. I. § 601; The State *v.* Straw, 42 N. H. 393. I have always understood this proposition to be sound law in all our States. But I notice an Illinois case in which there is a strong *dictum* that, if an indictment contains this conclusion, there can be no conviction on it as for a common-law offence. Paris *v.* People, 27 Ill. 74. I have not noticed any thing in the Illinois reports or statutes contrary to this *dictum*, but quite likely there is. In Bassett's Criminal Pleading, written by an Illinois lawyer and intended for Illinois practice, I find the following passage, not accompanied by any reference to authorities: "Where an indictment should conclude *contra pacem* only, and it also conclude against the statute, the latter will be deemed surplusage only." Bassett Crim. Pl. 16.

[3] Crim. Proced. 2d ed. I. § 593 et seq.

[4] Ante, § 374.

[5] Commonwealth *v.* Tanner, 5 Bush, 316; Harrison *v.* The State, 2 Cold. 232; The State *v.* Stubblefield, 32 Misso. 563; People *v.* Burke, 34 Cal. 661; People *v.* Martin, 32 Cal. 91; People *v.* White, 34 Cal. 183; Clarke *v.* Territory, 1 Wash. Ter. 82; The State *v.* Daley, 41 Vt. 564; Crim. Proced. 2d ed. I. § 611.

does not dispense with the necessity of describing persons, places, and things in the manner required in indictments on the common law.[1] These things are as important in indictments on statutes as in any other. The better statement of the rule was made by Metcalf, J. in the Massachusetts court, thus: "A charge in an indictment may be made in the words of a statute, without a particular statement of facts and circumstances, when, by using those words, the act in which an offence consists is fully, directly, and expressly alleged, without any uncertainty or ambiguity."[2]

§ 379. **Following Statute, continued.** — Indeed, in many cases and in various particulars, it is necessary that the allegations of the indictment should be broader than the words of the statute on which it is drawn.[3] Thus, in New Hampshire, an indictment against the selectmen of a town for wilful neglect "to raise and apply" money for the relief of the family of a soldier, drawn upon the statute on that subject, is insufficient if it does not show that an adequate sum was not raised by the town, or that there was not in the town a committee legally constituted to apply it.[4] And in Kentucky, an indictment simply charging that the defendant unlawfully exhibited a theatrical performance, without stating facts to show whether it was a common-law or statutory offence, has been held to be inadequate.[5] But the doctrines under this head are sufficiently set out into detail in the work on Criminal Procedure.

§ 380. **Continued.** — So it will there appear how closely the indictment must follow the statutory words. It is not always necessary that the precise words of the statute should be employed in the allegation, but their equivalents will often

[1] Ante, § 373. And see The State *v.* Fee, 19 Wis. 562; Davis *v.* People, 19 Ill. 74; The State *v.* Noland, 29 Ind. 212. In an indictment for perjury under the statute, it is not sufficient to charge the offence in the exact statutory words; but the facts and circumstances, such as time when it is of the essence of the offence, place, manner, and occasion of committing the alleged false swearing, should be set out with such particularity and certainty as will give the accused reasonable notice of what he is to defend himself against. Stofer *v.* The State, 3 W. Va. 689. An indictment upon a statute for receiving stolen goods must state from whom the goods were received. The State *v.* Beatty, Phillips, 52.

[2] Commonwealth *v.* Welsh, 7 Gray, 324, 327.

[3] Crim. Proced. 2d ed. I. § 623–630.

[4] The State *v.* Fitts, 44 N. H. 621.

[5] Pike *v.* Commonwealth, 2 Duvall, 89.

answer.[1] Still the doctrine seems to be, that enough of the exact words must be used to identify the statute on which the indictment is drawn; and, when enough of such exact words are not used, though equivalent ones are, it will be insufficient.[2]

§ 381. **Offence created by Common-law Name.** — We have seen,[3] that an offence is sometimes created by the use merely of a common-law name; as, when a statute makes it punishable to commit "robbery," or "larceny." It is the constant practice, and the rule, in such cases, to draw the indictment in the common-law form; and no one ever supposed that to charge the defendant, in the naked words of the statute, with having committed a "robbery" or a "larceny" would suffice. But it does suffice, as to the substance of the allegation, to use the common-law form;[4] and, where a statute defines and prohibits an offence substantially as it is defined and prohibited by the common law, an indictment which would be good at the common law is good under the statute also.[5]

§ 382. **Negative Averments.** — To learn when negative averments must be employed, the reader is referred to the work on Criminal Procedure.[6] The rules on this subject are nice, requiring careful discrimination, and they could not be stated here without repeating what is there said. But it should be observed, that, in the form of these averments, it is not necessary to follow the statute with such fulness as in the main allegation.[7] Thus, where a defendant was charged with taking up and using estray cattle contrary to a statutory provision, a negative allegation that he did it "without estraying them in the manner prescribed by law," was held to be sufficient.[8]

§ 383. **Alternative Clauses.** — One more proposition should be borne in mind. If an indictment is to be drawn on a statute, in alternative clauses, the pleader, as a general rule, to

[1] Crim. Proced. 2d ed. I. § 611–618; The State *v.* Butman, 15 La. An. 166; Carder *v.* The State, 17 Ind. 307; The State *v.* Pennington, 3 Head, 119.

[2] Crim. Proced. 2d ed. I. § 615–617; The State *v.* Smith, 20 N. H. 399.

[3] Ante, § 363.

[4] Evans *v.* The State, 25 Texas, Supp. 303.

[5] Roberts *v.* The State, 21 Ark. 183.

[6] Crim. Proced. 2d ed. I. § 631 et seq.

[7] Ib. § 641.

[8] The State *v.* Moreland, 27 Texas, 726. And see Reg. *v.* Smith, 7 Mod. 77; Schutze *v.* The State, 30 Texas, 508.

which there may be exceptions in consequence of a peculiar phraseology or a peculiar subject, may elect to charge no more than constitutes an offence within one clause, or he may proceed upon two clauses, or three, or all, as he deems best, and all in a single count; employing the conjunctive *and*, where the statute uses the disjunctive "or." But though the conviction may be for the whole, it is all, when proceeded against in this way, regarded as only one offence, subjecting the offender to no more than one penalty. In like manner, the conviction may be for no more than what barely constitutes a crime.[1]

III. *Illustrations showing the Practical Workings of the Rules.*

§ 384. **How to draw an Indictment on a Statute.** — The practitioner, having arranged the formal parts in the manner already described,[2] and having made his mind familiar with the facts of the particular case, will lay before him the statute. If it merely forbids an offence by a common-law name,[3] and affixes to it a punishment, he will know that the indictment is to be purely at common law, and need not mention the statute, provided common-law crimes are recognized in his State.[4] If the offence is against the United States, or against a State in which common-law crimes are unknown, the indictment should be in the same terms, but it should conclude against the form of the statute. If, on the other hand, the statute creates a new offence and defines its bounds, then, with the statute before him, he proceeds as follows: —

§ 385. **Statute against selling Adulterated Milk, and Indictment on it.** — Suppose, then, a statute is in the following terms: "Whoever sells or keeps or offers for sale adulterated milk, or milk to which water or any foreign substance has been added, shall," &c.[5] And suppose the facts of a case to be, that the defendant, who was a milk dealer, sold to a person whose name is known one quart of a mixture of milk and water, the precise proportions of which mixture could not be ascertained.

[1] Crim. Proced. 2d ed. I. § 586–592; The State *v.* McCollum, 44 Misso. 343; The State *v.* Batson, 31 Misso. 343.

[2] Ante, § 376.

[3] Ante, § 363, 381.

[4] Crim. Proced. 2d ed. I. § 597.

[5] Mass. Stat. of 1864, c. 122, § 4.

If the only proven act consists in the selling, there is no need to allege that he offered it for sale. If water was added, and some other foreign substance also, the simple allegation that water was added would be sufficient; for, where the evidence shows the presence of water, it is immaterial what further appears. The pleader, therefore, after passing the introductory part of the indictment, will proceed: —

That the said Jones, on the fifth day of March, in the year of our Lord eighteen hundred and seventy-two, at Boston, in said county of Suffolk, did sell [here the eye strikes the statutory words. Is it necessary to go beyond them and allege the price? The Indiana court held that it was, on an indictment for the unlicensed sale of intoxicating liquor; but most other courts have held this allegation to be unnecessary.[1] If the pleader wishes to be concise, and he is not in Indiana, he will probably not dwell on the price, but proceed] to one Jane Richards [here, according to the opinion of most courts, he must go beyond the statute and mention the name of the person to whom the sale was made,[2] though perhaps there may be some localities among us where this would not be necessary[3]] a certain quantity of adulterated milk, being milk to which water had been added [following thus far the exact material words of the statute; but he would here deem it best to expand the allegation beyond the words, in order to give it a more definite form, as], to wit, one quart of a mixture of which a certain proportion was milk, and a certain other proportion was water, to wit, two parts milk and one part water [then ending with the formal parts.][4]

§ 386. **Practical Hints.** — The reader is now prepared to consider the following practical hints, which the writer will offer him.

1. Never draw an indictment except with the statute spread out before you.

2. Do not lumber the allegation with matter which is certainly needless.

3. On the other hand, do not, except to gain some important end, run risks by omitting an allegation, where doubts may be raised whether its presence is necessary or not.

4. Always employ the exact statutory words, and do not

[1] Crim. Proced. 2d ed. I. § 514.

[2] Crim. Proced. 2d ed. I. § 104, 566, 569, 571; ante, § 373; Brown *v.* Mobile, 23 Ala. 722.

[3] And see The State *v.* Johnston, 6 Jones, N. C. 485.

[4] In Commonwealth *v.* Smith, 103 Mass. 444, where the proceeding was sustained, the allegation was, that the defendant, at, &c., "with force and arms, did unlawfully offer for sale and sell to one Gilman Currier, for the sum of eighteen cents, a large quantity, that is to say, two quarts of adulterated milk, that is to say, a certain quantity, to wit, two quarts of milk, to which a certain quantity, to wit, one pint, of water had been added."

experiment with other words which you may deem to be sufficient as substitutes.

5. To this end, keep your eye constantly on the statute while you are writing.

6. Guard every expansion beyond the statutory words so as not to encumber the record with needless matter so alleged as to render proof of it necessary.

7. Consider, at each step, whether or not expansion is necessary, so as to bring the allegation within constitutional or common-law requirements.

§ 387. **Continued.** — When an indictment is written, test it by the following questions: —

1. Are the formal parts all right? Particularly, the introduction — allegation of place — of time — "force and arms" — "against the peace" — "form of statute"?

2. Name of defendant? of person injured? of owner?

3. Descriptions of things? value?

4. Statutory words? exact? too many? too few? Allege more than statutory words?

5. Is any thing omitted which enters into the punishment?

6. Negative averments?

7. "Feloniously?"

This seventh question involves the inquiry whether the offence is felony or misdemeanor; because, if it is felony, the rules prevailing in a considerable proportion of the States require, that the act shall be alleged to have been "feloniously" done, even though this word is not in the statute. And perhaps, in some of the States, if the offence is a misdemeanor, the word "feloniously," should it be employed, cannot be rejected as surplusage, but it will spoil the indictment.[1]

§ 388. **Complicated Cases — Statutory Libel.** — When the indictment is to be drawn on a simple provision of pure statutory law, the process is easy. Such is the foregoing indictment for selling milk mixed with water. But a statute is sometimes complicated in its own provisions, and these again are complicated with the common law, in a way to present questions of real embarrassment. Thus, turning to the Pennsylvania stat-

[1] Crim. Proced. 2d ed. I. § 533–537, 626.

utes, we have the following: "If any person shall write, print, publish, or exhibit any malicious or defamatory libel, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, or ridicule, such person shall be guilty of a misdemeanor, and, on conviction, be sentenced," &c.[1] According to the commissioners who prepared the Penal Code, "this section merely puts the common-law definition of a malicious and defamatory libel in a statutory form; the object of the commissioners being to assign this crime a place in the statute laws, in order to admonish and instruct."[2] Is, then, an indictment on this provision, drawn simply in the common-law form, adequate? This question is here put as a general one, not inquiring what peculiarities may exist in the Pennsylvania procedure. Perhaps some courts might hold it to be adequate, but one cannot readily see how it can be so, as respects every particular form which might be sufficient at the common law. At all events, a prudent pleader, in the absence of express adjudication and of a statute modifying the common-law rules relating to the indictment, would draw his count in a manner to conform to the statutory description of the offence, while at the same time he clung in other respects to the established common-law models. Suppose, then, the libel consists of a handbill, posted up about the streets of a city, in the following words: —

"*Take Notice.* — All persons are cautioned against being swindled by Richard Bumper, grocer. He sells by false scales, and cheats in every way possible.

SAMUEL TINKER."

Having now the libel and the statute spread before us, let us take the author's work on Criminal Procedure, and there open to a form of the common-law indictment. We find one nearly enough conforming to the present facts at § 783 of the second volume. On examining it, we see that this particular form contains sufficient of the statutory words to meet the present case; and, if we should adapt that form to the present libel it would doubtless be adequate. Still, if the indictment were thus drawn, it would appear like an ill-fitting coat; here there

[1] Brightly's Purd. Dig. p. 221, § 26. [2] Ib. note.

would be too much, and there not enough, for good looks; so that it would not please an accurate pleader. Let us, therefore, proceed as follows: —

That Samuel Tinker, of ——, in the county of ——, at said ——, on the first day of July, in the year of our Lord eighteen hundred and seventy-two, contriving and intending to [here look at the statute] blacken the reputation of one [now look at the libel] Richard Bumper, grocer [now look again at the statute], and expose him to public hatred, contempt, and ridicule [having finished these statutory words, shall we go beyond them and add any thing about injury to the business of Bumper, as grocer? We may, if we wish, but in this particular case there is no reason why we should. Besides, if we had intended to do this, we ought to have inserted introductory averments adapted to this sort of allegation. The statute, the reader perceives, is now exhausted; and, although the fact that Bumper was a grocer and the libel was of him in his business might influence the discretion of the judge in pronouncing punishment where the amount of it lay within his discretion, yet matter of this sort, to produce its effect, need not appear in the allegation[1]], then and there maliciously did publish [one of the statutory words], of and concerning the said Bumper, a [looking now at the statute] malicious and defamatory libel, tending to blacken the reputation of said Bumper, and thereby exposing him to public hatred, contempt, and ridicule, the tenor of which libel [now looking at the libel] is the following: "All persons are cautioned against being swindled by Richard Bumper, grocer" (meaning the aforesaid Bumper). "He sells by false scales, and cheats in every way possible;" against the peace of the Commonwealth, and contrary to the form of the statute in such case made and provided.[2]

§ 389. **Statutory Libel, continued.** — If we now open the Maine Statutes, we shall there find enactments concerning libels differing considerably from this Pennsylvania one. They are as follows: "A libel is a malicious defamation of a living person, made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath, expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or of a deceased person, thus made public, designed to blacken and vilify his memory, and tending to scandalize or provoke his relatives or friends; but nothing shall be deemed a libel unless there is a publication thereof; and the delivery, selling, reading, or otherwise communicating a libel directly or indi-

[1] See Crim. Proced. 2d ed. I. § 84, 85.

[2] In the form which we have been in part following (Crim. Proced. 2d ed. II. § 783), there are several formal allegations of the needless kind, which are here omitted, — such as, "to the damage," &c., "to the evil example," &c. Ib. I. § 647. In that form, also, it is alleged that the defendant knew his libel to be false. Plainly things of this sort are unimportant.

rectly to any person, or to the party libelled, shall be deemed a publication." Then the next section proceeds in the following words: "Whoever makes, composes, dictates, writes, or prints a libel; directs or procures it to be done; wilfully publishes or circulates it, or knowingly and wilfully aids in doing either, shall be punished by imprisonment less than one year, and by fine not exceeding one thousand dollars."[1] In a subsequent chapter we have the following provision of a general sort: "Whoever attempts to commit any criminal offence, and does any thing towards it, but fails, is interrupted, or prevented in its execution, where no punishment is expressly provided for such attempt, shall be punished, when the offence thus attempted is punishable with death or imprisonment in the State prison for life, by imprisonment not less than one, nor more than ten years; but, in all other cases, by the same kind, but not exceeding one-half of the punishment that might have been inflicted, if the offence attempted had been committed."[2]

§ 390. **Continued.** — Now, suppose a man has written a gross libel, intending to publish it, but before he is able to carry out this intention it is seized and taken from him, — has he committed a statutory offence? At common law the transaction would plainly enough constitute, at least, an indictable attempt to publish a libel, and perhaps some judges might deem it to amount even to libel.[3] But the first of the foregoing sections provides, that "nothing shall be deemed a libel unless there is a publication thereof." If the language had been, that "nothing libellous shall be indictable unless there is a publication thereof," it would plainly enough have controlled the second section which makes punishable the person who "writes" a libel; the meaning being, that, if one writes a libel and another publishes it, the writer may be indicted, but not so if no publication follows the writing. And, as a specific statutory provision controls a general one,[4] this provision would create an exception to the general statute which makes punishable an attempt to commit a crime. On the other hand, as the first of this series of provisions is not what is last sup-

[1] Maine R. S. of 1871, c. 129, § 1, 2.
[2] Maine R. S. of 1871, c. 131, § 8.
[3] Crim. Law, 5th ed. II. § 926, 927, 949.
[4] Ante, § 126.

posed, but that "nothing shall be deemed a *libel* unless there is a publication thereof," the result of the three statutes construed together may be to make indictable the writing with the criminal intent, not as a substantive crime, but as an attempt; leading to this practical result, namely, that the statutes settle a disputed point in the common law, and subject the writer, when there is no publication, to a milder punishment than if publication had followed the writing. This latter interpretation seems to be the more scientific and practically the better of the two; yet no man lives who could tell with certainty, in advance of adjudication, which of the two expositions a particular court would adopt. This, it may be observed, is an apt illustration of the *certainty* which is practically produced by codifying the common law!

§ 391. **Continued — Attempt.** — Suppose, then, we so interpret the foregoing provisions as to make the writing of a libel an indictable attempt, where the writer means to publish it, but is intercepted in his purpose; and suppose the attempted libel to be the one on which the last form is drawn,[1] — being about to draw the indictment, we lay the statutes before us, and the libel. But what common-law forms do the books furnish to aid us? The subject of attempt has not been very much or accurately discussed in our law-books heretofore,[2] and we can expect to obtain from them but little absolute help. In the author's work on Criminal Procedure the indictment for attempt is discussed, and some forms are there given. The form for the present use should be found, if at all, in the division of the chapter which relates to the act which in itself alone is not necessarily criminal, but becomes so by reason of its being a step toward the commission of a substantive offence, the commission of which offence the doer of the act specifically intends.[3] But here we find that the authorities are in conflict, and some of them are quite unsatisfactory; so, after reading what is said, we conclude to get on without resort to either of the two forms given. On principle, we see that we must set out the act which was committed, and the specific intent which accompanied it. If, then, we draw the indictment

[1] Ante, § 388.
[2] Crim. Law, 5th ed. I. § 725.
[3] Crim. Proced. 2d ed. II. § 86–93.

as though it were for the substantive offence, and take care that it contains an allegation of a specific intent to publish the libel, but, instead of using the statutory word "publishes," employ the other statutory word "writes," we shall, at least, begin right. How far the particular words of the section making it indictable to "attempt" are to be brought in, we shall see as we go on.

§ 392. **Continued.** — Having passed the introduction we proceed: —

That Samuel Tinker, of ——, in the county of ——, at the said ——, on the first day of July, in the year of our Lord eighteen hundred and seventy-two, contriving and intending [here it is well to look into the first of the foregoing sections,[1] though probably not necessary in point of law to follow its precise terms, as the indictment is not really, in any part, on this section] maliciously to defame one Richard Bumper, grocer, to provoke him to wrath, expose him to public hatred, and deprive him of the benefits of public confidence and social intercourse, did then and there maliciously [here look into the second section] make, compose, and write a false, scandalous, malicious, and defamatory writing, then and there meaning and intending the same to be a libel, and then and there meaning and intending to publish the same, of and concerning the said Richard Bumper, in the words following, to wit: "All persons are cautioned against being swindled by Richard Bumper, grocer" (meaning the aforesaid Bumper). "He sells by false scales, and cheats in every way possible" [now turn to the third of the above quoted sections, which concerns the attempt]; but the said Tinker then and there failed, was interrupted, and prevented in the execution of his aforesaid purpose, so that he did not and could not publish the same; against the peace of the State, and contrary to the form of the statute[2] in such case made and provided.

§ 393. **Conclusion.** —The purpose of the discussions of the present sub-title is now accomplished. The author did not propose to furnish, in this place, positive instructions respecting the indictments for the various offences, but to bring before the reader enough of hint and example to show him in what manner to apply his learning in the actual work of this branch of professional practice.

[1] Quoted ante, § 389.

[2] The Maine Revised Statutes of 1871 are all one *statute*, though in separate chapters and sections; therefore any indictment drawn on them should conclude in the singular form. And see Crim. Proced. 2d ed. I. § 606.

CHAPTER XVII.

PROCEEDINGS ON PRIVATE STATUTES AND ON BY-LAWS.

394. Introduction.
395–402. Indictment on Private Statutes.
403–407. Procedure on Municipal By-laws.

§ 394. **Scope of this Chapter — Order of the Discussion.** — It is not often that there is occasion to draw an indictment on a private statute; that is, on a statute of which the courts do not take judicial notice. At the same time such occasion may occur; and, even should it not, some statements as to the proceeding are an essential introduction to a discussion of the proceedings for violations of city ordinances, and other by-laws of municipal corporations. We shall, therefore, consider, I. The Indictment on Private Statutes; II. The Procedure upon Municipal By-laws.

I. *The Indictment on Private Statutes.*

§ 395. **Need not recite Public Statute.** — Under this sub-title, nothing is necessary except to copy what is said on the subject by Chitty:[1] "It has long been perfectly settled that there is no necessity, in any indictment or information on a *public* statute, whether the offence be evil in its own nature, or only becomes so by the prohibitions of the legislature, to recite the statute upon which it is founded; for the judges are bound *ex officio* to take notice of all public acts of Parliament, and, where there are more than one by which the proceeding can be maintained, they will refer it to that which is most for the public advantage.[2] But if the indictment profess to recite the statute, and there be a material variance, and the indictment conclude 'contrary to the form of the *said statute*,' such variance will be fatal, and therefore it is in no case advisable

[1] 1 Chit. Crim. Law, 276–281.

[2] Dyer, 155 *a*, 346 *b*; 6 Mod. 140; Cro. Eliz. 186, 236; Hob. 310; 2 Hale P. C. 172; 2 Hawk. P. C. c. 25, § 100; 1 Saund. 135, note; Bac. Abr. Indictment, 1; Burn Just. Indictment, IX.; 1 Chit. Pl. 4th ed. 197.

to recite it;[1] though, if after such misrecital of a public act the indictment conclude generally as 'contrary to the statute in such case made and provided,' omitting any reference to the statute recited, the recital may be rejected as surplusage.[2]

§ 396. **How as to Private.** — "But the parts of a private act upon which an indictment is framed must be set out specially,[3] the same as other facts; and a variance, if properly shown to the court, will be fatal.[4] 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.[5] It will, therefore, be necessary to inquire what in such case would be deemed a variance so as to vitiate the proceedings.

§ 397. **How Private Statute to be recited.** — "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;[6] for a mistake, in this respect, will frequently prove fatal. Thus, if a Parliament was first holden on the 28th day of April, 23d year of Henry VIII., and afterwards holden on the 12th day of April in the next year, and a statute passed on the last of these days be recited as made at a Parliament holden on the first of them, the mistake will be fatal.[7] So if a Parliament be summoned for the 23d, and afterwards prorogued to the 25th, it would be a misrecital of an act passed during its sittings to describe it as holden on the former.[8] And in some cases the averment that a statute was made at a Parliament holden in a year when

[1] Cro. Eliz. 236, 249; Plow. 79, 83, 84; 1 Stra. 214; 1 Doug. 94; 4 Co. 48; Fost. 372; Cro. Car. 135; 1 Rol. 49, 50; W. Jones, 194; 2 Hale P. C. 172; 2 Hawk. P. C. c. 25, § 101; Bac. Abr. Ind. H. Stat. I.; 5 Burn J. Ind. IX.; Ld. Raym. 382; 6 T. R. 796.

[2] Id. ibid; 1 Ld. Raym. 382; Cro. Car. 232, 233; 2 Hale P. C. 172, 173; 2 Hawk. P. C. c. 25, § 104; 6 T. R. 773; but see 1 Saund. 133, note 3, in which this distinction is not noticed.

[3] The American annotator refers here to Goshen Turnpike *v.* Sears, 7 Conn. 86, 92; 1 Stark. Ev. 5th Am. ed. 197, notes; The State *v.* Cobb, 1 Dev. & Bat. 115.

[4] 1 Sid. 356; 2 Hale P. C. 172; 2 Hawk. P. C. c. 25, § 103; Bac. Abr. Ind. H. 2; Burn Just. Ind. IX.

[5] 2 Hawk. P. C. c. 25, § 103; Bac. Abr. Ind. H. 2; Burn Just. Ind. IX.; 1 Chit. Pl. 4th ed. 197.

[6] 2 Dyer, 203; 2 Hawk. P. C. c. 25, § 104; Bac. Abr. Ind. H. 2.

[7] 2 Hawk. P. C. c. 25, § 104; Plow. 79, 83, 84; Cro. Car. 232; Cro. Jac. 139; Burn. Just. Ind. IX.

[8] 2 Dyer, 203; 2 Hawk. P. C. c. 25, § 104; Bac. Abr. Ind. H. 2; and see 2 Chit Rep. 513.

it sat by prorogation, instead of the session of Parliament, has been considered as a fatal variance; because the court will not make any case stronger than the party himself has done upon the record.[1] But the indictment may be supported if it has been the constant course of precedents thus to refer to the statute by which the offence was created.[2]

§ 398. **Continued.** — "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.[3] And so a mistake in the day from which the statute began to operate will be material if a particular period be specified in its provisions;[4] but now, by a recent act,[5] the day, month, and year of passing a statute, and of its receiving the royal assent, are to be indorsed upon it, and to be regarded as the time of its commencement, unless some other date be particularly expressed in its body. It has been said, that an indictment was in one instance discharged for not showing the county in which the Parliament was holden;[6] but, as the time need not be averred, it is probable the omission of the place would be regarded as equally immaterial.[7] If, however, the indictment profess to set forth the county, and mistake it, it cannot be supported.[8]

§ 399. **Continued.** — "The title and preamble of the act need not in any case be recited, for they form no part of the law.[9] The title is mere matter of description given by the maker; and the preamble is no part of the statute, but generally contains the reasons and inducements for its being enacted.[10] But, although the contrary seems to have been thought by Lord Hale,[11] it is the better opinion that, if a party undertake

[1] 4 Inst. 27; Cro. Jac. 111; Lutw. 140; 1 Dyer, 95 *a*; 2 Dyer, 171 *a*; Skin. 110, 111; 2 Hawk. P. C. c. 25, § 104; Bac. Abr. Ind. H. 2.

[2] Yelv. 107; Dyer, 171 *a*; Cro. Jac. 139; Brownl. & G. 101; 2 Keb. 34; 2 Hawk. P. C. c. 25, § 104; Bac. Abr. Ind. H. 2.

[3] Sir F. Moore, 202; 2 Hawk. P. C. c. 25, § 104; Bac. Abr. Ind. H. 2.

[4] 2 Rol. Abr. 465; 2 Hawk. P. C. c. 25, § 106; Bac. Abr. Ind. H. 2.

[5] Stat. 23 Geo. 3, c. 13.

[6] Cro. Eliz. 106; Bac. Abr. Ind. H. 2.

[7] 2 Dyer, 303; 2 Hawk. P. C. c. 25, § 104; Bac. Abr. Ind. H. 2. And the courts are bound to take judicial notice of the place where a parliament sat. 1 Ld. Raym. 210, 343.

[8] Cro. Eliz. 583; Cowp. 474; 1 Chit. Pl. 4th ed. 198.

[9] See ante, § 44–51.

[10] Holt, 662, 663; 6 Mod. 62; 2 Salk. 609; 3 Salk. 331; 2 Hawk. P. C. c. 25, § 106, 107; Bac. Abr. Ind. H. 2.

[11] Hardr. 324.

to recite them, he must set them forth with correctness, or otherwise the variance will be fatal,[1] if the indictment conclude contrary to the statute *aforesaid;* because, if the prosecutor think fit to state that he founds his indictment on a particular statute, and then sets forth a title and preamble as part of it, and no act of Parliament be found with which they coincide, the result must be that there is no foundation for such a proceeding.[2] And therefore it has been holden, that the substitution of the word *indicari* instead of *indictari*, in the recital of the preamble of the statute of hue and cry, in a writ founded upon that provision, was fatal; but this is liable to question, upon the ground that so small an alteration could not be deemed a variance.[3] Indeed it has been holden in a declaration upon the same statute, that, if in reciting the preamble the 'burning of houses' be expressed, though the act speaks only of *arsons* generally, it will be sufficient;[4] and, in case of slander of an earl, upon the 2 Rich. 2, c. 5, it is good if the declaration mention 'earls' only, though the preamble professes to recite 'other great officers.'[5] By these decisions the authority of the former seems to be considerably shaken.[6]

§ 400. **Continued.** — "But it is more material to consider the accuracy with which the purview of the statute must be stated; because this recital is necessary in proceedings on a private enactment. 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.[7] Thus, if the indictment in case of forcible entry substitute the word *vi* for *manu forti*,[8] if, in the case of scandalum magnatum, *muncia* be used instead of *mendacia*,[9] expelled *and* disseised for ex-

[1] The American editor here refers to Murray *v.* Fitzpatrick, 3 Caines, 38, 41; People *v.* Walbridge, 6 Cow. 512.

[2] Holt, 662; 6 Mod. 62; 2 Salk. 609; 3 Salk. 331; 2 Hawk. P. C. c. 25, § 105; Bac. Abr. Ind. H. 2; Burn. Just. Ind. IX.; 1 Chit. Pl. 4th ed. 322.

[3] Hut. 56, 57; 3 Keb. 648, 662.

[4] 3 Keb. 647, 648, 661, 662; T. Jones, 51.

[5] T. Jones, 20, 21; 3 Keb. 647, 648, 661, 662.

[6] 2 Hawk. P. C. c. 25, § 107.

[7] 1 Ld. Raym. 382; 1 Doug. 97; 2 Hawk. P. C. c. 25, § 101; Bac. Abr. Ind. H. 2.

[8] Cro. Car. 98; 2 Bulst. 258; 2 Hawk. P. C. c. 25, § 151; Bac. Abr. Ind. H. 2.

[9] 4 Co. 12, 13; 2 Hawk. P. C. c. 25, § 101; Bac. Abr. Ind. H. 2.

pelled *or* disseised,[1] *admitterent* for *amitteret*,[2] it was formerly holden that the proceedings would be defective. But it seems to be a general and established rule, that a variance which does not alter the sense of a material part of the statute will not vitiate.[3] Thus, to write *sea* of Rome for *see* of Rome, in the recital of an oath prescribed by a statute, I do declare in conscience instead of I do declare in *my* conscience, maliciously *and* contemptuously for maliciously *or* contemptuously, or in *aliqua curia* instead of *aliquibus curiis*, are not material variances.[4] And notwithstanding the nicety required by some of the older decisions just cited, the strictness formerly required is now considerably relaxed.[5] 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 render the whole repugnant to the intent of the statute; for then the superfluous words cannot be rejected.[6]

§ 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,' we have seen that 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.[7] 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*

[1] Cro. Eliz. 697; acc. id. 307, cont.; and see 2 Hawk. P. C. c. 25, § 108.

[2] Cro. Jac. 133.

[3] The American editor refers here to Murray *v.* Fitzpatrick, 3 Caines, 38.

[4] Cro. Car. 135, 136, 522, 523; 1 Vent. 172; Palm. 565; W. Jones, 194; 2 Hawk. P. C. c. 25, § 102, 106.

[5] 2 Hawk. P. C. c. 25, § 108.

[6] 2 Hawk. P. C. c. 25, § 109; 4 Co. 12, 13.

[7] Ante, § 395; 1 Doug. 94; Fost. 372; 1 Stra. 214; 1 Ld. Raym. 382; Cro. Car. 232, 233; 2 Hale P. C. 172, 173; 2 Hawk. P. C. c. 25, § 104.

record, for the court will presume the recital to be correct until the contrary is formally shown."[1] . It must be evident to the reader, that, at this point, the learned author has fallen into the error of applying a rule of civil pleading to the criminal proceeding, not applicable in these circumstances. On principle, if a private statute is relied on in an indictment, then, at the trial, the prosecutor must prove this statute like any other fact; and, should there be a variance on this point, as on any other, between the allegation and the proof, there can be no conviction.

§ 402. **Form of the Allegation.** — The forms of the pleadings, setting out statutes, to be found in the old books, are not numerous; and, so far as a considerable search by the author enables him to speak, they are all in civil causes. But, accepting the above disquisitions by Chitty as sound, — and no reason occurs to the writer for questioning them, — we may deem the following to be adequate, while it accords with modern notions of pleading. After the introduction, proceed: —

> That, heretofore, and before the transpiring of the facts hereinafter alleged, it was enacted by the Senate and House of Representatives of the United States of America [or should the statute to be set out be a Massachusetts one, and the cause be in Massachusetts, it was enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, in manner following, that is to say, using the form established in the particular State, which differs in the different States] that [here copying so much of the statute, and only so much, as the indictment is to be founded upon, but substituting *should* for "shall," &c.], and that afterward [proceeding now to draw the indictment in the same manner as if the statute were a general one.]

Plainly it cannot be necessary to make *profert* of the statute, as it is of letters patent, deeds, and the like, on which an action is founded; for a statute is not in its nature a thing to be brought into court. Undoubtedly, if the pleader chooses, it may be recited under a "whereas," and so are the old forms. The past tense seems to be appropriate and perhaps necessary; because, in some way, the statute must appear to have a previous, in distinction from a mere present, existence, and to have been in being at the time when the offence was committed.[2] If it

[1] 1 Ld. Raym. 381, 382; 4 Doug. 97, in note.

[2] And see, as illustrative, Crim. Proced. I. § 1173.

was formerly necessary in England, as Chitty says it was not, to state the place of the meeting of the legislature, this cannot be necessary in our States; because the place of the meeting is fixed by public law.[1]

II. *The Procedure upon Municipal By-laws.*

§ 403. **Ancient Power of making By-laws — How enforced.** — We have already seen something of the doctrines which reg-

[1] In order that the reader may see what was the ancient method, I will here copy from Wentworth the form of reciting a statute in a penal action of debt. The fourth and fifth sections of Stat. 6 Anne, c. 16, are as follows: § 4, after a preamble, proceeds: "From and after the determination of this present session of Parliament, all persons that shall act as brokers within the city of London and liberties thereof shall from time to time be admitted so to do by the court of mayor and aldermen of the said city for the time being, under such restrictions and limitations for their honest and good behavior as that court shall think fit and reasonable, and shall upon such their admission pay to the chamberlain of the said city for the time being, for the uses hereinafter mentioned, the sum of forty shillings, and shall also yearly pay to the said uses the sum of forty shillings upon the nine and twentieth day of September in every year." And then it goes on to say how the money shall be applied. § 5, "If any person or persons, from and after the determination of this present session of Parliament, shall take upon him to act as a broker, or employ any other under him to act as such, within the said city and liberties, not being admitted as aforesaid, every such person so offending shall forfeit and pay, to the use of the said mayor and commonalty and citizens of the said city, for every such offence, the sum of five and twenty pounds, to be recovered by action of debt, in the name of the chamberlain of the said city, in any of her Majesty's courts of record, in which no protection, essoin, or wager of law shall be allowed, or any more than one imparlance." And the following is the opening part of a count of a declaration, on this statute, for acting as a broker within the city of London, not being admitted by the court of the mayor and aldermen to act as such: "That whereas in and by a certain act made in a Parliament of the Lady Anne, late Queen of Great Britain, holden at Westminster, in the county of Middlesex, the twenty-third day of October, in the sixth year of her reign, it was amongst other things enacted by the authority of the same Parliament, that from and after the termination of the then session of Parliament all persons that should act as brokers within the city of London and liberties thereof should from that time be admitted so to do by the court of the mayor and aldermen of the said city for the time being, under such restrictions and limitations for their good behavior as that court should think fit and reasonable; and it was further enacted by the said act, that, if any person or persons from and after the determination of the then present session of Parliament should take upon him to act as a broker, or employ any under him as such, within the said city and liberties, not being admitted as aforesaid, every such person so offending should forfeit and pay to the mayor and commonalty and citizens of the said city for every such offence the sum of twenty-five pounds, to be recovered by action of debt in the name of the chamberlain of the said city in any court of record (of the said lady the queen)." 7 Went. Pl. 241.

ulate the power of municipal corporations to make by-laws.[1] According to the law of England as it stood at the time when we received thence our unwritten law, a municipal corporation could not make a by-law on which an indictment or a summary prosecution before a magistrate could be maintained; and neither imprisonment nor disfranchisement could be provided for disobedience.[2] Therefore the ancient by-laws used to provide, that, for a breach of a provision, the offender should forfeit a sum named. This forfeiture could not be recovered in the court of the municipal corporation, for to suffer this would be to allow one to be judge in his own case; at least, if the action was in the name of the mayor and commonalty, it could not be brought in the mayor's court; but the method of recovering the penalty, mostly employed, was by an action of debt, or sometimes of assumpsit, in some one of the other courts, usually one of the courts at Westminster Hall.[3]

§ 404. **Modern Change.** — But, the reader is aware, in modern times city ordinances and other like by-laws are usually enforced by summary proceedings before a court sitting within the bounds of the municipal corporation; and the penalty is fine, or imprisonment, or both. These changes are wrought, directly or indirectly, by statutes, both in England and in our States generally. The ancient proceedings are ill adapted to modern manners and necessities.

§ 405. **How proceed on By-law — As to the Act of Incorporation.** — The method of procedure is usually, in the main, sufficiently pointed out by statutes. Where the principles of the common law prevail, an act of incorporation is generally regarded as a private act,[4] of which the courts do not take judicial cognizance. It is plain, therefore, that, where the common-law rules prevail, the court must be made cognizant of the act of incorporation; in other words, it, or so much of it as

[1] Ante, § 18–26.

[2] Clark's Case, 5 Co. 64 *a*, and Fraser's note; s. c. 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; Harscot's Case, Comb. 202.

[3] 1 Saund. Wms. ed. 312 *c*, note; Glover Mun. Corp. 60; Wood *v.* London, supra; Romdic *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.

[4] Dwar. Stat. 464, 465; People *v.* O'Brien, 38 N. Y. 193; People *v.* Hills, 35 N. Y. 449; Gaskin *v.* Meek, 42 N. Y. 186; People *v.* Davis, 61 Barb. 456.

shows the power to make the by-law in question, must be pleaded, then proved.[1] Plainly, within this doctrine, if the power relied on is the general power incident to all corporations, and there is no statute on the subject, it is necessary to set out only so much of the act of incorporation as will show its existence. But none of our corporate acts are so bare as this. If, for example, the power of making by-laws is committed to a body separate from the entire corporation, — as, if, as in our city charters, it is committed to the mayor and common council, — this part of the act of incorporation must be set out; else it will not appear that the by-law made by this body is valid.[2] So, if the by-law imposes a fine, in distinction from a penalty, or authorizes imprisonment, the provision of the statute empowering the corporation to impose such punishment must evidently be shown. But generally, in modern times, not always, our statutes either by some general provision or by a special clause in the act of incorporation itself, require the courts to take judicial cognizance of the act; then, of course, it need not be set out.[3]

§ 406. **Continued — As to the By-law.** — As the by-law is not a public, but a private law, it must be set out in the allegation; and this doctrine prevails even where the act of incorporation is public, and need not be pleaded.[4] The allegation must also show that the by-law proceeded from a body having the power, by the act of incorporation, to make by-laws.[5] But by legislation pretty generally prevailing now, the setting out even of a by-law has become in most localities unnecessary, and the court is to take judicial cognizance of it.[6] The provision

[1] Feltmakers *v.* Davis, 1 B. & P. 98.

[2] 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." p. 100. And see Rex *v.* Bird, 13 East, 367.

[3] See The State *v.* McAllister, 24 Maine, 139; The State *v.* Soragan, 40 Vt. 450; Clark *v.* Janesville, 10 Wis. 136.

[4] The State *v.* Soragan, 40 Vt. 450.

[5] Feltmakers *v.* Davis, 1 B. & P. 98.

[6] In a Massachusetts case, Wilde, J. once observed: "Another objection, on which great stress has been laid, relates to the form of the complaint, which ought, as it is urged, to have set out the by-law at large. But if the statute dispensing with the necessity of thus encumbering the record is a valid law [which the court held it to be], this objection must fail. Perhaps, even without the aid of the statute, the court below, being composed of citizens of

rendering it unnecessary pertains, of course, to the remedy, and it may be made applicable to past offences as well as future.[1] The complaint or information should conclude both against the form of the by-law,[2] and also against the form of the statute;[3] because evidently it rests both upon the by-law and upon the statute. In other respects, the allegation should conform, in fulness, to the indictment or complaint upon a statute; as, for example, it 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] The cause should be entitled in the name of the State or Commonwealth, the same as though the proceeding were on a statute.[5]

§ 407. **A Form of Allegation.** — In England, the Municipal Corporations Act of 5 & 6 Will. 4, c. 76, having given, in § 90 and 91, authority to such corporations to establish by-laws enforceable by fine, to be recovered by summary conviction, we have in Paley on Summary Convictions the following form of the allegation: —

"That, &c., did unlawfully suspend an article of dress, to wit, a shirt, over the causeway of a certain street there called High Street, for the purpose of then and there drying the same, contrary to the by-law of and for the said borough in that behalf duly made at a meeting of the council of the said borough, held on the day of , 18 , and which said by-law was at the time of the commission of the said offence, and still is, in force for the said borough, and contrary to the form of the statute in such case made and provided."[6]

This form will be suggestive, though doubtless some of the matter in it may be omitted. On the other hand, as the reader sees, it is insufficient by reason of not setting out the by-law, except where a statute dispenses with this formality. In this particular instance, the statute would not on general principles need to be set out, because it is general, not local or private.

Boston, were bound to take notice of the by-law; though generally, no doubt, a by-law must be pleaded." Commonwealth *v.* Worcester, 3 Pick. 462, 473.

[1] Commonwealth *v.* Bean, Thacher Crim. Cas. 85.

[2] Commonwealth *v.* Worcester, supra; Lewiston *v.* Fairfield, 47 Maine, 481.

[3] Commonwealth *v.* Gay, 5 Pick. 44; The State *v.* Soragan, supra.

[4] The State *v.* Goulding, 44 N. H. 284.

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

[6] 1 Paley Convict. 4th ed. 522.

BOOK IV.

THE LEADING STATUTORY OFFENCES CONNECTED WITH THE COMMON LAW.

CHAPTER XVIII.

SCOPE OF THE DISCUSSION AND HOW DIVIDED.

§ 408. **Scope of Present Book.** — It is the purpose of the author, in the series of chapters on which we are now entering, to bring together in groups the principal statutory provisions creating or defining offences of the sort analogous to those existing by the common law; and show how they operate, not only of themselves alone, but in connection with the common law. Incidentally, therefore, to the main purpose, the author will be obliged to draw the outlines of the leading common-law crimes. At the same time this is not an independent work, but is a volume in a series, of which the author's works on "Criminal Law" and "Criminal Procedure" are also parts. When, therefore, a particular offence has been discussed in those works, the discussion here will be brief. Still, in respect of such offences, something will be required to show the effect of statutes upon them. The leading statutory offences of the minor kind, and those less connected with common-law crimes, not there discussed, will be elucidated more fully in the subsequent part of this volume, with respect both to the law and the procedure.

§ 409. **In what Groups.** — Instead of following either the alphabetical order, as in the second volumes of the works on Criminal Law and Criminal Procedure, or the more philosophical order pursued in the first volume of the work on Criminal

Law, we shall here single out various leading and well-known crimes; and, after discussing them severally, group around them such as seem to have an affinity to them. Thus, under the Larceny group, we shall discuss, not only larceny proper, but cheats, false pretences, and some others; under the Robbery group, we shall consider, besides robbery, the other forms of taking property by force; under the Homicide group, we shall bring to view, besides the felonious homicides, the various other methods of endangering the personal safety, including, of course, such offences as assault and battery. But it is not necessary to specify all here.

CHAPTER XIX.

LARCENY AND OFFENCES IN AFFINITY TO IT.

410. Introduction.
411, 412. Larceny at Common Law.
413–429. Statutory Larcenies.
430. Malicious Mischief at Common Law.
431–449. Statutory Malicious Mischief.
450. Cheats at Common Law.
451, 452. Statutory Cheats.
453–462. Offences in Affinity with these.

§ 410. **How the Chapter divided.** — We shall consider, I. Larceny at the Common Law; II. Larceny under Statutes; III. Malicious Mischief at the Common Law; IV. Malicious Mischief under Statutes; V. Cheats at the Common Law; VI. Cheats under Statutes; VII. Statutory Offences in Affinity with these.

I. *Larceny at the Common Law.*

§ 411. **Outlines.** — Discussions of this offence, somewhat minute, and of the proceeding for its punishment, may be found in the other works of the present series.[1] There is perhaps no other offence in which the form of the allegation against the offender, as established and made good by ages of

[1] Crim. Law, 5th ed. II. § 757 et seq., Crim. Proced. 2d ed. § 696 et seq.

use, seems so nearly inadequate, as in this, to cover what the law requires to be proved. The indictment charges that the defendant did feloniously steal, take, and carry away certain articles of personal property, which it specifies, adding usually the value, of the goods and chattels of a person whom it names.[1] But when the law is expounded and the evidence produced, the following propositions are found necessary to be supported: —

1. The goods must correspond in description with the allegation in the indictment.

2. The ownership must be shown.

3. The value, so far as the law makes it essential to the punishment, but no further.

4. It must appear that the defendant committed a technical trespass on the goods. This point is incumbered with many rules of a very refined sort.

5. When the trespass was committed, they must have been personal property, and not real, or savoring of the realty, and of a kind to which the ancient common law attributed a value. Therefore of unreclaimed wild animals, of things adhering to the soil, of *chose in action*, and the like, there can be no larceny at the common law.

6. Simultaneously with the trespass, there must exist, in the mind of the thief, the intent to steal the goods. On the question of the nature of this intent, — as, whether the thief must mean to make them his own, or whether it is sufficient merely to intend to deprive the owner of them, — the adjudications are not quite uniform. But all hold that the thief must mean to take from the owner the entire property, in distinction from any mere temporary use.

7. These facts must all have transpired in the county in which the indictment is found.

§ 412. **General View.** — This enumeration of things will serve as an aid to the memory; but the law of larceny is full of technicalities, and no one can understand it who does not study it in its details. The reader can also refer to it to determine whether or not a statute has changed the common law of this offence.

[1] And see Crim. Proced. 2d ed. I. § 522; II. § 697.

II. *Larceny under Statutes.*

§ 413. **In General Terms.** — If a statute, in general terms, provides, that "whoever shall be guilty of larceny" shall be punished in a manner pointed out,[1] the offence which it creates is the same, in its entire extent and its limitations, as larceny at the common law.[2] For example, since larceny at the common law cannot be committed by taking and carrying away, in one transaction, any thing which pertains to the realty,[3] it cannot under the statute. Therefore, 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.[4] How the indictment should be drawn, in this class of cases, we have already seen.[5] The doctrine, in brief, is, that, where the indictment is really upon the statute, instead of being at the common law while the statute is simply looked to on the question of the punishment, it must be in the common-law form, but conclude against the form of the statute.[6]

§ 414. *Statutory Words extending beyond Common-law Doctrine:* —

Different Classes of Cases — Things not Subjects of Larceny at the Common Law. — The legislation of our country and of England presents numerous instances wherein statutes have broadened, or attempted to broaden, the doctrine of larceny as expounded by the common law; making, indeed, multitudes of larcenies which were not such under the unwritten laws. The most familiar of these make bank-bills and other *choses in action*, and various things pertaining to the realty, subjects of larceny, which were not such at the common law. The more general doctrine relating to this class of statutes is, that the offence created by them is to be treated in all respects as a common-law larceny, except that the indictment describes the instrument or other thing stolen in the statutory words, and concludes against the form of the statute.[7]

§ 415. **Continued — Follow Statute — Things fixed to the**

[1] La. Rev. Stats. of 1870, § 812.
[2] Ante, § 363.
[3] Ante, § 411; Crim. Law, 5th ed. II. § 763–766.
[4] The State *v.* Davis, 22 La. An. 77.
[5] Ante, § 381.
[6] And see Crim. Proced. 2d ed. II. § 731.
[7] Crim. Proced. 2d ed. II. § 731–736; Archb. Crim. Pl. & Ev. 13th ed. 296.

Realty. — Still, in these cases, the indictment must follow any descriptive words which the statute may contain.[1] Thus, it was in England provided by Stat. 2 & 3 Vict. c. 58, § 10, that, "if any person, &c., shall take, &c., the ore, &c., being in such mine," &c., he "shall be deemed, &c., guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny;" and it was ruled that the words "being in such mine" should in some way be covered by the allegation. Therefore where the indictment simply charged, that the defendants, persons employed in a mine, at a place named, did steal ore, the property of the adventurers in the said mine, then and there being found, it was insufficient, as not showing the property to have been in the mine when stolen.[2] In like manner, when Stat. 4 Geo. 2, c. 32, made it punishable in any one to "steal, rip, cut, or break with intent to steal, any lead, &c., being fixed to any dwelling-house," &c., the words "being fixed to any dwelling-house" were important, and it was necessary they should be covered by the allegation. The form given by Chitty is the following: that the defendant, at the time and place named, "sixty pounds weight of lead, of the value of four shillings, belonging to C. D., then and there fixed to the dwelling-house of the said C. D., feloniously did rip, steal, take, and carry away, against the form of the statute, &c., and against the peace," &c.[3] The special words in these cases are material; and, if the lead, for example, was found by the prisoner already unfixed, and, being therefore personal property, he carried it off, he cannot be convicted on this form of the indictment.[4]

§ 416. **Follow Statute, continued.** — Again, the United States act of April 30, 1790, provided, in § 16, "that, if any person, within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away, with intent to steal or purloin, the personal goods of another," he should be punished in a manner pointed out. And under this statute it has been deemed not to be sufficient

[1] Crim. Proced. 2d ed. II. § 734.

[2] Reg. *v.* Trevenner, 2 Moody & R. 476. And see Archb. Crim. Pl. & Ev. 13th ed. 300, 301.

[3] 3 Chit. Crim. Law, 973. And see, for further illustrations, Reg. *v.* Rice, Bell C. C. 87; Reg. *v.* Jones, Dears. & B. 555.

[4] Reg. *v.* Gooch, 8 Car. & P. 293.

to set out the larceny merely as at common law. Where it is not charged to have been on the high seas, the place must be alleged to be within the "sole and exclusive jurisdiction of the United States." Moreover, there must be an averment that the defendant took and carried away the goods with the intent to steal them, or with the intent to purloin them; it being, in this part also, not sufficient merely to follow the common-law form.[1]

§ 417. **Continued — As to the Trespass.** — We have seen,[2] that the common-law form of the indictment for larceny is very brief, yet it is holden to charge various elements which enter into the offence, among which is a trespass on the property stolen. If, then, a statute provides that, under certain circumstances which it specifies, there need be no trespass, but the wrongful act, without the trespass, shall be larceny, will the common-law form of the indictment suffice? On principle, and perhaps on authority, if the statute altogether dispenses with the element of a trespass, then, as no trespass need be proved, none need be alleged, and less than the common-law form will suffice.[3] Under such circumstances, it would seem, on principle, that the common-law form would not be ill; because, though it charged a trespass, that part of it might be deemed surplusage. But, where the statute dispensing with the trespass is special, applying only in circumstances which it particularly names, the indictment should contain allegations bringing the case within the special circumstances of the statute. For example, by the common law of Tennessee, the doctrine which exempts from the penalties of larceny the obtaining of goods by fraud was carried further than it is in England and the other States generally.[4] Upon this, "the act of 1842," says the court, "worked a material change in the common law. The trespass, either actual or implied, in every case of larceny at common law, in the taking, is, in certain cases specified in the statute, dispensed with. A fraudulent appropriation of property, by any person to whose charge or care it is delivered, subject to the immediate orders of the

[1] United States *v.* Davis, 5 Mason, 356. And see Crim. Proced. 2d ed. II. § 734.

[2] Ante, § 411.

[3] Prim *v.* The State, 32 Texas, 157.

[4] Crim. Law, 5th ed. II. § 814.

owner, or to the use of it in his business, or for the purposes of his trade, is declared to be larceny. So, also, if a contract of loan for use, or of letting and hiring, or other bailment or agency, be used merely as the means of procuring possession of property, with an intent to make a fraudulent appropriation at the time, it is in like manner, by statute, a larceny. In all these cases, the trespass necessary at common law is waived, and the fraudulent appropriation of goods, the possession whereof is obtained without a trespass, by any of the devices contained in the statute, completes the crime of larceny." Thereupon it was held, that an indictment in the mere common-law form would not support a conviction for the obtaining of goods by the frauds specified in the statute. "It cannot be maintained," continued the court, "that an indictment charging a simple larceny at common law, which includes a trespass in the taking, cannot [can] be sustained by proof of obtaining goods under false pretences." And it was further laid down, that, to allow this, would violate the provision of the State constitution, which secures to the prisoner the right "to demand the nature and cause of the accusation against him."[1]

§ 418. **Embezzlement.** — Out of the principle thus laid down, arose, by construction of the courts, the doctrine of embezzlement. A statute, meant to extend the crime of larceny, provided, that, when a person of a class specified — as, for example, a servant — embezzled goods intrusted to him, he should be deemed guilty of larceny; and thereupon the courts held, that an indictment in the common-law form as for larceny could not be maintained, but the allegation must be special, drawn upon the statute. The consequence was, that statutory larceny of this sort came to be looked upon as a separate crime, and it was called embezzlement.[2]

§ 419. **Larceny by Bailees.** — At common law, if a bailee acts honestly at the inception of the bailment, he cannot commit larceny of the goods while the relation of bailor and bailee subsists between him and the general owner. But if he breaks bulk, he thereby ends the bailment and then he may

[1] Hall *v.* The State, 3 Cold. 125.

[2] Crim. Law, 5th ed. II. § 319–328, 367, note; Crim. Proced. 2d ed. II. § 316–318.

commit larceny, and it is the same when the bailment is in any other way terminated, — as, for example, when a common carrier has taken the goods to their final destination. In like manner, if he receives the goods intending to steal them, he commits larceny in the original taking.[1] And if he becomes possessed of the goods as bailee, not honestly, but through fraud, — as, where a person obtains possession of a horse and sleigh by falsely and fraudulently pretending that he wants them to drive to a certain place, and to be gone a specified time, when in fact he does not intend to go to such a place, but to a more distant one, and to be absent a longer time, — and, while thus in possession, converts the property to his own use with felonious intent, though he did not at first intend a theft, he commits larceny. Said Dickerson, J. in a case of this sort, "The prisoner obtained possession of the property by fraud. This negatives the idea of a contract, or that the possession of the prisoner was a lawful one, when he sold the horse. He was not the bailee of the owner, but was a wrongdoer from the beginning; and the owner had a right to reclaim his property at any time."[2] Now, to meet those cases in which wrongdoers escape the penalties of larceny under the constructions of the courts, various statutes have been enacted.[3]

§ 420. **Continued — The Statutes.** — The statutes on this subject differ considerably in the different States. In Illinois, the provision is as follows: "If any bailee of any money, bank-bill, or note, or goods or chattels, shall convert the same to his or her own use, with an intent to steal the same, he shall be deemed guilty of larceny in the same manner as if the original taking had been felonious, and, on conviction thereof, shall be punished accordingly."[4] The present English provision is in the following words: "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 break bulk or otherwise determine the bailment, shall be guilty

[1] Crim. Law, 5th ed. II. § 809, 813, 833, 834, 836, 857–871.

[2] The State *v.* Coombs, 55 Maine, 477, 480.

[3] Crim. Law, 5th ed. II. § 863.

[4] Gross, p. 180, § 21. And see Crim. Law, supra; Commonwealth *v.* Williams, 3 Gray, 461.

of larceny, and may be convicted thereof upon an indictment for larceny." [1] This statute was passed in 1861. Previously to its enactment, the following provision was in force, passed four years before: "If any person, being a bailee of any property, 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 break bulk or otherwise determine the bailment, he shall be guilty of larceny." [2]

§ 421. **Continued — Form of the Indictment.** — It is perceived that the earlier and present English enactments are substantially alike, except that the present one contains a clause making the indictment for larceny sufficient. Under the former English enactment, a case was tried before Wightman, J. in which on an indictment as for larceny at the common law, concluding against the form of the statute, a man was tried and convicted as bailee under the statute; and, after some hesitation, he sentenced him to imprisonment.[3] This one decision, by a single judge, seems not to have satisfied the profession; for, in the subsequent cases which the author has noticed, the indictment was special in form, with a count added as for larceny at the common law.[4] The present statute plainly settles the question for England in favor of the common-law form;[5] but, aside from this and on principle, the ruling of Wightman, J. was evidently a departure from all precedent, having nothing to sustain it either in the English or American adjudications. If the reader will turn back to some practical directions for the drawing of indictments on statutes,[6] he will see that the form should vary with the particular language of the statute. But let us suppose that we are to draw an indictment on the Illinois statute, recited in the last section. It will be convenient to lay before us a form found in Bassett's Criminal Pleading, professedly drawn on this very section. It is as follows: —

"That J. S., late of C., in the county of C., on the first day of July, in the year of our Lord ———, at C., aforesaid, in the county aforesaid, one gold

[1] 24 & 25 Vict. c. 96, § 3.
[2] 20 & 21 Vict. c. 54, § 4.
[3] Reg. v. Haigh, 7 Cox C. C. 403.
[4] 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.
[5] Reg. v. Bunkall, Leigh & C. 371.
[6] Ante, § 375 et seq.

watch of the value of one hundred dollars, of the goods and chattels of one J. N., then and there found, intrusted to the said J. S. by the said J. N. for safe-keeping, the said J. S. then and there did fraudulently and feloniously convert to his the said J. N.'s [J. S.'s] own use, with intent feloniously to steal, take, and carry away the same, whereby and by force of the statute in such case made and provided, the said J. S. is deemed to have committed the crime of larceny; and so the jurors aforesaid, upon their oaths [oath] aforesaid, do say, that the said J. S. then and there, in manner and form aforesaid, the said gold watch, of the goods and chattels of the said J. N. feloniously did steal, take, and carry away; against, &c. and contrary, &c." [1]

The pleader in this instance has very properly consulted the forms established in embezzlement, and modelled his indictment after them. But the clause "whereby and by force of the statute, &c., the said J. S. is deemed to have committed the crime of larceny," is superfluous;[2] because this is a mere conclusion of law from the facts stated, and the courts take notice of the law and its conclusions, and they need never be alleged.[3] This clause we shall, therefore, reject. Again, this form does not keep closely enough to the statute to suit a well cultivated taste, or even to answer the requirements of the law; though possibly some courts might hold it to be adequate. The leading statutory word "bailee" is not used, as in good pleading it should be;[4] and only great leniency of judicial construction could accept the circumlocution "intrusted to the said J. S. by the said J. N. for safe-keeping," as a substitute for it. We shall do well to look further after forms in this connection; but the offence is recent in legislation, therefore the old books contain none. In an English case, the reporter, not giving the indictment *in extenso*, says: "The indictment alleged, that, on the 20th of July, 1859, the prisoner became and was bailee of moneys of Richard Carraway, deceased, to the amount of £40, and that, being such bailee, he fraudulently and feloniously did take and convert the said moneys to his own use, and that the prisoner in manner and form aforesaid feloniously did steal, &c., the said moneys." [5] Let us, therefore, draw our form on the above Illinois provision, and with respect to the facts attempted to be set forth in the foregoing Illinois form, as follows: —

[1] Bassett Crim. Pl. 94.

[2] Crim. Proced. 2d ed. II. § 333, compared with the statute recited in § 331.

[3] Ib. I. § 329, 515.

[4] Ib. I. § 335.

[5] Reg. *v.* Loose, Bell C. C. 259, 8 Cox C. C. 302.

That J. S. &c., on, &c., at, &c., became and was the bailee of one gold watch of the value of one hundred dollars, of the goods and chattels of one J. N. then and there being,[1] and, being so the bailee thereof, did then and there fraudulently and feloniously convert the same to his own use [it would probably be just as well to say, "That J. S. &c., on, &c., at, &c., being then and there the bailee of one gold watch, of the value, &c., of the goods and chattels, &c., did fraudulently and feloniously convert, &c.;" because an allegation, however material, is sufficient though stated in the participial or even adverbial form,[2] and in this instance the participial form is particularly appropriate], with intent to steal the same; and so the jurors aforesaid, upon their oath aforesaid, &c. [proceeding as in the form above to the end.]

§ 422. **Form of the Indictment, continued.** — But is this sufficient? In California it is held, in accord with the foregoing views, and contrary to the ruling of Wightman, J. that one cannot be convicted of larceny as bailee on an indictment for larceny drawn in the common-law form.[3] The court of this State, however, has gone further, and contrary to the foregoing views has held, that it is not enough to charge the defendant, as in the foregoing form, with being bailee, but the facts and circumstances of the bailment must be set out.[4] To the

[1] Probably no harm would come from here adding the word "found," so common in indictments for larceny; but it seems wholly inappropriate, and I should omit it. Crim. Proced. 2d ed. II. § 697, note. In the larceny case of The State *v.* Sparrow, 2 Taylor, 93, the entire phrase "then and there being found" was very properly held to be unnecessary.

[2] Crim. Proced. 2d ed. I. § 556–558.

[3] People *v.* Jersey, 18 Cal. 337.

[4] People *v.* Poggi, 19 Cal. 600. In this case, Norton, J. in delivering the opinion of the court, observed: "The indictment states 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 The People *v.* Cohen, 8 Cal. 42, that an indictment like this was insufficient, and the case of The People *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 The People *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

writer, this does not seem, on principle, to be necessary, for the following reasons: First, although the fact of the bailment is material, it is in a certain sense incidental; the offence consisting in the person who sustains the relation of bailee to the property doing the forbidden thing. The gravamen of the charge is, that this person did "convert the same to his own use." It is not denied, and it cannot be, that it is sufficient simply to follow the statute in this part of the allegation;[1] therefore, *a fortiori*, it should be sufficient in the other part. Secondly, the relation of bailee is well known in the law; just as well known, though not quite so common, as the relation of owner. It is not necessary to allege how a man became owner of personal property, or to state the facts and circumstances of the ownership. When one is charged with being owner, the allegation covers all necessary facts; in like manner it should be held, that, when one is charged with being bailee, the allegation covers all necessary facts.

§ 423. **What constitutes Bailee.** — As to what constitutes a bailee, within the meaning of these statutes, there do not appear to be any doctrines peculiar to the criminal law.[2] A bailment takes place when an article of personal property is put into the hands of one for a special purpose, and it is to be returned by the bailee to the bailor, or delivered to some third person, when the object of the trust is accomplished. If, then,

which are necessary to constitute a complete offence 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; Commonwealth *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." p. 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 mere precedents, they covered the precise point, I should adapt to the occasion the words of Seawell, J., sitting in the North Carolina court, in a case the point of which was stated in a note to the last section: "Now 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." The State *v.* Sparrow, 2 Taylor, 93, 94.

[1] People *v.* Poggi, supra.

[2] See the long note to the last section; Reg. *v.* Hassall, Leigh & C. 58, 8 Cox C. C. 491.

the specific thing is not to be restored on the trust being fulfilled, — as, if the money of a club is put into the hands of its treasurer, whose duty does not require him to keep and return the particular coins which he receives, — the transaction is not a bailment.[1] It was once held, in England, by a single judge, that a married woman could not be a bailee, within the meaning of these statutes;[2] but, though the point is perhaps not quite settled, it appears from a later case before the whole court that she can be. The idea on which she was supposed not to be capable of becoming a bailee is, that a contract is essential to a bailment, and that a married woman cannot enter into a contract. But on the other hand it is asserted that there may be a bailment without contract.[3] It was intimated and perhaps ruled by the recorder of London, in one case, that there cannot be a bailment which is procured by the bailee's fraud.[4] It seems to the present writer, that, though these two classes of cases are not without their difficulties, if the formalities which constitute a bailment are gone through with, it violates no principle of the law while it promotes justice to hold, that, on a question of crime, the formal bailee shall not be permitted to set up his own fraud, or even her own want of civil capacity, in defence. At the same time, this is a point which a practitioner could not be expected to carry before every judge.[5]

§ 424. **What Act of Bailee constitutes Larceny.** — It has been ruled, by a single judge, to be necessary, in order to maintain the charge of larceny against the bailee, to show some act of conversion inconsistent with the purpose of the bailment.[6] This doctrine has been both affirmed and denied by other

[1] Reg. *v.* Hassall, supra. And see Reg. *v.* Hoare, 1 Fost. & F. 647.

[2] Reg. *v.* Denmour, 8 Cox C. C. 440.

[3] Reg. *v.* Robson, Leigh & C. 93, 9 Cox C. C. 29.

[4] Reg. *v.* Hunt, 8 Cox C. C. 495.

[5] See further as to what constitutes 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, 9 Smith, Pa. 469. A man being on the ground in a state of partial intoxication and partly asleep, saw another, with whom he was acquainted, take from his pocket his watch, and employed no measures to prevent it because he believed the object to be to preserve the watch for him; this was ruled to constitute a bailment, subjecting the bailee, who converted the watch to his own use, to indictment under the statute. Reg. *v.* Reeves, 5 Jur. N. S. 716.

[6] Reg. *v.* Jackson, 9 Cox C. C. 505.

judges; but, where the prosecutor had given the prisoner money to buy coals, which the latter was to bring in his own cart to the former for hire, and the prisoner bought the coals in his own name, and on his way to the prosecutor's abstracted some of them for his own use, it was held, that, whichever view of the above point be taken, here was a bailment of the coals, which in law were the prosecutor's, though they had never come into his own hands, and here was a sufficient act of conversion.[1] So if a carrier is employed to deliver a boat's load of coals, in his own cart, to persons named in a list, and he fraudulently sells some of them and takes the money to his own use, he may be convicted of the larceny of these coals as bailee.[2] And it was laid down in another case, that a carrier who, receiving money to procure goods, obtains the goods which he duly delivers, but fraudulently retains the money, may be convicted of the larceny of the money as bailee.[3] Looking at the question of the necessary combined act and intent, in the light of principle, if the statutory words are "shall convert the same to his own use," evidently the mere intent to convert is not enough, there must be some act also. But the act need not be such as would be unlawful if the intent were lawful. On the other hand, the act may receive color from the intent. Thus, it might be lawful for a common carrier, acting in good faith, to stop on the way at his own house, and there to change the goods from one vehicle to another; but, if he should do this intending to steal them, and as an act of theft, the case would be entirely different; and then, on principle, he would be guilty of larceny as bailee within the statute.

§ 425. **Summary of Foregoing Doctrines.** — There are various other statutory larcenies, differing more or less from larceny at the common law; but it is believed that the practitioner who makes himself acquainted with the principles governing those already discussed in this sub-title, will have little difficulty with the rest. It is perceived, that almost the only peculiarity governing these larcenies relates to the form of the indictment.

[1] Reg. *v.* Bunkall, Leigh & C. 371, 9 Cox C. C. 419.

[2] Reg. *v.* Davies, 14 W. R. 679, 14 Law Times, N. S. 491.

[3] Reg. *v.* Wells, 1 Fost. & F. 109.

And here the doctrine is, that, in some way, the allegation must be brought within both the statute and the common law. If the statute simply makes it larceny to steal a particular thing, of which there could be no larceny at the common law, then an allegation in the common-law form, merely employing the statutory term, answers both these ends. If the statute uses further descriptive words, these words also must be employed. If, again, the statute makes a particular act larceny, when the act was not such at the common law, then the act must be set out in the words of the statute, while still the indictment must be so drawn as to embrace also the common-law form. If, lastly, the statute simply makes that larceny which was such at the common law, the common-law form of the indictment will suffice, but nothing short will. In all these cases, it should be borne in mind, the indictment must conclude "against the form of the statute in such case made and provided."

§ 426. **Stealing a Particular Animal.** — There are, however, some English and American statutes which require explanation, differing somewhat from the foregoing. Thus, in England, from early times, there have been statutes making the stealing of particular animals mentioned larceny, and attaching thereto a particular punishment, though at the same time these animals were the subjects of larceny at the common law. The present English enactment, condensing into one section what went before, is as follows: "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," &c.[1] In words more or less closely resembling these, various statutes have been enacted in our States. We have already seen how the animal is to be named in the indictment, when the words employed in the statute to designate it overlie one another in meaning.[2] The word "horse" includes in meaning a mare or gelding, as well as the animal of the male sex;[3] so a mare

[1] 24 & 25 Vict. c. 96, § 10. The prior statute of 7 & 8 Geo. 4, c. 29, § 25, was in nearly the same words. But before this time the statutory provisions were several, and in forms perhaps less compact. See 2 East P. C. 614–617.

[2] Ante, § 247, 248.

[3] Baldwin *v.* People, 1 Scam. 304; Reg. *v.* Aldridge, 4 Cox C. C. 143.

filly is a "mare."[1] It was formerly held that an indictment for stealing a "cow" could not be supported by evidence of stealing a heifer;[2] but this was during the reign of the old doctrine, when the words were narrowed by construction, so as not to overlie one another. In accordance with what is pretty generally the accepted view now, the Alabama court has held, that an indictment for stealing a cow is sustained by proof of the larceny of a heifer between two and three years old, that never had a calf.[3] But the reader should remember that the old doctrine is still held in some of our States; for example, it is in Texas.[4]

§ 427. **Continued.** — The general doctrine of larceny, as it prevails in England and our States, makes the punishment greater or less according to the value of the goods. Therefore, since whatever enters into the punishment prescribed by the law for any offence must always be alleged in the indictment,[5] it is necessary that the ordinary indictment for larceny should mention the value of the thing stolen. But in these cases of the statutory larceny of a specified animal, where the statute is silent on the subject of value, there need be no allegation of value in the indictment.[6] At the same time, this sort of indictment often alleges the value, and no harm can come from the allegation, which is mere surplusage. It must, of course, conclude against the form of the statute, when the statute affects any thing except the punishment. But where an indictment charged a larceny of a mare, saddle, and bridle, yet did not conclude against the form of the statute, it was held, in England, that, since the stealing of the mare, as well as the stealing of the saddle and bridle, was a felony at the common law, and not created or altered in its nature by the statute, the indictment would suffice, and the statutory punishment would attach to the stealing of the mare.[7]

§ 428. **Continued.** — It follows, from these views, that a

[1] Rex *v.* Welland, Russ. & Ry. 494.
[2] Rex *v.* Cook, 1 Leach, 4th ed. 105, 2 East P. C. 616.
[3] Parker *v.* The State, 39 Ala. 365.
[4] Ante, § 248; Marshall *v.* The State, 31 Texas, 471.
[5] Crim. Proced. 2d ed. I. § 77 et seq.
[6] The State *v.* Daniels, 32 Misso. 558; Sheppard *v.* The State, 42 Ala. 531; Crim. Proced. 2d ed. I. § 541, 567; II. § 713–717.
[7] Williams *v.* Reg. 7 Q. B. 250.

count charging a larceny of the particular animal may be joined in the indictment with one charging a larceny at the common law.[1]

§ 429. **Continued.** — And in other respects the indictment conforms to the common-law indictment for larceny. For example, it should allege the name of the owner.[2] And the same may be observed of the other particulars relating to this offence. Thus there must be a felonious intent; as, if a person stealing other property takes a horse, not to steal it, but to get off with the other property, and then he turns the horse loose, he does not commit larceny of the horse.[3]

III. *Malicious Mischief at the Common Law.*

§ 430. **General Doctrine.** — Malicious mischief is perhaps plainly enough an offence at the common law, but its boundaries are in some respects uncertain. If one destroys an article of personal property through ill-will or resentment toward its owner, he commits this offence, as the doctrine is pretty generally held. But if the act of mischief consists merely in some serious damage to the property, or if the destruction or damage is to something pertaining to the realty, or if the malevolent mind is of a more general sort and there is no particular ill-will toward the owner, the question whether this offence is committed is one upon which the authorities are less harmonious. Most courts hold, that malice toward the owner is necessary; the division is nearly equal upon the question, whether the offence can be committed by doing damage to real estate; and there is great uncertainty as to what is the damage or destruction which the common law requires.[4] The consequence is, that this sort of ground is pretty generally covered by statutes. Indeed, the plentifulness of the statutes, particularly the English ones, and their early dates, appear to be the main cause of the uncertainties connected with the common law itself.

[1] Barton *v.* The State, 18 Ohio, 221. And see The State *v.* Nutting, 16 Vt. 261.

[2] The State *v.* France, 1 Tenn. 434.

[3] Rex *v.* Crump, 1 Car. & P. 658.

[4] Crim. Law, 5th ed. II. § 983 et seq., and the places in Vol. I. there referred to; Crim. Proced. 2d ed. II. § 837 et seq.

IV. *Malicious Mischief under Statutes.*

§ 431. **English Legislation.** — The early English statutes on this subject were very numerous, diversified, and complicated in their provisions. The reader will find an excellent view of them in East's Pleas of the Crown.[1] But, except as reënacted, or otherwise adopted by express legislation, no one of them appears to have ever had any force as law in this country.[2] In 1827, all the early legislation was superseded by Stat. 7 & 8 Geo. 4, c. 30, wherein what had gone before was digested and revised. This statute consists of forty-three sections, and covers a wide range of matter. But still legislation on the subject accumulated, till, in 1861, 24 & 25 Vict. c. 97, in seventy-nine sections, was passed "to consolidate and amend the statute law of England and Ireland relating to malicious injuries to property."

§ 432. **Black Act.** — The most noted of the many early English statutes on this subject is 9 Geo. 1, c. 22, known as the Black Act. It took its name from the occasion of enacting it, and from the preamble, which recites, that, "whereas several ill-designing and disorderly persons have of late associated themselves under the name of *blacks*," &c. This statute is not confined to malicious mischief, but it extends to some other subjects also. A part of the first section is as follows: "If any person, &c., 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, &c., 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."

§ 433. **American Statutes — Malice against Owner.** — The American statutes are in diverse terms, but in the main they are based on the English. One of the important questions arising under these enactments relates to the nature of the malice which must be shown to have moved the defendant to the unlawful act. As elsewhere explained, it is the general common-law doctrine, in this country, that "the malice must be against

[1] 2 East P. C. 1045–1103.

[2] Crim. Law, 5th ed. II. § 999.

the owner of the property, and not against another person, or against the property itself; it not being, for instance, sufficient where a man kills an animal out of an ill mind toward it."[1] And the same doctrine was applied by the English courts in the interpretation of the early statutes, at least, of the Black Act; for, as observed by Mr. East, "it is clearly settled, that, in order to bring an offender within this law, the malice must be directed against the owner of the cattle, and not merely against the animal itself."[2] Why? The author has not been able to discern the reason in the opinions of the English courts.[3]

§ 434. **Malice against Owner, continued — English Interpretations.** — The cases in which the point has been held having all risen under the Black Act, Mr. East derives this result from the preamble; and the same result he derives also from the preamble of the similar and earlier statute of 37 Hen. 8, c. 7. He deems that the word "maliciously," employed in the statutes, would not of itself lead to this consequence; but it would be satisfied by acts coming within "its most general signification, as denoting an unlawful and bad act, an act done *malo animo* from an unjust desire of gain, or a careless indifference of mischief."[4] The entire preamble of the Black Act, of which

[1] Crim. Law, 5th ed. II. § 996.

[2] 2 East P. C. 1172.

[3] 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, 4th ed. 527, 2 East P. C. 1072; Rex *v.* Kean, 2 East P. C. 1073, 1 Leach, 4th ed. 527, note; Rex *v.* Shepherd, 1 Leach, 4th ed. 539, 2 East P. C. 1073; Anonymous, 2 East P. C. 1073, 1 Leach, 4th ed. 540, note; in which several cases it was held that malice or resentment toward the animal was not sufficient, it must be against the owner.

[4] 2 East P. C. 1062, 1063, 1071, 1072. For example, Stat. 22 & 23 Car. 2, c. 1, § 7, provides, that, "if any person, &c., on purpose and of malice aforethought, and by lying in wait, shall unlawfully cut out or disable the tongue, &c., of any subject, with intention in so doing to maim or disfigure him," &c.; and East observes: "It does not seem necessary that the malicious intention described should 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, 4th ed. 55, 1 East P. C. 394], who was an entire stranger to the gentleman whom he 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 an-

the reader will judge for himself, is in the following words: "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, robbing 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."[1] This question could not have arisen in England since 1827, the consolidating act of 7 & 8 Geo. 4, c. 30, having provided, in § 25, "that every punishment and forfeiture by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise."[2] And this provision is continued in the present act.[3]

§ 435. **Continued — American Interpretations.** — Whether, un-

other, the party is equally liable to be indicted or appealed for such maim." 1 East P. C. 396. The same doctrine, the reader will observe, is by the courts applied to the "*malice* aforethought" which constitutes murder. Crim. Law, 5th ed. I. § 328; II. § 675 et seq.

[1] For the effect of a preamble on the interpretation of the statute, see ante, § 48–51.

[2] As to the interpretation of this provision, see Reg. *v.* Tivey, 1 Den. C. C. 63, 1 Car. & K. 704.

[3] 24 & 25 Vict. c. 97, § 58.

der our American statutes, expressed in general terms, yet employing the word "maliciously," there must be express malice toward the owner, or whether general malevolence, or resentment toward the beast injured, will suffice, is a question upon which we appear not to have any very enlightened judicial discussions, but upon it differing opinions have been expressed. Where the indictment is at common law, the American doctrine appears pretty plainly to be that there must be a particular malice toward the owner;[1] but, where the indictment is drawn on a statute, the question depends partly on the particular language of the statute, and partly, as just observed, on the differing views of different judges.[2]

§ 436. **Continued — How in Principle.** — Since all statutes are to be construed in harmony with the common law,[3] if, at the common law, a particular malice toward the owner, in distinction from general malevolence, or resentment against an animal injured or destroyed, is necessary, it is difficult to avoid requiring the same thing under a statute the words of which are not express on this point. But it occurs to the writer that there may, after all, be some doubt as to what is the true common-law doctrine. As the common law does not recognize any rights in animals, and does not punish mere cruelty toward them, it seems pretty plainly to follow that no ill mind toward the animal can properly supply the malice required by these statutes.[4] But the question whether there must necessarily be a particular malice toward the owner is one of another sort; and, on principle, general malice, or a particular malice toward a third person, ought to suffice; because, in general, this sort of malice constitutes a sufficient evil intent in the criminal law, while also it falls within the reasons on which these prohibitions are founded.[5]

§ 437. **Illustrations of the Required Malice.** — Where, then, the killing or maiming of an animal is in a passion against it,[6] or

[1] Crim. Law, 5th ed. II. § 996.

[2] Hobson *v.* The State, 44 Ala. 380, 381; Johnson *v.* The State, 37 Ala. 457; The State *v.* Pierce, 7 Ala. 728; The State *v.* Enslow, 10 Iowa, 115; Mosely *v.* The State, 28 Ga. 190; Wright *v.* The State, 30 Ga. 325; The State *v.* Hambleton, 22 Misso. 452.

[3] Ante, § 7, 75, 82, 88, 114, 123, 131–144, 155, 156.

[4] Crim. Law, 5th ed. I. § 594, 595.

[5] And see ante, § 434 and note.

[6] Rex *v.* Kean, 2 East P. C. 1073; Rex *v.* Shepherd, 1 Leach, 4th ed. 539, 2 East P. C. 1073; Anonymous, 2 East P. C. 1073.

where a maiming is done to make it quiet while an act of bestiality is being committed,[1] the transaction lacks the sort of malice required in malicious mischief. In like manner, if an animal is in the habit of trespassing on a man's fields, and destroying his crops, and during an act of trespass he shoots the animal, not out of any malice, but to preserve his crops, though he may not be justified civilly, he is criminally. The motive is not what the law deems malicious.[2] But as observed by Chitty,[3] "it is not necessary to give evidence of express malice against the owner, which will be presumed until the contrary appears.[4] 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 held that the intent was sufficient to bring the case within the act, and the defendant was convicted." [5]

§ 438. **Form of the Indictment — Black Act.** — On the beforementioned clause of the Black Act, "if any person, &c., shall unlawfully and maliciously kill, &c., any cattle," &c.,[6] Chitty furnishes the following form of the indictment: —

"That A. H., late of, &c. [being an ill-designing and disorderly person, and of a wicked and malicious mind, after the first day of June, in the year of our Lord one thousand seven hundred and twenty-three, to wit[7]], on, &c. [with force and arms[8]], at, &c., one [black[9]] gelding [of the price of fourteen pounds[10]], of the goods and chattels of one J. J. [in a certain field belonging to him the said J. J.[11]] then and there being, feloniously, unlawfully, wilfully, and maliciously then and there did kill and destroy [to the great damage of him the said J. J.[12]], against the form of the statute, &c., and against the peace, &c." [13]

[1] Rex *v.* Pearce, 1 Leach, 4th ed. 527, 2 East P. C. 1072.

[2] Wright *v.* The State, 30 Ga. 325.

[3] 3 Chit. Crim. Law, 1087, note.

[4] 2 East P. C. 1074. The American editor refers also to The State *v.* Council, 1 Tenn. 305.

[5] Dawson's Case, MS. The indictment is given 3 Chit. Crim. Law, 1088.

[6] Ante, § 432.

[7] Plainly none of the words enclosed in these brackets are necessary. The words "after," &c., are introduced to cover the following, in the statute: "If any person or persons, from and after the first day of June, in the year of our Lord one thousand seven hundred and twenty-three," &c. Even in such a case, it is probably always sufficient that the date alleged in the indictment appears on its face to be later than that of the taking effect of the statute; if the statute is an old one, it certainly is. Crim. Proced. 2d ed. I. § 622.

[8] In most of our States, not necessary, probably not necessary in any of them. Crim. Proced. 2d ed. I. § 502; II. Ib. § 57, 380, 603; Taylor *v.* The State, 6 Humph. 285.

[9] Not necessary. Post, § 443.

[10] As to this, see post, § 444.

[11] Plainly not necessary.

[12] Unnecessary. Ante, § 388, note; Crim. Proced. 2d ed. I. § 647; II. Ib. § 57.

[13] 3 Chit. Crim. Law, 1087.

With this form before us, let us proceed to consider what is required of some of the particular allegations, as well under the American as under the English statutes.

§ 439. **"Feloniously."** — The above form contains the word "feloniously," because, as we have seen,[1] the offence under the Black Act, on which the indictment is drawn, is felony.[2] But, under most of the American statutes, the offence is misdemeanor, and, when it is, the indictment should not charge the act to have been committed feloniously.[3]

§ 440. **The Word to designate the Animal.** — The statute on which this indictment is drawn, the reader perceives, employs the words "any cattle," and it does not descend to terms expressive of particular species of cattle. Yet the pleader, in this instance, makes use of the word "gelding," which is not found in the statute, and does not add that the gelding is an animal of a sort known as "cattle." Now, this form of the allegation has been held, both in England and in numerous cases in this country, to be adequate. Thus, on this very statute, where the allegation was that the defendant killed, &c., "one mare, of a mixed red and white color, and one brown stone colt, the goods and chattels [not adding, the "cattle"] of one Matthew Batten," it was held to be sufficient.[4] On the other hand, to charge the defendant with having committed the offence on "certain cattle," employing the exact statutory word, has been held to be inadequate; the species of cattle must be mentioned. The allegation may, however, be "certain cattle, to wit, one mare," &c.; but in this case the *videlicet* cannot be rejected as surplusage, and the proof must show the animal to have been a mare.[5] In like manner, where, in Tennessee, the statutory word was "beast," and the indictment charged the injury to have been done to a "horse beast," this was held to be sufficient.[6] And where, in Missouri, the statute employed the single word "cattle," the words "a certain horse beast, to wit, one mare," were held to be adequate.[7] Likewise where the

[1] Ante, § 432.
[2] Reg. *v.* Gray, Leigh & C. 365.
[3] Ante, § 387; Crim. Proced. 2d ed. I. § 626.
[4] Reg. *v.* Paty, 2 W. Bl. 721. In Reg. *v.* Tivey, 1 Den. C. C. 63, this doctrine was accepted as of course.
[5] Rex *v.* Chalkley, Russ. & Ry. 258.
[6] The State *v.* Pearce, Peck, 66.
[7] The State *v.* Hambleton, 22 Misso. 452.

statutory words were "cattle or other beast," the single word "steer" was held in Vermont to be adequate in the indictment.[1] In like manner, where the statutory words were "horse, cattle, or other domestic beast," and the indictment simply charged that the offence was committed on a "hog," — an animal evidently coming within the general term, — this was held to be sufficient, it not being necessary to add that the hog is a "domestic beast." The courts take notice of such things.[2]

§ 441. **Continued.** — What is thus laid down must not be confounded with another question. As we have already seen,[3] if the statute, instead of employing one general term, like "cattle," or "beast," enumerates various particular species, — thus, for example, "horse, mare, ewe, or sheep," — it used to be held, that the pleader must select the most appropriate specific word, and no other one would answer in its place.[4] And this doctrine still prevails in some of our States, though it is exploded in England and is contrary to sound principle.[5] But whether we receive this doctrine or not, it follows from what is said in the last section, that, if the specific enumeration is followed by a general term, — as "horse, mare, ewe, sheep, or *other beast*," — and the indictment is for an injury to an animal within the general term, but not within any of the specific words, — it is sufficient to employ the specific name of the animal, which, it is seen on this statement, is not found in the statute.

§ 442. **Cattle — Beast.** — The word "cattle," in these statutes, includes horses, mares, colts, geldings, and the like,[6] pigs,[7]

[1] The State *v.* Abbott, 20 Vt. 537.

[2] The State *v.* Enslow, 10 Iowa, 115. In Tennessee, where the statute had the single word "beast," and the indictment employed the single word "cow," the court, holding this to be sufficient, said: "The word beast is here used as a generic term, and includes all animals of that description. The indictment describes the specific animal killed, and the animal so described is a 'beast;' and, by necessary consequence, the indictment charges that the defendant killed a 'beast.'" Taylor *v.* The State, 6 Humph. 285, 286, opinion by Green, J.

[3] Ante, § 247, 248.

[4] See, for illustration, Rex *v.* Beamy, Russ. & Ry. 416.

[5] See ante, § 247, 248, 426; Crim. Proced. 2d ed. I. § 619, 620.

[6] The State *v.* Hambleton, 22 Misso. 452; Rex *v.* Paty, 1 Leach, 4th ed. 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, 4th ed. 73, note; Reg. *v.* Tivey, 1 Den. C. C. 63, 1 Car. & K. 704; ante, § 440.

[7] Rex *v.* Chapple, Russ. & Ry. 77.

asses,[1] sheep,[2] a steer,[3] and probably many other specific animals. Evidently the word "beast" includes every thing which the word 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. **Particular Description of the Animal — Name of the Owner.** — In the form extracted from Chitty, the color of the animal is mentioned,[7] so also it is in a case recited in a preceding section.[8] But this sort of particularity is not necessary, and it is not usual in good pleading at the present day;[9] for, if thus unnecessarily the color is alleged, the allegation must be proved, and it cannot be rejected as surplusage.[10] A good pleader is careful not to clog the record in this way.[11] All that is necessary, of particular description, is to state the name of the owner, or, when not known, to set out the usual excuse, the same as in larceny. And this must be done, or the indictment will be bad.[12] Where the indictment is for killing sheep, for example, the ownership may be laid in the agistor, the same as it could be in larceny.[13] Where it was for killing a dog, and the dog belonged to a minor son living with his father, it was held to be ill to lay the ownership in the father.[14]

§ 444. **Value — Amount of Damage.** — Whether the mischief is to animals or to any other property, it is not necessary on general principles to allege either the value of the property or the amount in value of the injury done to it.[15] But if the punishment which the law appoints depends on either of these, then that on which it depends must be alleged, in pursuance of the universal rule,[16] that whatever enters into the punish-

[1] Rex *v.* Whitney, 1 Moody, 3.
[2] Rex *v.* Hughes, 2 Car. & P. 420.
[3] The State *v.* Abbott, 20 Vt. 537.
[4] The State *v.* Pearce, Peck, 66.
[5] Taylor *v.* The State, 6 Humph. 285.
[6] The State *v.* Enslow, 10 Iowa, 115.
[7] Ante, § 438.
[8] Ante, § 440.
[9] Taylor *v.* The State, 6 Humph. 285; The State *v.* Hambleton, 22 Misso. 452; Commonwealth *v.* Sowle, 9 Gray, 304.
[10] Crim. Proced. 2d ed. I. § 486.
[11] Ante, § 386.
[12] The State *v.* Smith, 21 Texas, 748; Crim. Proced. 2d ed. II. § 843; Rex *v.* Patrick, 2 East P. C. 1059.
[13] Rex *v.* Woodward, 2 East P. C. 653. In an indictment for maliciously injuring a dwelling-house occupied by a tenant at will of the owner, the house may well be described as the house of the tenant. The State *v.* Whittier, 21 Maine, 341. See The State *v.* Mason, 13 Ire. 341.
[14] The State *v.* Trapp, 14 Rich. 203.
[15] The State *v.* Jones, 33 Vt. 443.
[16] Crim. Proced. 2d ed. I. § 77 et seq.

ment must be set out in the indictment.[1] This doctrine is well illustrated by two Indiana cases occurring on two different statutes. The one statute provides, that "every person who shall maliciously or mischievously injure or cause to be injured any property of another, or any public property, shall be deemed guilty of a malicious trespass, and be fined not exceeding two-fold the *value of the damage done*, to which may be added imprisonment, not exceeding twelve months." And where the indictment set out the malicious killing of a dog of the value of forty dollars, this was held to be insufficient; because the penalty depended on the value of the damage done to the owner, and not on the value of the property. Although, in this instance, the animal was killed, still its carcass might be of some worth; so that, not the value of the dog, but the value of the damage done by killing should have been alleged.[2] The other statute provides, that "every person who shall injure any tree, &c., on the land of another person, . . . without license so to do from competent authority, . . . shall be deemed guilty of a trespass, and, upon conviction, shall be fined in five times the *value of such property*." And it was held that an information stating the value of the tree, but not the amount of damage to the owner, was sufficient. Davison, J. observed: "In this instance, the tree injured is alleged to be of the value of one dollar, and as such value constitutes the basis upon which the penalty for the commission of the offence is estimated, there seems to be no valid reason why the damage to the owners of the property should have been alleged."[3]

§ 445. **Continued.** — In estimating the damage or injury, only what is direct can be taken into the account, not what is consequential. Thus, in England, it being provided by Stat. 7 & 8 Geo. 4, c. 30, § 19, that, if one should maliciously damage any tree, &c., he should be punished in a particular way when the amount of injury done should exceed £5, a man was indicted for injuring the trees in a hedge, exceeding £5 in amount. The proof was, that the injury to the trees them-

[1] Crim. Proced. 2d ed. II. § 840.

[2] Harness *v.* The State, 27 Ind. 425.

[3] The State *v.* Shadley, 16 Ind. 230, 231. For a form of indictment on this statute, see Crim. Proced. 2d ed. II. § 841, note. See, also, Commonwealth *v.* Cox, 7 Allen, 577.

selves was £1; but, to repair the mischief, it would be necessary to stub up the old hedge and plant a new one, involving a further outlay of over £4. Upon this it was contended that the injury exceeded, in point of law, £5; but, said Pollock, C. B. delivering the opinion of the court, "there is, it is true, a consequential injury exceeding £5, but that is not sufficient."[1] Moreover, if a certain amount of injury is inflicted in one transaction, and a certain other amount in another, the two cannot be added together to make up the statutory sum.[2]

§ 446. **Allegation and Proof of the Injury.** — In the foregoing form,[3] it is alleged that the defendant "did kill and destroy" the animal. The statutory words were "kill, maim, or wound":[4] but evidently the allegation rested simply on the word "kill." And if this word "kill," and no more, had been employed, it would have been sufficient. Thus, where the statute was, "If any person shall wilfully or maliciously kill or destroy, or wound, the beast of another, he shall," &c., an indictment in the following words, the offence being a misdemeanor, was sustained as adequate, — the form, indeed, is an excellent one: —

"That, &c., on, &c., at, &c., did wilfully and maliciously kill a cow, of the value of five dollars, the property of William Watts, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."[5]

So, where a statute employed the words "kill, maim, or disfigure any horse," &c., an indictment alleging that the defendant a certain horse "of one Joseph Wilbur then and there wilfully and maliciously did kill" — not saying any thing of the means or mode of the killing — was adjudged to be sufficient.[6] In like manner, an indictment for wilful trespass to timber, alleging that the timber was cut down and destroyed, need not enter into particulars; for this injury includes all others.[7] And when the words of a statute were, "cut, injure,

[1] Reg. *v.* Whiteman, Dears. 353, 6 Cox C. C. 370, 25 Eng. L. & Eq. 590.
[2] Reg. *v.* Williams, 9 Cox C. C. 338.
[3] Ante, § 438.
[4] Ante, § 432.
[5] Taylor *v.* The State, 6 Humph. 285.
[6] Commonwealth *v.* Sowle, 9 Gray, 304; s. p. Hayworth *v.* The State, 14 Ind. 590; The State *v.* Hambleton, 22 Misso. 452.
[7] The State *v.* Watrous, 13 Iowa, 489. And see Jarnagin *v.* The State, 10 Yerg. 529.

or destroy any leaden or other pipe used as an aqueduct, for the conveyance of water," an indictment in the following form was held on demurrer to be good: —

"That, &c., on, &c., with force and arms, at Hydepark aforesaid, wilfully and maliciously did cut, injure, and destroy certain leaden pipe, used as an aqueduct for the conveyance of water, being the property of one Harvey Jewett then and there being found, contrary," &c.[1]

§ 447. **Continued.** — There is probably not much room for doubt that what is said in the last section is good law in matter of principle as well as in the authorities cited. And, on the other hand, it is plain, both in principle and authority, that there are cases in which it is not enough simply to use the statutory word as descriptive of the injury.[2] Thus, where the statutory words were "maim, beat, and torture," it was laid down that the indictment must go beyond the words, and aver such specific acts as would show the offence to be within the inhibition.[3] Passing over what is said in the work on Criminal Procedure, it may be here observed, that, where the charge was that the defendant, at a time and place named, "certain personal property, to wit, an omnibus, of the value of five hundred dollars, the property of Jacob H. Hathone, did wilfully and maliciously injure, 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," the setting out was held to be sufficient.[4] So likewise was it in the following allegation: that the defendant "did maliciously and mischievously injure one wagon, the property of, &c., of the value of, &c., 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

[1] The State *v.* Jones, 33 Vt. 443. And see The State *v.* Hockenberry, 11 Iowa, 269; Crim. Proced. 2d ed. I. § 629 and note.

[2] See, for various cases, and some observations, Crim. Proced. 2d ed. I. § 629 and note; II. § 841 and notes.

[3] The State *v.* Pugh, 15 Misso. 509, more particularly stated Crim. Proced. 2d ed. I. § 629.

[4] Commonwealth *v.* Cox, 7 Allen, 577.

said wagon where the said Kennedy could never find them the said taps, hammer, and neck yoke, which taps, &c., were of the value of," &c.[1]

§ 448. **Kill — Wound — Maim — Disfigure, &c.** — The word "kill," as used in these statutes, requires no explanation. The interpretations of the words "wound" and "maim" have already been given.[2] So also have those of various other words which the reader can find by consulting the Index. A statute in Iowa having employed the words "kill, maim, or disfigure," the court distinguished the latter two by laying it down, that to "maim" a domestic animal implies a permanent injury; to "disfigure" it is to commit a lower grade of the same offence, and the injury need not be permanent, but, however slight, if it lessens the animal's value, and the intent is malicious, the crime is complete. "Thus," observed Baldwin, J. "to shave a horse's mane 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 offence. Malice toward the owner of the animal is the ingredient of this offence; 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 offence is complete." [3]

§ 449. **Conclusion.** — In the author's works on Criminal Law and Criminal Procedure, other matter may be found relating to the present sub-title; but it is believed that what is said in this volume will enable the intelligent practitioner to interpret and proceed upon most of the numerous and complicated statutes, relating to the subject, to be found in our several States. Useless would it be to say, in this connection, every thing which might be said.

V. *Cheats at the Common Law.*

§ 450. **General View.** — The subject of cheats at the common

[1] The State *v.* Williams, 21 Ind. 206.

[2] Ante, § 314, 316.

[3] The State *v.* Harris, 11 Iowa, 414.

law has become of but little practical consequence; because the statutes against obtaining goods by false pretences have covered nearly all the ground occupied by the common-law cheat, while in most respects they extend much further. The general doctrine is, that if, by some false representation of a thing, called a symbol or token, extending beyond mere words, one commits a fraud on another to his injury, or thus perpetrates a public fraud, the transaction is indictable at the common law. Indeed, it is laid down that frauds affecting the public at large, or the public revenue, are punishable by indictment at the common law, though accomplished without resort to any false token or symbol.[1] The reader will find the law of the subject explained, in its particulars, in the author's work on the Criminal Law;[2] and the pleading, practice, and evidence, in his work on Criminal Procedure.[3]

VI. *Cheats under Statutes.*

§ 451. **General View — The Law.** — In like manner, in the author's other works, the law, and the procedure under it, for the statutory crime of obtaining goods by false pretences, are pretty fully considered.[4] The statutes in our several States and in England are similar the one to another, and to some extent are copies of one another. Still, in various particulars, they are found to differ; therefore the practitioner, in examining any question, should lay the statutes of his own State before him, and keep in mind the diversities while consulting decisions of courts foreign to his own. In general terms, a false pretence is a false representation, which may be in mere oral words, or it may be in writing, or by signs, or the like, relating to some existing or past fact; and, to be indictable otherwise than as an attempt, it must actually mislead, and so produce such a particular cheat as falls within the words of the statute. A promise not meant to be kept is not a false pretence. How it is if the pretence is frivolous in its nature, not calculated to

[1] United States *v.* Watkins, 3 Cranch C. C. 441.

[2] Crim. Law, 5th ed. II. § 141 et seq.

[3] Crim. Proced. 2d ed. II. § 157 et seq.

[4] Crim. Law, 5th ed. II. § 409 et seq.; Crim. Proced. 2d ed. II. § 157 et seq.

deceive the average of men, but, being addressed to a weak or incautious mind, does deceive this person and work a fraud upon him, is one of the questions, connected with this subject, upon which judicial opinions are not harmonious. But it is not best to undertake a complete summary of doctrines here.

§ 452. **Continued — The Procedure.** — In drawing the indictment, the practitioner should consider whether the offence is a felony or a misdemeanor in his own State; and, if the former, according to the practice prevailing in England and in a part of our States, he must not omit to employ the word "feloniously," though this word should not be found in the statute.[1] It is not sufficient merely to charge the offender with having employed "false pretences," in the naked words of the statute, the pleader must go further and specify the pretences;[2] so also he must specify the goods obtained, and from whom.[3] The indictment must negative the pretence, aver that the defendant knew them to be false, show the connection between them and the accomplished fraud, and in all other respects conform to the rules of sound pleading.[4] Of course, it must be supported by the evidence; but, where the other parts of the case are within the law, if the defendant failed to accomplish the meditated fraud, he may be indicted for the attempt.[5]

VII. *Statutory Offences in Affinity with these.*

§ 453. **General View.** — There are various statutory offences which are not exactly of the nature of larceny with its statutory modifications, or exactly of the nature of cheats or of statutory false pretences, while still they are akin to each. Those to be mentioned under this sub-title illustrate this general proposition.

§ 454. **Altering Marks on Cattle.** — It is customary, in some localities, for the owners of cattle which are liable to be mixed with those of other owners, to put upon their own some mark or brand to distinguish them from all others. And in some

[1] Ante, § 387.

[2] Crim. Proced. 2d ed. II. § 165, 166.

[3] Ib. § 173, 174; Commonwealth *v.* Lincoln, 11 Allen, 233; The State *v.* Kube, 20 Wis. 217; Commonwealth *v.* Davis, 9 Cush. 283.

[4] Crim. Proced. 2d ed. II. § 163–186.

[5] Ib. § 194–196; Crim. Law, 5th ed. II. § 488.

of our States there are even provisions of law for recording the mark. If, then, a man effaces the mark which another has put on his cattle, to distinguish them, or puts on them his own mark, intending, by so doing, to convert them to his own use, or to prepare the way for so converting them, it is evident, on principle, that he commits either actual or attempted larceny at the common law; though the author does not recollect any case in which this question was actually discussed. But, in those States in which the practice of marking or branding cattle mostly prevails, the legislatures have not left this question to the determination of the common law, they have provided a special remedy by statute.

§ 455. **Continued — Indiana Statute, with Form of Indictment.** — The Indiana statute is as follows: "Every person who shall alter the mark or brands of the horse, mare, gelding, ass, mule, sheep, goat, neat cattle, or hog of another, or mark or brand any such animal, with intent to steal the same, if the value of the animal so marked be five dollars or upward, shall be subject to the punishment inflicted on those guilty of grand larceny; and, if the value of such animal be less than five dollars, such person shall be subject to the punishment inflicted on those guilty of petit larceny." And a book on Indiana criminal practice supples the following form of the indictment: —

That A. B., on the —— day of ——, in the year ——, at said county, unlawfully and feloniously altered the mark of a certain hog, of the goods and chattels of C. D., of the value of fifteen dollars, by then and there unlawfully and feloniously cutting out a crop on the right ear of said hog, and changing said mark into a swallow fork, said crop on the right ear being then and there the lawful and duly recorded mark for the hogs for the said C. D., contrary, &c.[1]

§ 456. **Continued — Illinois Statute, with Form of Indictment.** — "Every person who shall mark or brand, alter or deface the mark or brand, of any horse, mare, colt, jack, jennet, mule, or any one or more head of neat cattle or sheep, goat, hog, shoat, or pig, not his or her own property, but belonging to some other person, with intent thereby to steal the same, or to prevent identification thereof by the true owner, shall, on conviction thereof, be punished by confinement in the penitentiary

[1] Bicknell Crim. Pr. 482; referring, for the statute, to Felony Act, § 25, 2 G. & H. 445.

for a term not less than one year nor more than three years; provided, that no person shall be condemned to the penitentiary under this section unless the value of the property affected shall amount to $5. And in case the value of the property affected by the offence herein described, &c., shall not amount to $5, then the offender shall be punished by imprisonment in the county jail, for a term not exceeding three months, and fined not exceeding $50."[1] And on this statute an Illinois book furnishes the following form of the indictment for branding a mare with intent to steal the same:

"That J. S., late of C., in the county of C., on the third day of August, in the year of our Lord ——, at C. aforesaid, in the county aforesaid, did feloniously brand (*or* '*mark*') a certain bay mare, the property of one J. N., with intent thereby feloniously to steal, take, and carry away the same; against, &c., and contrary, &c."[2]

§ 457. **Continued — Allegation of Value.** — We have seen, that whatever enters into the punishment must be charged in every indictment; and that, within this rule, where the value of a thing is an element regulating the punishment fixed by law, it must be alleged, but in other circumstances it need not be.[3] Within this rule, both the foregoing indictments, the reader perceives, ought to state the value of the animal. The former does, and it is therefore, on general principles, sufficient. The latter does not, and, under it, no more, at most, than the milder punishment could be inflicted. If, in Illinois, there is a provision of statutory law making this form sufficient to sustain the heavier punishment (the writer is not aware that there is), such provision is in violation of the guaranties of the Constitution of the State.[4]

§ 458. **Continued — Owner's Name.** — But for the purpose of precision and identification, as already seen,[5] it is necessary that the name of the owner, if known, should be alleged in this indictment. And where the allegation was, that the animal belonged to "an estate," this was held to be insufficient.[6]

[1] R. S. of 1845, c. 30, § 65, Gross, p. 178, § 14.

[2] Bassett Crim. Pl. 85.

[3] Ante, § 370, 371, 444; post, § 461.

[4] See Crim. Proced. 2d ed. I. § 77 et seq., 95 et seq. And see the discussion in Vol. II. of that work, § 562–609.

[5] Ante, § 373, 443.

[6] People *v.* Hall, 19 Cal. 425.

§ 459. **Continued — Statutory Words — "Fraudulently."** — The indictment in these cases, as in all others, must follow the material statutory words. Therefore, where the Florida statute made it punishable "if any person shall *fraudulently* alter or change the mark or brand of any animal," &c., an indictment which omitted the word "fraudulently" was held to be insufficient, though in place of it the pleader inserted the two words "wilfully and feloniously." For, said Randall, C. J. "the gist of the offence is the intent to defraud the owner." [1]

§ 460. **Describing the Mark or Alteration.** — The reader has observed, that, in the Indiana form before quoted,[2] the pleader has described the alteration which the defendant made in the mark, but this sort of description is not given in the Illinois form.[3] Whether this is necessary is a question on which judges would be likely to differ; the only decision on the point, now before the author, occurred in a North Carolina case, in which it was held sufficient simply to allege that the defendant "unlawfully, knowingly, and wilfully did alter the mark of a certain cow, the property of Martha Benson." [4] This decision, if we assume it to be correct, goes to the extreme of condensation, beyond which nothing more can be done. And if we cannot pronounce it to be absolutely wrong in principle, still the form it sanctions plainly descends less into detail than is usual in the approved forms in analogous cases.

§ 461. **Continued — "Altering" a Brand.** — As to what is an altering of the brand of an animal, it has been held that putting on it a new brand, without defacing the former one, is an act falling within the prohibition.[5]

§ 462. **Estray Animals.** — There are various statutes for the protection of owners, regulating the taking up of animals found estray. And some of these statutes render certain acts penal. The Texas statute makes the unlawful use of an estray indict-

[1] Morgan *v.* The State, 13 Fla. 671.

[2] Ante, § 455.

[3] Ante, § 456.

[4] The State *v.* O'Neal, 7 Ire. 251, 254; Crim. Proced. 2d ed. I. § 629, note.

[5] Atzroth *v.* The State, 10 Fla. 207. As to the "altering" of bank-bills, see ante, § 217.

able, and the degree of the punishment is determined in some measure by the value. Therefore an indictment on this statute must allege the value of the animal.[1]

CHAPTER XX.

PHYSICAL INJURIES TO THE PERSON.

463, 464. Introduction.
465–477. Murder and other Indictable Homicides.
478–494. Rape and Carnal Abuse of Children.
495–499. Mayhem and other Maimings.
500–510. Other Aggravated Assaults.
511–514. Simple Assaults.

§ 463. **General View.** — According to a doctrine developed in the work on the Criminal Law,[2] if a man wrongfully and wantonly injures the person of another by means of any sort of physical force, he is indictable therefor. In most cases, perhaps in all, this injury is such as, in one view of it, is known in the law as a battery; though, when it proceeds further than a mere battery, it is more commonly spoken of under its aggravated name, — as, a rape, a mayhem, a manslaughter, and the like. And even where the wrong-doer does not go so far as to inflict actual injury, but endeavors to, and proceeds a certain way in carrying out the endeavor, he commits an indictable attempt, known by the technical name assault.[3] Now, assault is the lightest of the common-law offences which come within the scope of this chapter; the heaviest is murder. Between these two extremes lie various others.

§ 464. **Order of the Discussion — How divided.** — But, the reader will observe, through these several offences there extends — generally, if not always — the one element of assault; and, where more than assault is committed, the element also of a

[1] The State *v.* McCormack, 22 Texas, 297; ante, § 457. As to the larceny of estrays, under the common law, see Crim. Law, II. § 876.

[2] Crim. Law, 5th ed. I. § 548.

[3] Ib. II. § 23 and note.

battery. Thus it is at the common law; and the statutes have not much, if at all, changed the common law in this particular. A natural order of the discussion, therefore, would be to begin with assault and proceed upward through its various aggravations; but it will be practically more convenient here to reverse this order. Consequently we shall consider, I. Murder and the other Indictable Homicides; II. Rape and the Carnal Abuse of Children; III. Mayhem and other Maimings; IV. Other Aggravated Assaults; V. Simple Assaults.

I. *Murder and the other Indictable Homicides.*

§ 465. *How at the Common Law:* —

Historical View. — By the common law, as received and administered in this country, all homicides which are indictable are felonies, but all are not punishable by death. Anciently, in England, the law inflicted certain forfeitures on persons committing homicides which were not otherwise punishable;[1] but these forfeitures do not exist in our country. Formerly, also, all felonious homicides were punishable by death; but then these, like all other felonies, became subject to the benefit of clergy, so that most offenders practically escaped all serious punishment. Upon this state of the law, a statute took away the benefit of clergy from such indictable homicides as were committed of "malice aforethought." These were thereupon called murder, and the rest were known as manslaughter. A milder punishment was provided for manslaughter, while the death penalty continued to be inflicted for murder; and thus stood the law which was adopted and made common law in the United States. The line distinguishing indictable from unindictable homicides is drawn by the ancient common law of England; that distinguishing murder from manslaughter is drawn by an ancient English statute, which has become common law with us.[2]

§ 466. **What Homicides Indictable.** — Since, then, the distinction between the indictable and not indictable in homicide depends upon the ancient common law, as modified and confirmed by decisions extending down to the present time, there

[1] Crim. Law, 5th ed. II. § 617.
[2] And see Crim. Law, 5th ed. II. § 616–628; Crim. Proced. 2d ed. II. § 498–501.

is no way in which the distinction can be fully learned, except by tracing down this line of adjudication. In general it may be said, that, when one takes another's life, either by design or by accident, if there were no circumstances justifying the taking, and if the taker were doing a thing palpably careless or otherwise wrong, or were omitting a plain duty, and death followed within a year and a day, though unintended, an indictment as for a felonious homicide will lie. But this general proposition, to be of practical avail, should be examined in connection with the specific points adjudged.[1]

§ 467. **What Indictable Homicides are Murder.** — When we have ascertained that a particular homicide is indictable at the common law, then, if we would determine whether it is murder or manslaughter, we are to inquire whether or not it was committed of "malice aforethought." If it was, it is murder; if it was not, it is only manslaughter. But the meaning of the words "malice aforethought" is not to be determined in the same way as if they were found in a statute just enacted, and had never been construed. On the other hand, they were employed in a statute on this subject as far back as 1389 (13 Rich. 2, stat. 2, c. 1), were found also in several other early statutes, and were first construed at a time when the courts took more liberties with statutes than they do now. Thus, it is said in an old book: "He that doth a cruel act voluntarily, doth it of malice prepensed. By the statute of 5 Hen. 4, if any one out of malice prepensed shall cut out the tongue or put out the eyes of another, he shall incur the pain of felony. If one doth such a mischief on a sudden, that is malice prepensed; for, saith my Lord Coke, if it be voluntarily, the law will imply malice."[2] And thus, step by step, the courts proceeded, till the doctrine was long ago and is now established, that, to constitute the "malice prepensed," or "*aforethought*," which distinguishes murder from manslaughter, the slayer need not have contemplated the injury beforehand, and need at no time have intended to take life. If he specifically meant, not death, but bodily harm of a certain standard in magnitude or kind, or if he purposely employed a certain weapon or did certain acts

[1] Crim. Law, 5th ed. II. § 629–671.

[2] Reg. *v.* Mawgridge, J. Kel. 119, 127.

from which the *law* implies malice, the offence is murder when death follows within a year and a day, the same as though he intended to kill. The actual intent is in many circumstances an important element; but there may be murder as well without as with a murderous mind, and especially the fatal result need not be predetermined.[1] Thus the words "malice aforethought" have a technical legal meaning, differing considerably from the popular idea of them.

§ 468. **Form of the Indictment.** — Of the form of the indictment it is necessary here only to observe, that, as the "malice aforethought" is all which distinguishes murder from manslaughter, the indictment for murder is the same as for manslaughter, except that it adds, to what is necessary in the latter, these statutory words, together with the word "murder" which is also found in the old statutes dividing felonious homicides into murder and manslaughter.[2]

§ 469. *Statutory Murder and Manslaughter:* —

General Terms. — From what has already been said,[3] the reader perceives, that, if a statute in general terms provides a punishment for "murder" or for "manslaughter," it means murder or manslaughter as the offence is defined at the common law.[4] Then, in the absence of any statutory provision, the indictment should be drawn precisely as at the common law. If it is in a State in which there are no common-law offences, or if the offence is against the United States, it should also conclude against the form of the statute. But if it is in a State in which there are common-law offences, the conclusion may be either way at the election of the pleader.[5]

§ 470. **Statutes defining Murder and Manslaughter — Degrees.** — There are some States in which the statutes are not in these general terms, but they proceed to define murder and manslaughter. It is so, for example, in New York. There the Revised Statutes defined murder and manslaughter, as though they had never been defined before, and made four degrees of the latter. Afterward the statutes were so altered as to make,

[1] Crim. Law, 5th ed. II. § 672–719.
[2] Crim. Proced. 2d ed. II. § 501, 540–548.
[3] Ante, § 363.
[4] The State *v.* Mullen, 14 La. An. 570.
[5] Ante, § 381, 384, 413.

also, two degrees of the former. While the Revised Statutes remained unaltered,[1] it was held that an indictment for murder, drawn after the common-law model, and concluding against the form of the statute, was sufficient.[2] And since murder has been there divided into two degrees, the same form of the indictment has been held adequate to sustain a conviction of murder in either the first or second degree.[3]

§ 471. **Two Degrees of Murder, continued — Form of Indictment.** — We have seen elsewhere,[4] that this latter doctrine, not only does violence to the common-law rules, and to the principles of natural justice, but it is repugnant also to guaranties found in all our constitutions. And the reason is, that, by the rules of the common law, by the dictates of natural justice, and by constitutional guaranty, whatever is made by law an element essential to the fixing of the punishment for any offence, must be set out in the indictment;[5] while, according to the statutes of all our States, dividing murder into two degrees, the punishment for the first degree is higher than for the second, and the common-law forms do not necessarily, though some of them do in fact, charge more than is essential to constitute murder in the second degree. Indeed, without looking into the words of the statute, or of the indictment, we should know that this must be so. And the reason is, that, since at common law a killing accompanied by certain facts is murder, the indictment drawn upon the common law must allege so much of fact as such law makes essential to the crime, and it need not allege more. Then, in the nature of things, if this common-law offence is to be divided into two degrees, there is but one way in which it can be done. It cannot be done by subtracting, from what the common law required, some fact, and making a homicide murder in the second degree where such fact does not exist; for then something would be made murder which was not murder before, and the common-law

[1] See, for their provisions, as respects murder, and for an exposition of them, Crim. Law, 5th ed. II. § 720, 721.

[2] People *v.* Enoch, 13 Wend. 159; Crim. Proced. 2d ed. II. § 614.

[3] Fitzgerald *v.* People, 37 N. Y. 413, dissenting opinion by Bacon, J. 685; Kennedy *v.* People, 39 N. Y. 245; Keefe *v.* People, 40 N. Y. 348.

[4] Crim. Proced. 2d ed. II. § 562–608; Crim. Law, 5th ed. I. § 797; Bishop First Book, § 401 and note, 455; ante, § 372.

[5] Crim. Proced. 2d ed. I. § 77 et seq.; ante, § 370–372.

murder would not be divided. It must, therefore, be done, and it is actually done, by adding to the common-law murder some element which was not essential in murder before, and declaring that, where this element exists, the murder shall be in the first degree, while, where it does not exist, the murder shall be in the second degree. Then, if the law provides, as it does, a higher punishment for murder in the first degree than in the second, this added element must be charged in the indictment, else the indictment sets out only what merits the lower punishment. There is no possible escape from this conclusion. No judge ever did or ever will pretend to meet the argument, and escape from this its conclusion. What has been said on the other side is mere imponderable fog, sometimes assuming one undeveloped form and sometimes another. Truth here, as elsewhere, is a line of light, while error is a mere bank of fog. And, in spite of whatever may be said to justify a contrary doctrine, the proposition still remains unassailed and unassailable, that, if a court condemns to the gallows, where hanging is provided only for murder in the first degree, a prisoner upon an indictment wherein the special element making the killing murder in this degree is not charged, it does the same thing as to pronounce sentence of death without any allegation; in other words, it in effect commits murder itself.[1]

[1] The blundering of so many courts on this subject seems, at first thought, inexplicable. While conversing with one who had been called upon judicially to consider this question, and who had arrived at a result according with these views, he suggested that the blundering probably arose from the judges accepting, without consideration, the popular meaning of the words "malice aforethought," instead of their legal meaning. It may be so. It is thus: this question comes before one not familiar with the criminal law, and he thinks, if he does not say, that the words "malice aforethought," which he reads in the indictment, must, of course, charge the highest possible kind of malice. If he had ever given much attention to this branch of jurisprudence, he would see at once, that, by construction of the courts, these words charge the very lowest malice possible in this crime, — just enough to make the killing murder in distinction from manslaughter, and nothing more. And, when the statute requires that, to constitute murder in the first degree, the "malice aforethought" shall be "deliberately premeditated," these statutory adjectives have a meaning, and are not void; therefore the malice must be something more than mere naked "malice aforethought." Consequently, if it must be more, the indictment must allege it to be more. Perhaps no judge has actually, in direct terms, expressed the erroneous idea above intimated; but the court came, at least, very near to it in The State *v.* Verrill, 54 Maine, 408, 415, 416, in a passage quoted Crim. Proced. 2d ed. II. § 599. And there

§ 472. **Second Degree — First Degree, continued.** — Whether the doctrine of the New York courts, that the common-law form of the indictment is sufficient, under the statutes of the State, even to charge murder in the second degree, is sound in legal principle, is a different question. The idea on which the doctrine is based seems to be, that the statute merely gives shape and form to the common law, — in other words, merely defines it, — hence, though the enactment has, in some not very important particulars, changed the boundaries of the crime, yet, as they remain substantially as before, no change in the indictment is required.[1] In some of the other States, this doctrine, either by reason of the differing statutes or of different judicial views prevailing on the bench, is not followed. Thus, in an Ohio case, Bartley, C. J. in delivering the opinion of the majority of the court, discourses as follows: "In Pennsylvania, Virginia, New York, and other States, different degrees have been created in murder, affixing the punishment of death to murder with express malice, and other murder of the

are various cases in which this idea seems to be fairly enough implied. I happen to have before me a book on the New York local practice in which the author has illustrated, in his own case, how easy it is to slide into such a notion; and I shall so far depart from my rule not to say any thing in criticism of a living text writer, as to copy the passage here. "At the common law," he observes, "one of the requisites of murder was, that it should be committed with malice prepense or aforethought. It will be noticed that our statute uses the words 'premeditated design.' The Mississippi statute uses the same words; and it was judicially held in that State, that 'malice aforethought' and the words 'premeditated design' were, in legal effect, regarded as the same. [Referring to McDaniel *v.* The State, 8 Sm. & M. 401.] The phrase 'malice aforethought' may, therefore, be said to include premeditation and an intent to kill." 1 Colby Crim. Law, 593. Now, we have seen (ante, § 467), that the phrase "malice aforethought" does not include premeditation and an intent to kill. If it did, there could be no murder without this premeditated intent, and all murders would be in the first degree. Neither, so far as I am aware, did any court ever so far forget itself as actually to lay down the doctrine that it had this meaning. The Mississippi court, in the case referred to, did not announce any such doctrine. The statute in question is not given in the report. But the court did say, in substance, that the words "premeditated design" in this statute meant nothing more than the term "malice aforethought" of the common law. Whether this is an adjudication contrary to the general doctrine, or not, I cannot say, because the entire statute is not given; and particular words are liable to be bent in meaning by the connection in which they stand. But it is plain, from the case itself, that the court did not understand either of these forms of words as implying either premeditation or a specific intent to take life.

[1] People *v.* Enoch, 13 Wend. 159, before cited.

most aggravated character, and imprisonment as the punishment for the other and less aggravated kinds of murder. The statutes of these States, however, in making the different degrees of murder, have followed, as closely as practicable, the common-law description of murder. So that, in many instances, the form of the indictment for murder at common law would seem to be sufficient in those States. In other States, however, murder is defined by statute essentially different from murder at common law in various and material matters. In Ohio, there are no crimes or misdemeanors by the common law, and the statute of this State, which defines murder with great precision and certainty, is, &c. . . . It may, therefore, be assumed as well settled, that 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."[1]

§ 473. **Continued — Indiana.** — The doctrine adverse to what is held by the New York courts, at least as concerns murder in the first degree, may also be illustrated by the Indiana practice. In this State, like Ohio, it may be observed, if the fact is material, that all crimes are in some way the creatures of statutes.[2] A book of Indiana criminal practice[3] gives us the following

[1] Fouts *v.* The State, 8 Ohio State, 98, 111, 112. So, by later decisions, an intent to kill being required to make murder in the first or second degree under the Ohio statute, this intent must therefore be expressly averred in every indictment for either of these crimes. Hagan *v.* The State, 10 Ohio State, 459; Kain *v.* The State, 8 Ohio State, 306. The provision creating the offence of murder in the first degree is in the following words: "If any person shall purposely and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another, every such person shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death." And the court has held, that, even where the murder is by poisoning, there must be the intent to kill, and this intent must in some way appear in the allegations of the indictment. Robbins *v.* The State, 8 Ohio State, 131; Loeffner *v.* The State, 10 Ohio State, 598.

[2] Crim. Law, 5th ed. I. § 35 and note.

[3] Bicknell Crim. Pr. 254 et seq.

view of the Indiana law and procedure on this subject: "Our statutes of murder," observes the author, "are as follows: —

"If any person of sound mind shall purposely and with premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill any human being, such person shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death.[1]

"If either party to a duel be killed, the survivor shall be deemed guilty of murder in the first degree, and shall suffer death.[2]

"Any person convicted of murder in the first degree may, instead of being sentenced to death, in the discretion of the jury be imprisoned in the State's prison during life.[3]

"If any person shall, by previous appointment made within the State, fight a duel without the State, and in so doing shall inflict a mortal wound upon any person, whereof the person so injured shall die within this State, such person so offending shall be deemed guilty of murder in the first degree, in the county where such death shall happen, and shall suffer death, or be imprisoned in the State's prison during life.[4]

"If any person shall, purposely and maliciously, but without premeditation, kill any human being, every such person shall be deemed guilty of murder in the second degree; and, on conviction thereof, shall be imprisoned in the State's prison during life."[5]

§ 474. **Continued — First Degree.** — These are the principal statutes; and the author goes on to give us a brief form of the indictment, which, he informs us, has been sustained as sufficient[6] by reason of the following statutory provisions: "The offence charged must be clearly set forth in plain and concise language, without repetition, and with such a degree of certainty that the court may pronounce judgment upon a conviction, according to the right of the case."[7] Also: "The words used

[1] 2 R. S. 388, § 2; 2 G. & H. 435.
[2] 2 R. S. 396, § 3; 2 G. & H. 436.
[3] 5 R. S. 396, § 4; 2 H. & G. 437.
[4] 2 R. S. 396, § 5.
[5] Ib. § 6.
[6] Cordell *v.* The State, 22 Ind. 1. He also refers, in this connection, to The State *v.* Murphy, 21 Ind. 441; and to 14 Ind. 23, 220; 11 Ind. 307, 557; 8 Ind. 200.
[7] 2 R. S. 368, § 60; 2 G. & H. 403.

in an indictment must be construed in their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning."[1] Again: "Words used in the statute to define a public offence need not be strictly pursued in the indictment; but other words conveying the same meaning may be used."[2] The indictment is as follows: —

"That Thomas Cordell, on, &c., at, &c., did feloniously, purposely, and with premeditated malice, unlawfully kill and murder Patrick Quirk, by then and there feloniously, purposely, and with premeditated malice, cutting, stabbing, and mortally wounding said Patrick Quirk with a knife which he, the said Thomas Cordell, then and there had and held in his hands, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana."

It is perceived that this is an indictment for murder in the first degree, on the first clause of the before-quoted statutes.

The author observes:[3] "The words 'purposely and with premeditated malice' are in the statute; and the words purposely and with premeditated malice seem to be held essential. Thus, where the words were 'feloniously, wilfully, and of his malice aforethought' [the common-law form], it was held that such words charged murder in the second degree only." On looking into the case to which the learned author here refers, it is perceived that what the court held was, that such an indictment would not sustain a conviction for murder in the first degree; and, though the language of the judge implies that it would sustain a verdict for murder in the second degree, nothing of the sort was decided.[4]

§ 475. **Continued — Second Degree.** — If we are to infer from this, that, in Indiana, an indictment as at the common law will sustain a conviction for murder in the second degree, still such appears not to be the usual form. Thus, in one case, the following was held to be adequate: —

"That Samuel Dukes, &c., on, &c., at, &c., feloniously, purposely, and maliciously, but without premeditation, did kill and murder John G. White, a human being, by then and there feloniously, purposely, and maliciously, but without premeditation, shooting the said John G. White in the abdomen with a certain gun, loaded and charged with gunpowder and leaden shot, which gun, he, the said Samuel Dukes, in his hands then and there had and held, and discharged, and

[1] 2 R. S. 368, § 58.
[2] Ib. § 59.
[3] Bicknell Crim. Pr. 258.
[4] Finn *v.* The State, 5 Ind. 400.

shot off, at and against the said John G. White. And so the jurors aforesaid, upon their oaths aforesaid, do find and say, that the said Samuel Dukes did feloniously, purposely, and maliciously, but without premeditation, kill and murder the said John G. White, on the day and year last aforesaid, at the county aforesaid." [1]

And the form which the author before us furnishes is like it, but more brief, thus : —

"That A. B., &c., on, &c., at, &c., feloniously, purposely, and maliciously killed and murdered C. D., by then and there feloniously, purposely, and maliciously cutting, stabbing, and mortally wounding said C. D., with a knife, which he the said A. B. then and there had and held in his hands, contrary, &c." [2]

§ 476. **General View.** — It is not best to pursue this subject further. The practitioner should consult the particular statutes, decisions, and usages of his own State ; but, unless specially constrained by them, he should cling to the particular words of the enactment in framing his indictment. And, in the proofs, he should bear in mind the language of the statute on which he is proceeding. If this is done, he may also keep as closely to the common-law form of the allegation, and in the proofs and law generally derive as much help from common-law rules, as the case will admit of. And surely it is right that a statute should be as much regarded and followed when its function is to take away a man's life, as when it extends in its penalties only to liberty or property.

§ 477. **Statutory Manslaughter.** — There are some statutory manslaughters, and statutory divisions of this offence as known at the common law, but the adjudications are not sufficient in number and importance to render a discussion of them profitable.[3] Something may be found, at the places cited, in the author's works on the Criminal Law and Criminal Procedure.

II. *Rape and the Carnal Abuse of Children.*

§ 478. *At the Common Law : —*

General View. — Rape, at the common law, has been discussed in the author's other works ; and, in the same connec-

[1] Dukes *v.* The State, 11 Ind. 557.

[2] Bicknell Crim. Pr. 481. He refers to 22 Ind. 1; but the indictment here given is for murder in the first degree, and there is no other. See ante, § 474 and note.

[3] See Crim. Law, 5th ed. II. § 731 ; Crim. Proced. 2d ed. II. § 610, 614 ; United States *v.* Warner, 4 McLean, 463 ; Thomas *v.* The State, 38 Ga. 117 ; Walters *v.* Commonwealth, 8 Wright, Pa. 135.

tion, something has been said of the carnal abuse of children.[1] Rape is an offence resting partly on the ancient common law, but chiefly on old English statutes which are common law in this country.[2] Hence the indictment, in England, concludes against the form of the statute, though perhaps this conclusion is not strictly necessary.[3] The old definitions declare this offence to be the unlawful carnal knowledge, by a man, of a woman, by force and against her will. And to this form of the definition the indictment, under our unwritten law, usually conforms.[4]

§ 479. **Continued — Against Will — Without Consent.** — Still the attention of the courts has of late been directed to the statutes, and it is seen and admitted, that, instead of the words "against her will," in the definition, the true language is, "without her consent;" making perhaps an important difference in the actual limits of the offence.[5] To complete the offence of rape, therefore, there must be, 1. a carnal knowledge, and this requires a penetration and, according to some authorities, an emission also;[6] 2. force, but, where the other circumstances concur, this would seem to be sufficiently implied in the act itself;[7] 3. absence of consent in the woman. If a consent is obtained by fraud it avails the defendant, but if by force it does not.[8]

§ 480. **Carnal Abuse of Children.** — The carnal abuse of female children is, like rape, an offence under our unwritten law; but resting, even more distinctly than rape, on early English statutes, which are common law with us. In this offence, the consent of the female is of no avail whatever to the defendant.[9] The offence, with us, is almost altogether statutory. As to our unwritten law, as it comes to us by construction of the early English statutes, the author has elsewhere stated the following conclusion, which is as definite as he could obtain: "Though we have almost no direct decisions to

[1] Crim. Law, 5th ed. II. § 1107 et seq.; Crim. Proced. 2d ed. II. § 947 et seq.

[2] Crim. Law, 5th ed. II. § 1108–1113.

[3] Crim. Proced. 2d ed. II. § 949, 950.

[4] Ib. § 591; Crim. Law, 5th ed. II. § 1113.

[5] Crim. Law, 5th ed. II. § 1114, 1115.

[6] Ib. § 1127–1132.

[7] Ib. § 1120, 1121.

[8] Ib. § 1122–1126.

[9] Reg. *v.* Beale, Law Rep. 1 C. C. 10.

guide us, yet, according to established principles, the common law of this country makes the unlawful carnal knowledge of a girl who consents, while between ten and twelve years old, indictable as misdemeanor; below ten, indictable, probably as felony; if not, then indictable as misdemeanor." [1]

§ 481. *Rape under American Statutes:* —

General View. — The statutes of our States generally have not much changed the law of this offence. In a considerable part of them, where there is any legislation, the statute simply provides a punishment for "rape," leaving the offence to its common-law definition.[2] It is so, also, of the United States statute, making "rape" punishable in certain localities within the jurisdiction of the general government.[3] Still other statutes are like the Massachusetts one, which provides, that "whoever ravishes and carnally knows a female of the age of ten years or more, by force and against her will, or unlawfully and carnally knows and abuses a female child under the age of ten years, shall be punished," &c.[4] But a statute like this is interpreted to leave the boundaries of the offence as at the common law.[5]

§ 482. **"Against her Will."** — And there are many States in which rape is partly or fully defined by statute; and, in most or all of these, the ravishment must be, as in the Massachusetts statute just quoted, "against the will" of the woman, instead of "without her consent." [6]

§ 483. *Carnal Ravishment of Children under Statutes, with some further Views of Statutory Rape:* —

In General — Connection of the Two Crimes. — The principal difference between the carnal abuse or ravishment of a child, and rape, as the offences are known at the common law, consists in the fact, that the former may be committed when the female consents, and the latter cannot.[7] Both, under many of our statutes, are called rape, and they are generally treated of together.

§ 484. **Ohio Statute.** — As a specimen of the forms which

[1] Crim. Law, 5th ed. II. § 1138.
[2] Ante, § 363, 413.
[3] Act of March 3, 1825, 4 U. S. Stats. at Large, c. 45, § 4.
[4] Gen. Stats. c. 160, § 26.
[5] See Commonwealth *v.* Sugland, 4 Gray, 7.
[6] Ante, § 479.
[7] Ante, § 479, 480.

the statutory law assumes, we may first look at that of Ohio, as follows: —

"If any person shall have carnal knowledge of his daughter or sister, forcibly and against her will, every such person so offending shall be deemed guilty of a rape, and, upon conviction thereof, shall be imprisoned in the penitentiary and kept at hard labor, during life.

"If any person shall have carnal knowledge of any other woman, or female child, than his daughter or sister as aforesaid, forcibly and against her will; or if any male person, of the age of seventeen years and upwards, shall carnally know and abuse any female child, under the age of ten years, with her consent; every such person so offending shall be deemed guilty of a rape, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than twenty nor less than three years."[1]

§ 485. **Indictment under Latter Section — Daughter or Sister.** — It has been observed, by the Ohio court, that the offences created by these two sections "are distinct and separate crimes, and not merely different grades of the same crime." And the court added, and apparently adjudged, 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."[2] This decision may be sound; still there is room to doubt whether all other courts would hold the point, under like statutory provisions, in the same way. The view of those who would dissent from this Ohio decision would be, that, since all statutes must be construed together,[3] these two sections, standing together, must be especially so. Looking, then, at the two sections together, we have the result, that, when the woman is the daughter or sister of the defendant, he is to be punished more heavily than when she is not. The relationship may exist, and still the prosecuting power may not choose to avail itself of this fact and demand the higher punishment, or the fact may be unknown to the prosecutor; and, in either

[1] Swan Stats. 269; Warren Crim. Law, 3d ed. 246.

[2] Howard *v.* The State, 11 Ohio State, 328.

[3] Ante, § 82, 86 et seq.

case, if the indictment neither affirms nor negatives the relationship, the prisoner cannot get off by showing himself to be more guilty than he is charged with being. There are many analogies in the law favoring this view; perhaps it may derive some support from what follows in the present discussion.

§ 486. **Wife.** — At the common law,[1] and under statutes like the Massachusetts one before cited,[2] it is not necessary to allege that the woman is not the wife of the ravisher.[3]

§ 487. **Age.** — Where the indictment alleges that the act was against the will of the woman, it need not mention her age, or allege that she was above the statutory age.[4] And where the facts show that the girl was below the statutory age, the defendant may be convicted if the case has the ordinary ingredients of rape, force and want of consent.[5] The rule that the age of the female need not be alleged applies even where the words are, as in the Massachusetts statute before quoted,[6] "a female of the age of ten years or more."[7] Neither, though a boy under fourteen cannot by the common-law rules commit rape, is it necessary to make any mention in the indictment of the age of the defendant.[8] And where the words of the California statute, drawn on the like pattern with the Ohio one,[9] were "any person of the age of fourteen years and upward, who shall have carnal knowledge," &c., the court held, that, even upon this statute, the age of the defendant need not be alleged. "It does not," said Sawyer, J. "appear upon the face of the indictment that the defendant was under fourteen years of age, and we see no better reason for averring that he is over fourteen than in any other criminal case for averring that the party charged is of such age as to render him capable in law of committing the crime."[10] But where the case is for the carnal abuse of a female child, and the fact of her want of

[1] Crim. Proced. 2d ed. II. § 949.
[2] Ante, § 481.
[3] Commonwealth *v.* Scannel, 11 Cush. 547.
[4] Crim. Proced. 2d ed. II. § 954.
[5] The State *v.* Storkey, 63 N. C. 7; O'Meara *v.* The State, 17 Ohio State, 515; Charles *v.* The State, 6 Eng. 389; Reg. *v.* Neale, 1 Car. & K. 591.
[6] Ante, § 481.
[7] Commonwealth *v.* Sugland, 4 Gray, 7.
[8] Crim. Proced. 2d ed. II. § 954.
[9] Ante, § 484.
[10] People *v.* Ah Yek, 29 Cal. 575, 576.

age is to stand in the place of her want of consent, the age must be averred.[1]

§ 488. **Sanity — Homicide.** — In further illustration of this subject, it may be observed, that the before-quoted Indiana statute creating the offence of murder in the first degree commences, "if any person of *sound mind* shall," &c., yet the indictment does not set out the soundness of the defendant's mind.[2] "This is not material," says Bicknell. "All persons are presumed to be sane until the contrary is shown. Insanity is matter of excuse or defence; and the sanity of the defendant requires neither allegation nor proof in the first instance, on behalf of the State, in any criminal prosecution."[3]

§ 489. **"Ravish" — "Carnally know" — "Abuse."** — It is a plain proposition that the indictment must follow the material statutory words. Thus, in rape proper, where the question is not affected by our own statutes, the indictment must contain the word "ravish;"[4] because it is found in Stat. Westm. 2 (13 Edw. 1), c. 34, which is common law with us.[5] And this old statute, by the same word, appears to apply to the carnal knowledge of girls between ten and twelve who consent; but, where the girl is below ten, the case under our common law appears to be governed by 18 Eliz. c. 7, § 4; as follows, "that, if any person shall unlawfully and carnally know and abuse any woman-child under the age of ten years, every such unlawful and carnal knowledge shall be felony, and the offender thereof being duly convicted shall suffer as a felon without allowance of clergy."[6] But, as already observed, this offence, with us, rests almost entirely on our own statutes; and, where a statute does not contain the word "ravish," the indictment on it need not. It is so, for example, of an indictment on the North Carolina act, the words of which are "unlawfully and carnally know and abuse any female child under the age of ten years."[7] It is plain, that, if the statute is in the alternative,

[1] The State *v.* Storkey, supra; O'Meara *v.* The State, supra; Reg. *v.* Martin, 9 Car. & P. 215. See Reg. *v.* Shott, 3 Car. & K. 206.

[2] Ante, § 473, 474.

[3] Bicknell Crim. Pr. 256, referring to 1 Blackf. 395.

[4] Crim. Proced. 2d ed. II. § 953; Train & Heard Preced. 442.

[5] Crim. Proced. 2d ed. II. § 950.

[6] Crim. Law, 5th ed. II. § 1109, 1112, 1133.

[7] The State *v.* Smith, Phillips, 302. If the word "ravish" is employed,

"carnally know *or* abuse," the use of either of the two terms alone, or the use of both of them connected by the conjunction *and*, is sufficient. Perhaps "carnally know" includes in its meaning all which is signified by "abuse;" at all events, under the English statute of 24 & 25 Vict. c. 100, § 50, which makes it felony to "carnally know *and* abuse any girl under the age of ten years," it has been held that the indictment is sufficient if it employs merely the words "carnally know."[1]

§ 490. **"Actual Violence."** — In like manner, where the Connecticut statute provided, that "every person who shall with actual violence make an assault upon the body of any female with intent to commit a rape, shall suffer imprisonment," &c., an information was adjudged sufficient which charged in effect, that the defendant with force and arms did make an assault on A. W., 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. Although the words "actual violence" were not used, the idea was sufficiently embraced within the allegation.[2]

§ 491. **Whether Carnal Abuse includes Assault.** — The common form of indictment for ordinary rape, whether necessarily or unnecessarily we need not inquire,[3] charges that the defendant did, upon the woman, "make an assault," &c.; and the same form is pretty generally employed in the indictment for the carnal abuse of a female child.[4] Now, if the latter indictment is in this form, and no technical rule prevents, such as that there cannot be a conviction for misdemeanor on an indictment for felony,[5] then, if the carnal abuse is not proved,

when it is not in the statute, it does no harm, but it may be rejected as surplusage. McComas *v.* The State, 11 Misso. 116.

[1] Reg. *v.* Holland, 16 Law T. N. S. 536, 15 W. R. 879, 10 Cox C. C. 478. 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, &c., at, &c., "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," &c. People *v.* Mills, 17 Cal. 276. And see People *v.* Ah Yek, 29 Cal. 575.

[2] The State *v.* Wells, 31 Conn. 210; Crim. Proced. 2d ed. II. § 976, note.

[3] See Reg. *v.* Allen, 2 Moody, 179, 9 Car. & P. 521.

[4] Crim. Proced. 2d ed. II. § 949, 958, 960.

[5] Crim. Law, 5th ed. I. § 804 et seq.

but the assault is, there can be a conviction for the assault.[1] But it is a doctrine in the law of simple assault, that there is no assault where there is consent;[2] while, on the other hand, it is the peculiarity of this law of carnal abuse that the offence is committed equally whether the girl consents or not. It follows from this, that, if a girl consents, there can be neither a simple assault in the unsuccessful endeavor to effect the purpose, nor an assault with intent to commit the offence of carnal abuse. Such is the well-settled English law,[3] it is so held under the Ohio statute;[4] and it is clear beyond room for doubt in matter of principle. At the same time, in respect of the evidence, youth, inexperience, and subjection in the child will be taken into the account; and often a very small circumstance will be admitted to overcome the apparent consent.[5] But in assault, unlike rape, a consent obtained by fraud is no consent; therefore, when a man having venereal disease, and knowing it, induced a girl of thirteen, ignorant of his condition, to consent to a connection by which she was infected, it was ruled, on a trial before a jury, that he thereby committed an indecent assault.[6]

§ 492. **Continued.** — Still, contrary to the leading doctrine laid down in the last section, it has been held, in New York[7] and Michigan, that, the consent of the girl being void as to the carnal abuse, which is the principal matter charged, it must be taken to be so also as to the minor matter, the assault. In the Michigan case, which was an information for an assault on a girl seven years old with intent carnally to know and abuse her,[8] the defendant, with the girl's consent, had lain indecently exposed before her in bed. The jury found that he was not guilty of the intent to commit the higher crime, but convicted

[1] Reg. *v.* Guthrie, Law Rep. 1 C. C. 241.

[2] Crim. Law, 5th ed. II. § 35, 36.

[3] Reg. *v.* Guthrie, supra; 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.

[4] Smith *v.* The State, 12 Ohio State, 466.

[5] Crim. Law, 5th ed. II. § 36; Reg. *v.* Day, 9 Car. & P. 722; Reg. *v.* McGavaran, 6 Cox C. C. 64.

[6] Reg. *v.* Bennett, 4 Fost. & F. 1105.

[7] Hays *v.* People, 1 Hill, N. Y. 351.

[8] The statute, the information, and the facts were nearly identical with what appeared in the Ohio case of Smith *v.* The State, 12 Ohio State, 466, where the majority of the court held the contrary.

him of simple assault and battery, and the proceeding was sustained, Martin, C. J. observing: "As actual consent of a female child under the age of ten years cannot be shown upon a trial for the crime of rape, because the law will not suffer the presumption of incapacity to consent to be repelled, or even attacked, neither, in case of a charge of assault with intent to commit such crime, can consent be shown to negative such intent. . . . There can be no presumption or evidence of consent in cases in which the law declares there exists an absolute inability to consent."[1] The oversight of the court, for such there plainly was, consisted in not drawing certain distinctions with sufficient clearness. Assault is not necessarily a part of this statutory offence of carnal abuse. The statute has expressly provided, that, where there is a consent, — in other words, *where there is no assault*, — the mere act of what would be fornication if the girl were older, shall be indictable. The case is as if, where fornication is made a crime by statute, a man and woman should meet by mutual arrangement for the illicit purpose; and, after an indecent exposure, but before the offence was committed, an alarm should interrupt them, then the man should be indicted for assaulting the woman!

§ 493. **Attempt.** — Still, in these cases, though the law does not term the act an assault, if it was done with the intent to have carnal knowledge of the child with her consent, it is, in States where there are common-law crimes, indictable as an attempt to commit the substantive offence.[2] But in a State, like Ohio, where there are no common-law crimes, it is not so indictable; if there is no statute to meet the case, the offender must escape.[3]

§ 494. **The Carnal Knowledge.** — We have elsewhere seen,[4] that, in ordinary rape, there must be penetration, but there is no particular depth requisite; simply *res in re* will answer, even though the hymen is not broken. And whether there must be emission is a question on which the authorities differ.

[1] People *v.* McDonald, 9 Mich. 150, 152, 153.

[2] Reg. *v.* Martin, 2 Moody, 123, 9 Car. & P. 213; Reg. *v.* Beale, Law Rep. 1 C. C. 10; Reg. *v.* Ryland, 11 Cox C. C. 101.

[3] Smith *v.* The State, 12 Ohio State, 466.

[4] Crim. Law, 5th ed. II. § 1127–1132.

In some of the States, it is rendered unnecessary by statute,[1] the same as it is in England. Now, in reason, whatever is essential in rape, even less ought to be required to constitute the offence of carnal abuse. Still, the North Carolina court has gone so far as to adjudge, that emission is necessary even in the latter crime.[2] Probably not many courts would hold this doctrine. But all hold to the necessity of something which, in distinction from mere outward contact, may be called penetration. In one case, of a child under ten, where the hymen was not broken, but there was a venereal sore upon it, and the defendant by his counsel contended that this might be and still there be no penetration, Parke, B. said: "I shall leave it to the jury to say, whether, at any 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."[3]

III. *Mayhem and other Maimings.*

§ 495. **General View.** — The offence of mayhem at the common law, together with various statutory maims, has been discussed by the author elsewhere,[4] and the expositions need not be repeated here. Though mayhem is an offence at the common law, it is, in the actual proceedings against the offender, practically statutory in all our States. A few words, therefore, will be useful concerning the proceeding on our American statutes.

§ 496. **New York Statute and Indictment.** — The statute of New York is as follows: "Every person, who, from premeditated design, evinced by lying in wait for the purpose, or in any other manner, or with intention to kill or commit any felony, shall, 1. Cut out or disable the tongue; or, 2. Put out an eye; or, 3. Slit the lip, or slit or destroy the nose; or, 4. Cut off or disable any limb or member of another, on purpose, upon conviction thereof shall be imprisoned in a State prison for such term as the court shall prescribe, not less than seven

[1] Waller *v.* The State, 40 Ala. 325.

[2] The State *v.* Gray, 8 Jones, N. C. 170.

[3] Reg. *v.* Lines, 1 Car. & K. 393.

[4] Crim. Law, 5th ed. II. § 1001 et seq.; Crim. Proced. 2d ed. II. § 851 et seq.

years." [1] It is seen that this provision has many alternative clauses, and the indictment may be on one, or another, or several of them, at the pleader's election. It is sometimes useful as well as pleasant, especially to students, to see exactly how papers are entitled and otherwise appear in practice (things of this sort, however, vary somewhat with fashion, and differ in the different States [2]), therefore let us present here, precisely as it appears, except with diminution of the spaces, a blank kindly furnished the author by the present district attorney of Albany. It is as follows: —

IN THE COURT OF
OF THE COUNTY OF ALBANY.

Of Term, in the year of our Lord one thousand eight hundred and seventy-

City and County of Albany, ss:

THE JURORS FOR THE PEOPLE OF THE STATE OF NEW YORK IN AND FOR THE BODY OF THE CITY AND COUNTY OF ALBANY, BEING THEN AND THERE SWORN AND CHARGED, UPON THEIR OATH,

Present, That late of the First Ward in the City of Albany, on the day of in the year of our Lord one thousand eight hundred and seventy- with force and arms, at the of in the said County of Albany, being then and there armed with a certain dangerous weapon, to the jurors aforesaid unknown, with malicious intent, and from premeditated design, evinced by lying in wait for the purpose, one then and there to maim and disfigure, in and upon the said feloniously did make an assault; and that the said with the said instrument, from premeditated design, evinced by lying in wait for the purpose, the of the said then and there feloniously, wilfully and maliciously did on purpose from premeditated design, evinced by lying in wait for the purpose, with malicious intent, then and there, and thereby, in manner aforesaid, said then and there to maim and disfigure, contrary to the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT:

That said late of the Ward and City aforesaid, on the day of in the year of our Lord one thousand eight hundred and seventy- with force and arms, at the of in the said County of Albany, with with malicious intent, from premeditated design, evinced by lying in wait for the purpose, the said then and there to maim and disfigure, in and upon the said feloniously did make an assault; and that

[1] 2 R. S. 664, marg. p. § 27, 2 Edm. Stat. 683.

[2] See Bishop First Book, § 489–491.

the said with from premeditated design, evinced by lying in wait for the purpose, the of the said then and there feloniously, wilfully, maliciously, on purpose did from premeditated design, evinced by lying in wait for the purpose, with malicious intent, then and there, and thereby, in manner aforesaid, the said then and there to maim and disfigure, contrary to the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT:

That said late of the Ward and City aforesaid, on the day of in the year of our Lord one thousand eight hundred and seventy- with force arms, at the of in said County of Albany, with malicious intent, from premeditated design, evinced by lying in wait for the purpose, the said then and there to maim and disfigure, in and upon the said feloniously did make an assault; and that the said from premeditated design, evinced by lying in wait for the purpose, the of the said then and there feloniously, wilfully and maliciously, on purpose did from premeditated design, evinced by lying in wait for the purpose, with malicious intent, then and there, and thereby, in manner aforesaid, the said then and there to maim and disfigure, contrary to the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT:

That said late of the Ward and City aforesaid, on the day of in the year of our Lord one thousand eight hundred and seventy- with force and arms, at the of in the said County of Albany, being then and there armed with a certain dangerous weapon, to the jurors aforesaid unknown, with malicious intent, and from premeditated design, evinced by lying in wait for the purpose, the said then and there to maim and disfigure, in and upon the said feloniously did make an assault; and that the said with the said instrument, from premeditated design, evinced by lying in wait for the purpose, the of the said then and there feloniously, wilfully and maliciously did, on purpose from premeditated design, evinced by lying in wait for the purpose, with malicious intent, then and there, and thereby, in manner aforesaid, said then and there to maim and disfigure, contrary to the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT:

That said late of the Ward and City aforesaid, on the day of in the year of our Lord one thousand eight hundred and seventy- with force and arms, at the of in the said County of Albany, with with malicious intent, from premeditated design, evinced by lying in wait for the purpose, the said then and there to maim and disfigure, in and upon the said feloniously did make an assault; and that the said with from premeditated design, evinced by lying in wait for the purpose, the of the said then and there feloniously, wilfully, maliciously, on purpose did from

premeditated design, evinced by lying in wait for the purpose, with malicious intent, then and there, and thereby, in manner aforesaid, the said then and there to maim and disfigure, contrary to the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT:

That said late of the Ward and City aforesaid, on the day of in the year of our Lord one thousand eight hundred and seventy- with force and arms, at the of in the said County of Albany, with malicious intent, from premeditated design, evinced by lying in wait for the purpose, the said then and there to maim and disfigure, in and upon the said feloniously did make an assault; and that the said from premeditated design, evinced by lying in wait for the purpose, the of the said then and there feloniously, wilfully and maliciously, on purpose, did from premeditated design, evinced by lying in wait for the purpose, with malicious intent, then and there, and thereby, in manner aforesaid, the said then and there to maim and disfigure, contrary to the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT:

That said late of the Ward and City aforesaid, on the day of in the year of our Lord one thousand eight hundred and seventy- with force and arms, at the of in the said County of Albany, being then and there armed with a certain dangerous weapon, to the jurors aforesaid unknown, with malicious intent and from premeditated design, evinced by lying in wait for the purpose, said then and there to maim and disfigure, in and upon the said feloniously did make an assault; and that the said with the said instrument, from premeditated design, evinced by lying in wait for the purpose, did, on purpose, then and there, feloniously, wilfully and maliciously, *cut off* a member, to wit, the of the said from premeditated design, evinced by lying in wait for the purpose, with malicious intent, then and there, and thereby, in manner aforesaid, said then and there to maim and disfigure, contrary to the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT:

That said late of the Ward and City aforesaid, on the day of in the year of our Lord one thousand eight hundred and seventy- with force and arms, at the of in the said County of Albany, with with malicious intent, from premeditated design, evinced by lying in wait for the purpose, the said then and there to maim and disfigure, in and upon the said feloniously did make an assault; and that the said with from premeditated design, evinced by lying in wait for the purpose, did, on purpose, then and there, feloniously, wilfully and maliciously, *cut off* a member, to wit, the of the said from premeditated design, evinced by lying in wait for the purpose, with malicious intent, then and there, and thereby, in manner

aforesaid, said then and there to maim and disfigure, contrary to the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT:

That said late of the Ward and City aforesaid, on the day of in the year of our Lord one thousand eight hundred and seventy- with force and arms, at the of in the said County of Albany, with malicious intent, and from premeditated design, evinced by lying in wait for the purpose, said then and there to maim and disfigure, in and upon the said feloniously did make an assault; and that the said from premeditated design, evinced by lying in wait for the purpose, did, on purpose, then and there, feloniously, wilfully and maliciously *cut off* a member, to wit, the of the said from premeditated design, evinced by lying in wait for the purpose, with malicious intent, then and there, and thereby, in manner aforesaid, said then and there to maim and disfigure, contrary to the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT:

That said late of the Ward and City aforesaid, on the day of in the year of our Lord one thousand eight hundred and seventy- with force and arms, at the of in said County of Albany, being then and there armed with a certain dangerous weapon, to the jurors aforesaid unknown, with malicious intent and from premeditated design, evinced by lying in wait for the purpose, said then and there to maim and disfigure, in and upon the said feloniously did make an assault; and that the said with the said instrument, from premeditated design, evinced by lying in wait for the purpose, did, on purpose, then and there, feloniously, wilfully and maliciously, *disable* a member, to wit, the of the said from premeditated design, evinced by lying in wait for the purpose, with malicious intent, then and there, and thereby, in manner aforesaid, said then and there to maim and disfigure, contrary to the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT:

That said late of the Ward and City aforesaid, on the day of in the year of our Lord one thousand eight hundred and seventy- with force and arms, at the of in the said County of Albany, with malicious intent, from premeditated design, evinced by lying in wait for the purpose, the said then and there to maim and disfigure, in and upon the said feloniously did make an assault; and that the said with from premeditated design, evinced by lying in wait for the purpose, did, on purpose, then and there, feloniously, wilfully and maliciously, *disable* a member, to wit, the of the said from premeditated design, evinced by lying in wait for the purpose, with malicious intent, then and there, and thereby, in manner aforesaid, said then and there to maim and disfigure, contrary to the statute in such

case made and provided, and against the peace of the people of the State of New York and their dignity.

AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT:

That said late of the Ward in the City aforesaid, on the day of in the year of our Lord one thousand eight hundred and seventy- with force and arms, at the of in the said County of Albany, with malicious intent, and from premeditated design, evinced by lying in wait for the purpose, said then and there to maim and disfigure, in and upon the said feloniously did make an assault; and that the said from premeditated design, evinced by lying in wait for the purpose, did, on purpose, then and there, feloniously, wilfully and maliciously *disable* a member, to wit, the of the said from premeditated design, evinced by lying in wait for the purpose, with malicious intent, then and there, and thereby, in manner aforesaid, said then and there to maim and disfigure, contrary to the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

District Attorney.

This bill, when it is folded, is indorsed on the back as follows: —

COUNTY OF ALBANY.

Court of .....

THE PEOPLE

against

INDICTMENT: MAYHEM.

NATHANIEL C. MOAK,
District Attorney.

A TRUE BILL.

.....

Foreman.

Filed	*day of*	187
Arraigned	*day of*	187
	Plead *Guilty.*	
Tried	*day of*	187

§ 497. **Indiana Statutes and Indictment — Malicious Mayhem.** — Bicknell tells us, that, in Indiana, there are two kinds of mayhem, — malicious and simple. The statute creating the former is as follows: "Every person who, on purpose and of malice aforethought, shall unlawfully disable the tongue, put out an eye, cut or bite off the nose, ear, lip, or other member of any person, with intent to disfigure or disable such person, shall be deemed guilty of malicious mayhem, and, upon conviction thereof, shall be imprisoned in the State's prison for not less than two or more than fourteen years, and be fined not exceeding one thousand dollars." And this author furnishes the following form of the indictment: —

"FLOYD CIRCUIT COURT, October Term, A.D. 1864.

"The State of Indiana } Malicious Mayhem.
A—— B—— } *v.*

State of Indiana, Floyd County, ss:

"The grand jurors for the county of Floyd, upon their oath, present, that A. B., on the eighth day of August, A.D. 1864, at said county, feloniously, purposely, and of his malice aforethought, bit off the ear of C. D., with intent then and there feloniously, purposely, and with malice aforethought to disfigure the said C. D. [or, the charge may be thus: cut off the right hand of C. D., with intent then and there feloniously, purposely, and with malice aforethought to disable the said C. D.], contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

"E. F., *Prosecuting Attorney.*"[1]

§ 498. **Continued — Simple Mayhem.** — The statute of simple mayhem is: "Every person who shall violently and unlawfully deprive another of the use of any bodily member, or who shall unlawfully and wilfully disable the tongue or eye, or slit or bite the nose, ear, or lip of another, shall be deemed guilty of simple mayhem, and, upon conviction, shall be fined not exceeding two thousand dollars, nor less than five dollars, and may be imprisoned in the county jail not exceeding six months and not less than twenty days." And the indictment, omitting the introduction, is as follows: —

"That A. B. on the —— day of ——, in the year ——, at said county, violently, unlawfully, and wilfully bit off the right ear of C. D., contrary," &c.[2]

§ 499. **Conclusion.** — By consulting the index, the reader will find references to various words explained in the earlier

[1] Bicknell Crim. Pr. 300, 301. [2] Bicknell Crim. Pr. 468, 469.

parts of this volume, employed in the statutes against mayhems and maims. It is best, therefore, not to pursue the subject further here.

IV. *Other Aggravated Assaults.*

§ 500. **General View — How treated of in the Author's other Works.** — The offence of simple assault, and the joint offences of assault and battery, enter into a great variety of compounds in the law. The author has treated of them, in the companion works to this, in most of their aspects and connections. Let us see what some of them are.

1. We have assault pure and simple, constituting an indictable wrong of itself.[1]

2. Then we have assault as the first step in a battery, and constituting a part of what is sometimes regarded as the compound crime of assault and battery.[2]

3. In the next place, assault is one of the forms of attempt; and, as such, is treated of under the title Attempt, and in other like connections.[3]

4. Then, again, assault is one of the elements of a considerable number of the substantive crimes.[4] It is of affray,[5] though the indictment may be so drawn as not to include it;[6] of battery, as just observed; of duelling, where the case proceeds to actual combat;[7] of most indictable homicides, though perhaps not of all;[8] of false imprisonment and kidnapping, at least in most cases;[9] of mayhem;[10] of rape, but not necessarily of the carnal abuse of a young girl;[11] sometimes, but not always, of riot;[12] and of robbery, though this is not in all cases necessary.[13] And the list of substantive offences into

[1] Crim. Law, 5th ed. II. § 22 et seq.; Crim. Proced. 2d ed. II. § 54 et seq.

[2] Crim. Law, 5th ed. II. § 70 et seq.; Crim. Proced. 2d ed. II. § 54 et seq.

[3] Crim. Law, 5th ed. I. § 553, 746, 750, 751; II. § 42–54; Crim. Proced. 2d ed. II. § 77–85, 651 et seq.

[4] Crim. Law, 5th ed. II. § 56.

[5] Crim. Law, 5th ed. II. § 1 et seq.

[6] Crim. Proced. 2d ed. II. § 25.

[7] Crim. Law, 5th ed. II. § 311 et seq.

[8] Crim. Proced. 2d ed. II. § 502, 512, 513, 538, 558, 651–656.

[9] Crim. Law, 5th ed. II. § 56, 747 et seq.; Crim. Proced. 2d ed. II. § 365, 366, 690, 691.

[10] Crim. Proced. 2d ed. II. § 865; ante, § 496.

[11] Crim. Proced. 2d ed. II. § 949, 955, 959, 960; ante, § 491.

[12] Crim. Proced. 2d ed. II. § 993.

[13] Ib. § 1002; Crim. Law, 5th ed. II. § 1166–1173.

which assault enters might be somewhat, but not much, enlarged beyond this.

Let us, therefore, not attempting to traverse here the whole field, which has been pretty well examined in the author's other works, call to mind a few points connected with our American statutes.

§ 501. **The Indictment.** — The leading principle regarding the indictment is, that it must contain a complete and formal charge of assault, the same as though it were for a simple assault only, and to this must be added an allegation of the aggravating matter.[1] It must conform, likewise, to the statutory words.[2] How far, and whether at all, beyond covering the words of the statute, the indictment must go in setting out the particulars of the aggravating matter, we shall in a measure see as we go on, and it was somewhat considered in the work on Criminal Procedure.[3]

§ 502. *Assaults with Intent to kill, to murder, to commit Manslaughter, and the like:* —

General View. — This subject is discussed, in various aspects, in the companion works to the present one.[4] The statutes creating or defining this offence differ in their terms; and, it is obvious, in every case the particular words of the statute must be attended to.

§ 503. **Intent to kill — To commit Murder — Manslaughter.** — Some of the statutes make it an offence of a particular sort to assault one with intent to "kill"; others, to "commit murder"; others, to "commit manslaughter"; others, to "commit murder or manslaughter." Now, in the construction of these statutes, and of an indictment drawn upon them, it is the general rule, that, if the verb "to kill" is used, it is satisfied by the intent to do what would constitute, if done, either murder or manslaughter. And if the two words "kill and murder" are used in the indictment, proof of an intent to commit manslaughter will satisfy the former, and proof of intent to commit murder will satisfy the latter; and there may be a

[1] Crim. Proced. 2d ed. I. § 82; II. § 78; Crim. Law, 5th ed. II. § 52; Adell *v.* The State, 34 Ind. 543.

[2] Crim. Proced. 2d ed. II. § 80; post, § 504.

[3] And see Ib. § 77–85.

[4] Crim. Law, 5th ed. I. § 413 and note, 553, 736, 788, 795; II. § 57, 742; Crim. Proced. 2d ed. II. § 77–83.

conviction of one or both, or a conviction of the one and an acquittal of the other, upon the same count.[1] And the like practice may be resorted to where the statute has such words as "to kill *or* do other bodily injury," and the indictment covers these words, using the copulative *and* for the disjunctive "or" of the statute.[2] So, on such an indictment, the conviction may be for a simple assault; unless the aggravated offence is by statute a felony, and the simple assault is a misdemeanor, and the common-law rule applicable to such a case has not been altered by statute, as it has in many of our States.[3]

§ 504. **Continued.** — But we have seen, in other parts of this volume, that the words of a statute may be bent from their natural and ordinary meaning by the connection in which they stand, and their relation to the other statutory words.[4] Thus it has been in Mississippi, where the expression "intent to kill," as it stands in the statutory provisions of the State, is construed to mean an intent to commit murder.[5]

§ 505. **Language of the Statute.** — As already observed,[6] the indictment must conform to the language of the statute. Thus, in Missouri, where the statute provided that "every person who shall, on purpose and of malice aforethought, shoot at or stab another, or assault or beat another with a deadly weapon, or by any other means or force likely to produce death, or great bodily harm, with intent to kill, maim,

[1] The State *v.* Butman, 42 N. H. 490; Hall *v.* The State, 9 Fla. 203; The State *v.* Reed, 40 Vt. 603. And see The State *v.* Calligan, 17 N. H. 253.

[2] Beckwith *v.* People, 26 Ill. 500. Of course, if the two are separate offences against distinct statutes, the rule is otherwise. Morman *v.* The State, 24 Missis. 54. But where, in such a case, the indictment charges, in the same count, the assault to have been committed "with intent to do bodily harm," and also "with intent to kill," it is saved from duplicity by one of the averments being defective (see Crim. Law, II. § 367, note); as, if it is under the New York statute, by omitting to charge that the assault "to do bodily harm" was "without justifiable or excusable cause." Dawson *v.* People, 25 N. Y. 399.

[3] Commonwealth *v.* Lang, 10 Gray, 11; The State *v.* Shepard, 10 Iowa, 126; Boyd *v.* The State, 4 Minn. 321; Strawn *v.* The State, 14 Ark. 549; Warrock *v.* The State, 9 Fla. 404.

[4] Ante, § 268, 269.

[5] Morman *v.* The State, 24 Missis. 54; Bradley *v.* The State, 10 Sm. & M. 618; Morgan *v.* The State, 13 Sm. & M. 242; Anthony *v.* The State, 13 Sm. & M. 263.

[6] Ante, § 501; Crim. Proced. 2d ed. II. § 80.

ravish, or rob such person," &c., an indictment was held to be ill which omitted to cover, by averment, the words "on purpose and of malice aforethought."[1] But, where words of this sort are not in the statute, it is of no consequence to allege that the assault was of malice aforethought, or was on purpose.[2] For example, it being provided in Iowa, that, "if any person assault another with intent to commit murder, he shall be punished," &c., the court adjudged it to be sufficient to allege that the defendant "wilfully, feloniously, and unlawfully did make an assault, &c., with intent him, &c., then and there to kill and murder, contrary," &c.[3] It is seen, that, as respects the assault, this form merely alleges a simple assault; but, under some statutes, the assault must be in fact, therefore must be charged in the indictment as being, a compound one, and under some of them it must proceed to a battery. Thus, it being provided in Mississippi, that "every person who shall be convicted of shooting at another, or of attempting to discharge any kind of loaded fire-arms, or any air-gun, at another, or of any assault and battery upon another, by means of any deadly weapon, or by such other means or force as was likely to produce death, with intent to kill, &c., such other person, &c., shall," &c., an indictment was held to be insufficient which alleged, that the defendant, at a time and place named, "one Alson Shelby, &c., then and there feloniously and maliciously did, with a certain drawn knife, stab and wound, with intent then and there feloniously, wilfully, and of his malice aforethought, the said Shelby to kill and murder"; because it did not allege that the drawn knife was, in the language of the statute, a "deadly weapon," or in terms charge a battery.[4] In like manner, as respects the intent, it is not sufficient under this statute simply to allege the intent "to kill and murder," the indictment must go further and specify the person whom the defendant intended to deprive of life.[5]

§ 506. **Continued — Intent to rob or steal.** — Still it is not,

[1] The State *v.* Harris, 34 Misso. 347.

[2] The State *v.* Newberry, 26 Iowa, 467; Rice *v.* People, 15 Mich. 9.

[3] The State *v.* Newberry, supra.

[4] Ainsworth *v.* The State, 5 How. Missis. 242.

[5] Jones *v.* The State, 11 Sm. & M. 315. And see The State *v.* Murphy, 21 Ind. 441.

in every possible case, necessary that the allegations of the indictment should cover every word of the statute.[1] Thus, to draw an illustration from a case where the intent is other than to kill, the Revised Statutes of Massachusetts having provided, that, "if any person, not being armed with a dangerous weapon, shall assault another with force and violence, and with intent to rob or to steal, he shall be deemed a felonious assaulter, and shall be punished" &c., the following was held to be sufficient: —

"That, &c, at, &c., on, &c., not being then and there armed with a dangerous weapon, in and upon one Rodman S. Sherman feloniously, and with force and violence, an assault did make, with the intent the moneys, goods, and chattels of the said Rodman S. Sherman, from the person and against the will of the said Rodman S. Sherman then and there feloniously and by force and violence and by assault and putting in fear, to rob, steal, take, and carry away, against the peace and dignity of the Commonwealth, and contrary to the form of the statute in such case made and provided."

The objection, which was overruled, was, that the indictment did not charge the offender to have been "a felonious assaulter, or to be deemed and taken as such."[2] The reader will observe, that this part of the statute merely states its conclusion from the facts, — in other words, a conclusion of law, — which, as already seen,[3] need never be alleged in any indictment.[4]

§ 507. **"Any Crime," &c. — Manslaughter.** — In a certain chapter of the New Hampshire Revised Statutes are certain provisions regarding crimes; and, among the rest, the *punishment* for manslaughter is defined. Then we have the following:

[1] Ante, § 382, 383, 440, 441, 473, 474, 487, 488.

[2] Commonwealth *v.* Sanborn, 14 Gray, 393.

[3] Ante, § 421.

[4] In Kentucky, a statute provides, that, "if any person shall wilfully and maliciously shoot at and wound another, with an intention to kill him, so that he does not die thereby, with a gun or other instrument loaded with a leaden bullet or other hard substance, he shall" &c. And it was adjudged sufficient to aver that the defendant "with a certain pistol, which he then and there had and held, feloniously and maliciously shot and wounded one B., then and there being, with the intent then and there to kill and murder the said B."; not stating that the person shot at "did not die thereby," or covering the statutory words "loaded with a leaden bullet or other hard substance." Burns *v.* Commonwealth, 3 Met. Ky. 13. But this decision was compelled by certain statutes rendering necessary less of allegation than the common-law rules require. On principle, and according to the common-law rules, perhaps the former omission is unimportant, but the latter is evidently important. See, also, Dawson *v.* People, 25 N. Y. 399.

"If any person shall make an assault upon another, with an intent to commit any crime described in this chapter, the punishment whereof shall be, &c., he shall be punished," &c. And it was held that this provision embraced, among the rest, an assault with intent to commit manslaughter.[1]

§ 508. **Continued.** — Somewhat like the above statute of New Hampshire is that of Indiana, as follows: "Every person who shall perpetrate an assault, or an assault and battery, with intent to commit a felony, shall, upon conviction thereof, be imprisoned," &c.[2] Upon this, a writer on the Indiana criminal law observes, that "there can be no indictment for an assault and battery with intent to commit the crime of manslaughter; because the peculiarity of manslaughter is, that it is free from unlawful intention to kill."[3] This point does not appear, however, to have been decided by the Indiana court; it is contrary to the actual course of things in the other States;[4] and, without inquiring whether manslaughter is different under the Indiana statute from what it is at the common law, we may conclude that the proposition is not sound as general American doctrine. It is true, that these aggravated assaults do require the specific intent to bring about the particular criminal result; though, in matter of proof, the intent may be inferred from the tendency of the act, and from other circumstances.[5] As a general proposition, manslaughter does not admit of accessories before the fact; because, when one instigates another to kill a man at a future time, and it is done not in his presence, the killing thus predetermined is murder.[6] But where this sort of prior planning does not exist, if one intends to kill another and does kill him, the offence is in some circumstances manslaughter, while in others it is murder.[7] Therefore it follows that there may be an assault with intent to commit manslaughter as well as murder.

[1] The State *v.* Calligan, 17 N. H. 253.

[2] Bicknell Crim. Pr. 290, referring to 2 R. S. 397, § 9.

[3] Bicknell Crim. Pr. 292.

[4] See ante, § 503, 507.

[5] Crim. Law, 5th ed. I. § 729, 730, 736; II. § 741, 742; Jeff *v.* The State, 39 Missis. 593; Morgan *v.* The State, 13 Sm. & M. 242; Ike *v.* The State, 23 Missis. 525; Morman *v.* The State, 24 Missis. 54; People *v.* Yslas, 27 Cal. 630; Rumsey *v.* People, 19 N. Y. 41; King *v.* The State, 21 Ga. 220; Weaver *v.* The State, 24 Texas, 387.

[6] Crim. Law, 5th ed. I. § 678.

[7] Crim. Law, 5th ed. II. § 676, 695.

§ 509. *Assaults with other Special Intents: —*

Larceny. — We have already[1] seen the form of an indictment for assault with intent to commit larceny. Bicknell, treating of the Indiana statute,[2] says:[3] "As larceny is a felony under the laws of Indiana, a person may be indicted for an assault and battery with intent to commit the crime of larceny.[4] But in such case it will not be sufficient, in charging the indictment, to say, 'with intent to commit the crime of grand larceny.' You must say, 'with intent then and there, unlawfully and feloniously, to steal, take, and carry away the personal goods and chattels of C. D. then and there being,' or, you may say, 'with intent feloniously to steal, take, and carry away divers goods and chattels then and there being,' — not naming any owner."[5] Now, it is reasonably certain that some courts would hold to be adequate the form of allegation which this writer thus pronounces to be insufficient; indeed, such appears to be the better doctrine, though most of the forms in actual use go to the extent indicated by him as necessary. But this sort of question is sufficiently discussed elsewhere.[6]

§ 510. **Conclusion.** — It is not proposed, in these elucidations, to exhaust the subject. The reader will find, in the author's other works, an abundance of matter relating to the topic of this sub-title. What is here said will be suggestive to the reader; and, for most purposes, of itself a sufficient guide.

V. *Simple Assaults.*

§ 511. **General View.** — Assault, at the common law, has been defined, in another connection, to be "any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being: as, raising a cane to strike him; pointing, in a threatening manner, a loaded gun at him; and the like." Still other definitions have been proposed;[7] and, on the whole, though the offence is in most respects easy of comprehension, it is not quite easy to be defined. It is much the same with larceny;

[1] Ante, § 506.
[2] Ante, § 508.
[3] Bicknell Crim. Pr. 292.
[4] 16 Ind. 232; 21 Ind. 441.
[5] See 1 Car. & K. 421.
[6] Crim. Proced. 2d ed. II. § 77–92.
[7] Crim. Law, 5th ed. II. § 23 and note.

and we have seen that, in consequence of this fact, there has ceased to be any very close connection between the better form of the definition of larceny, and the better form of the indictment.[1]

§ 512. **Indictment — Compared with Definition.** — In consequence, probably, of the difficulty of defining assault, the common-law indictment does not undertake to set out the facts which constitute the offence. It simply declares that the defendant "did make an assault," &c. And though the technical word "assault" ought properly to be used, it is not quite clear that some other form of expression will not answer instead of this word.[2] The case seems to fall within the doctrine that necessity will excuse what else would be required in the pleading; as, where the charge of being a "common scold," of keeping a "common gambling house," or the like, is admitted in this general form, because the pleader cannot well be more precise.[3]

§ 513. **Statutory Definition — Indictment.** — In some of our States, but not generally, statutes have undertaken to define assault. Thus, in Indiana: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another," &c.[4] And the question becomes important, whether, by reason of such a statute, the form of the indictment should be changed. It is plain, that, according to one class of opinion,[5] it need not be. Indeed, our American books of the law are full of instances in which, after a statute has defined an offence, in words not following the common-law form of the indictment, the old form has been continued, and no question has been made of its adequacy. But the Indiana court has held, contrary to the common practice, that the foregoing statute requires a change in the indictment, and the old form can no longer be followed. The question arose on an indictment for assault with intent to commit a rape. "It may be," said Downey, J. in delivering the opinion of the court, "that indictments similar in form to this may have been in

[1] Ante, § 411.
[2] Crim. Proced. 2d ed. II. § 55–58.
[3] Crim. Proced. 2d ed. I. § 493 et seq.
[4] Act of Dec. 2, 1865, 3 Ind. Stats. 258.
[5] Ante, § 471, 472.

use in this State prior to the enactment of the statute defining an assault. But since the legislature has furnished a definition of an assault, and thus placed it in the same category with other defined offences, we must apply, in prosecutions for that offence, the same rule which is applied to prosecutions for other offences; that is, that the offence 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. A learned jurist of this State has, with reference to the statute of 1865, furnished the following precedent: —

"The grand jurors for the county of Floyd, and State of Indiana, upon their oath present, that A. B., on the third day of August, A. D. 1864, at said county, did feloniously attempt to commit a violent injury upon the person of C. D., he, the said A. B., then and there having a present ability to commit said injury, by then and there feloniously, purposely, and with premeditated malice, shooting at and against the said C. D., with a certain gun, then and there loaded with gunpowder and leaden shot, which the said A. B. then and there in both his hands had and held, with intent then and there and thereby, him, the said C. D. feloniously, purposely, and with premeditated malice to kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana."

And so the court held, that, as respects the part which charges the simple assault, the old form is not adequate, but the assault must be alleged in the terms of the statutory definition.[1]

§ 514. **Continued.** — If, as often as the statutory law does any thing by way of defining a crime, the pleader must weave the definition into his indictment, it is evident that much of our American practice in criminal cases has been wrong. On the other hand, it is necessary to cling firmly to

[1] Adell *v.* The State, 34 Ind. 543, 545, 546, referring to Bicknell Crim. Pr. 479; Malone *v.* The State, 14 Ind. 219, where, among other things, Perkins, J. said: "As, under our law, we are to look to the statute alone for the definition of offences, it follows that, as a general rule, it will be sufficient in an indictment or information, to charge them in the language of the statute," p. 221; The State *v.* Bougher, 3 Blackf. 307. As to the form from Bicknell, it may be observed, if important, that in other cases of indictments for compound assaults, this author employs the old form, p. 290, 291. I do not find, in the book, any indictment for a simple assault only. If we look carefully at this form, we shall see that it omits the statutory word "unlawful"; which, on general principles, it plainly ought to cover. Still the indictment has the word "feloniously"; and, quite likely, some courts would hold this to be sufficient as a substitute, while certainly others would not. Crim. Proced. 2d ed. I. § 503, 612–620 and the notes; II. § 43, 163, 959; ante, § 459.

the doctrine, about which there can be no question, that, when a statute, in whatever form, makes a particular thing essential to the punishment which itself prescribes, the indictment must in some way contain an allegation of this thing.[1] But, in the present instance, we are considering whether the statute defining assault has rendered it necessary to set out the particular facts entering into the offence. In essence, if the word "assault," as used in the indictment, meant, before the statutory definition was given, such a combination of facts as constitutes assault at the common law, it now means such a combination of facts as constitutes assault under the statute. And it is believed that the majority of our American tribunals would hold, under like circumstances, that, since the one word "assault" extended sufficiently into the particulars before the statute, it does so now. This case is thus distinguished from those in which the words of the common-law indictment are specific in meaning, and the statute then adds to the offence an element which the common law did not require. If, in such instance, the common-law allegation does not embrace this added element, it must be expanded by added words until it will. The application of these principles may not always be easy, but the principles themselves appear to be plain, and to be sufficient guides.

CHAPTER XXI.

OTHER FORMS OF INDICTABLE PHYSICAL FORCE.

515, 516. Introduction.
517–531. Robbery and its Affinities.
532, 533. Burglary and its Affinities.
534–538. Arson and its Affinities.
539–542. Riot and its Affinities.

§ 515. **General View — Scope of this Chapter.** — Physical force, employed by a man to the injury of another, or to the disturbance of the community, may be either actual or con-

[1] Ante, § 370–372.

structive, and it may be carried into effect or only attempted. In the last chapter, we considered such force as is employed against the persons of individuals; in this chapter, we shall take a view of the remaining kinds of indictable force. Yet it should be remembered, that, in the present Book, we are contemplating only such statutory offences as have a close affinity to the common law, — those, therefore, which in their leading aspects were brought under review in the author's other works. Such pure statutory crimes as are not discussed elsewhere by the author are left for later pages of this volume.

§ 516. **How the Chapter divided.** — We shall consider I. Robbery and its Affinities; II. Burglary and its Affinities; III. Arson and its Affinities; IV. Riot and its Affinities.

I. *Robbery and its Affinities.*

§ 517. *Robbery at the Common Law:* —

General Doctrine — The Law. — Robbery, at the common law, has been defined elsewhere by the present author to be "larceny committed by violence from the person of one put in fear."[1] This definition differs in the form of expression, though not in substance, from what has been given by preceding authors. There has been no one form of words uniformly used; but Lord Hale's language accords in the main with what has been more commonly employed, as follows: "Robbery is the felonious and violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling."[2] To constitute this offence, there must be, 1. Violence; but it need only be slight, for any thing which calls out resistance is sufficient; or, what will answer in place of actual violence, there must be such demonstrations as put the person robbed in fear. The demonstrations or fear must be of a physical nature, with the single exception, that, if one parts with his goods through fear of a threatened charge of sodomy, the taking is robbery. There must, therefore, be, 2. A larceny, embracing the same elements as a simple larceny. And, 3. The taking must be from what is technically called the "person;" the meaning of which ex-

[1] Crim. Law, 5th ed. II. § 1156.

[2] 1 Hale P. C. 532. For a collection of definitions, see Crim. Law, supra, note.

pression is, not that it must necessarily be from the actual contact of the person, but it is sufficient if it is from the personal protection and presence.[1]

§ 518. **The Indictment.** — The indictment charges, in the first place, an assault; but it is probable that the offence may be sufficiently set out in some other form of words, though the author is not aware that this has been decided. Where the usual form is employed, "the assault," says Chitty,[2] "must be stated to have been *feloniously* made, and it will not suffice to add this word to the allegation of the taking and putting in fear.[3] The indictment must show that the property was taken with violence from the person, and against the will of the party injured, but it does not seem so certain that it is necessary to state that an actual terror was excited, though this is unquestionably more secure.[4] The putting in fear need not be stated in the indictment, so that the fact be charged to be done violently and against the will of the party.[5] [But if, instead of alleging violence, the pleader alleges a putting in fear, which is the other alternative in the offence, this allegation must be proved.[6]] The term *violently* is not requisite; it will suffice if from the whole statement it is clear that a robbery has been committed by a forcible taking of property against the will of the owner.[7] The offence itself should be described according to the facts;" and the indictment should set out a larceny of the goods, the same as in simple larceny.[8]

§ 519. *Robbery under Statutes:* —

In General. — There are, in our States, many statutes against robbery, but the effect of most of them is merely to reassert the common law. Thus, in 1804, a statute in Massachusetts made punishable "any person who shall, by force and violence, or other assault and putting in fear, feloniously steal, rob, and take away from the person of another, any money, goods," &c.;

[1] Crim. Law, 5th ed. II. § 1158–1173.

[2] 3 Chit. Crim. Law, 805.

[3] Rex *v.* Pelfryman, 2 Leach, 4th ed. 563; Anonymous, 2 Dyer, 224 *b*.

[4] Foster, 128; 1 Hale P. C. 534.

[5] 5 Burn. Just. 24th ed. 67; Commonwealth *v.* Humphries, 7 Mass. 242; Commonwealth *v.* Clifford, 8 Cush. 215.

[6] Glass *v.* Commonwealth, 6 Bush, 436.

[7] 2 East P. C. 783, 784.

[8] Commonwealth *v.* Clifford, supra; Crim. Proced. 2d ed. II. § 772, 1001, 1002; and see § 1002–1008, for various views respecting the form of the indictment.

and this was held to be a mere reënactment of the common law. Consequently an indictment was adjudged to be good, which omitted the words "putting in fear;" because it would have been good at the common law.[1] And in Ohio, where they have no common-law crimes,[2] but a statute provides, "that, if any person shall forcibly and by violence, or by putting in fear, take from the person of another any money or personal property, of any value whatever, with intent to rob or steal, every person so offending shall be deemed guilty of robbery, and, upon conviction thereof, shall," &c.,[3] — this is held to create a crime identical with robbery at the common law. Said Ranney, J.: "On recurring to the common-law definition of this crime, as laid down by Hale, Hawkins, and Blackstone, works of acknowledged authority, we find the legislature have incorporated it almost literally into the statute. What is the irresistible implication? Plainly, that they were used in the legal sense, and with the settled construction placed upon them." Therefore it was adjudged to be sufficient, in the proofs, to show that the taking was from the immediate presence and control of the individual robbed, though not from the actual contact of his person.[4] And the same was held on a Tennessee statute defining robbery to be the "felonious taking, from the person of another, goods or money of any value, by violence or putting in fear."[5] In like manner, the robbery of the California statute is deemed to be the same as at the common law; it is as follows: "Robbery is the felonious and violent taking of money, goods, or other valuable thing from the person of another by force or intimidation."[6] We have already seen,[7] that, where a statute merely provides a punishment for "robbery," it means robbery as defined by the common law.

§ 520. **How the Indictment.** — According to principles already

[1] Commonwealth *v.* Humphries, 7 Mass. 242.

[2] Crim. Law, 5th ed. I. § 35.

[3] Stat. Mar. 7, 1835, § 15, Warren Crim. Law, 246.

[4] Ante, § 517; Turner *v.* The State, 1 Ohio State, 422, 425.

[5] Crews *v.* The State, 3 Cold. 350. The Indiana statute defines robbery in the same terms; and there the common-law doctrines are deemed to be applicable in determining the limits of the offence. Brennon *v.* The State, 25 Ind. 403.

[6] People *v.* Shuler, 28 Cal. 490, 492.

[7] Ante, § 363.

laid down,[1] it seems perhaps to follow, that, when the statute is in any of the forms mentioned in the last section, or in any analogous form, any indictment drawn as at the common law and concluding against the form of the statute will be sufficient. In a sort of general way, this is so; but, in some circumstances, and as respects some of the statutes and particular facts, the result seems to be otherwise. At all events, it appears to be the prevailing custom where these statutes exist, and the custom is evidently to be commended, to draw the indictment, not after the common-law model, but expressly upon the statute; and, when it is so, the terms of the statute must be reasonably regarded.

§ 521. **Continued — Ohio, &c.** — In Mr. Warren's book, we have the following form of the allegation upon the Ohio statute quoted in the section before the last: —

"That, &c., in and upon one M. N. then and there being, feloniously and forcibly did make an assault, and then and there six pairs of linen table-cloths, of the value, &c., the personal goods, chattels, and property of the said M. N., from the person and against the will of the said M. N. feloniously, forcibly, by violence, and by putting him the said M. N. in fear, did steal, take, and carry away, with intent, then and there, the goods, chattels, and property aforesaid, feloniously to steal."[2]

Now, without saying that this form is not adequate in law, a little examination will show it to be loosely drawn, and, at least, not in good legal taste. The statute, the same as the common law, provides, in the alternative, for two sorts of robbery, either "forcibly and by violence," or "by putting in fear." The allegation opens with the word "feloniously," which is right, showing that the crime which is to be set out is a felony;[3] then it seems to proceed on the first alternative of the statute, employing the word "forcibly," but it does not add "and by violence" as it ought, in this view, in order to cover the statute. Afterward there is a sort of lame attempt, possibly one which the court might hold to be sufficient, to cover the other alternative of the statute; but further criticism of this kind is not necessary. When one draws an indictment in such a case as this, the first question is, whether both alternatives shall be covered or only one, and, if the latter, which

[1] Ante, § 381, 413.
[2] Warren Crim. Law, 3d ed. 253.
[3] Ante, § 386.

one. In matter of law, this indictment would be good, drawn on either of the alternatives, without mentioning the other; but, in such a case, the proofs must sustain the charge as laid.[1] But, though in law, when the indictment is adequate, it is sufficient to prove either the force and violence or the putting in fear, and both need not be shown, there is no repugnance between them; therefore the alternative clauses may be covered by a single count, and for most cases it is practically best they should be. Let, therefore, the indictment on this statute be as follows: —

That A, &c., on, &c., at, &c., in and upon one B, then and there being, an assault did feloniously and forcibly and by violence make, and did then and there feloniously put the said B in fear, and thereby did then and there feloniously steal, take, and carry away [or perhaps the single statutory word "take" is sufficient,[2] but the full form will sustain a conviction for simple larceny if the force or fear is not proved,] from the person of the said B six pairs of linen [better omit this adjective[3]] table cloths, of the value, &c., of the personal property of the said B [then and there being found[4]], with the intent to rob him the said B thereof, and to steal the same, against the peace, &c., and contrary to the form of the statute, &c.

From some analogies[5] and from one case[6] it might be inferred, that, wherever actual larceny is set out in the full form as above, the indictment will be sufficient though it does not proceed to allege the intent to steal or rob. But it has been held, that, even in such a case, this intent must be averred.[7]

§ 522. **Continued — Indiana, &c.** — In Indiana (and it is the same in Tennessee[8]) the words of the statute are: "Every person who shall forcibly and feloniously take from the person of another any article of value, by violence or putting in fear, shall be deemed guilty of robbery, and, upon conviction thereof, shall," &c. And the following is deemed to be an adequate form of the indictment: —

"That A. B., &c., on, &c., at, &c., forcibly and feloniously took from the person of C. D., by violence and putting him in fear, one gold watch, of the

[1] Ante, § 518; Glass *v.* Commonwealth, 6 Bush, 436.

[2] See post, § 522.

[3] Ante, § 443.

[4] Common, but not necessary. See ante, § 421 and note.

[5] See, under the title burglary, Crim. Law, 5th ed. II. § 116; Crim. Proced. 2d ed. II. § 148.

[6] Turner *v.* The State, 1 Ohio State, 422.

[7] Matthews *v.* The State, 4 Ohio State, 539; Boose *v.* The State, 10 Ohio State, 575.

[8] Ante, § 519.

value of one hundred dollars, of the [personal[1]] goods and chattels of the said C. D., contrary, &c. and against," &c.[2]

We have seen,[3] that, under this statute, the offence is bounded as by the common law. This form of the indictment, though it covers the statutory terms, comes short of filling the common-law idea of the offence. Particularly it fails in not alleging a larceny of the watch; because plainly the phrase "feloniously took one gold watch, of the value, &c., of the goods," &c., comes far short of charging a larceny of it, according to common-law doctrines. On principle, then, the allegation would require to be expanded beyond the statutory terms, to embrace a full charge of larceny.[4] And so the Massachusetts court held that it must be, on a statute the words of which were, "if any person shall, by force and violence, or by assault and putting in fear, feloniously rob, steal, and take from the person of another," &c. The point decided was, that the ownership must be alleged, but the principle is the same.[5] In the absence, therefore, of adjudication in one's own State, it is safer, if this form is to be followed, to expand it as thus suggested.

§ 523. **Continued — California — Ownership in Third Person.** — The California statute defines: "Robbery is the felonious and violent taking of money, goods, or other valuable thing from the person of another by force or intimidation." And the following has been adjudged sufficient: —

"That A, &c., on, &c., at, &c., upon B, did feloniously make an assault and put him in fear and danger of his life, and from his person and control, and against his will, did [then and there] feloniously, forcibly, and violently steal, take, and carry away, &c., the property and money of C," &c.

It is perceived, that, in this case, the indictment lays the ownership in a person other than the one robbed, and such form of the allegation was held not to be objectionable.[6]

§ 524. **Continued — "By Force" — "Intimidation" — "From the Person."** — Some of the statutes have the words "by force;"

[1] This word "personal," it seems to me, is better omitted.

[2] Bicknell Crim. Pr. 319; referring to 28 Ind. 22; and, for the statute, to 2 R. S. 403, § 18, 2 G. & H. 442.

[3] Ante, § 519.

[4] Crim. Proced. 2d ed. I. § 623–630; Bates *v.* The State, 31 Ind. 72.

[5] Commonwealth *v.* Clifford, 8 Cush. 215. See ante, § 518. And see People *v.* Vice, 21 Cal. 344.

[6] People *v.* Shuler, 28 Cal. 490.

others, "by force or intimidation." The consequence is, that the statutory term must be used in the indictment.[1] In like manner, the statutory words "from the person" must be followed, else the indictment will be ill.[2] In the latter instance, it is not sufficient to say "from another person," — words of a different meaning.[3]

§ 525. *Aggravated Robberies:* —

From the Dwelling-house — Highway Robbery. — Remembering, therefore, that the proof of the foregoing statutory robberies is the same in substance as of robbery at the common law, let us look a moment at certain aggravated robberies. These appear to have begun, in England, with Stat. 23 Hen. 8, c. 1, § 3, which took away clergy from defendants under conviction "for robbing of any person or persons in their dwelling-houses, or dwelling place, the owner or dweller in the same house, his wife, his children, or servants then being within, and put in fear and dread by the same, or for robbing of any person or persons in or near about the highways." The date of this provision is 1531. In 1547 it was confirmed, but not much changed, by Stat. 1 Edw. 6, c. 12, § 10, as follows: "That no person, &c., attainted or convicted of . . . breaking of any house by day or by night, any person being then in the same house where the same breaking heretofore hath been or hereafter shall be committed, and heretofore hath been or hereafter shall be thereby put in fear or dread, or of or for robbing of any person or persons in the highway, or near to the highway," should be admitted to clergy. Thus stood the law creating the two kinds of robbery known as robbery in the dwelling-house and highway robbery; till, in 1691, a statute (3 Will. & M. c. 9, § 1) rendered the foregoing provisions unimportant by taking away clergy from all who should "rob any person:" that is, from every sort of robbery as defined by the common law.[4] Now, if the reader will consult the author's "First Book of the Law," [5] he will see that the first two of the above statutes are of dates sufficiently early to have been com-

[1] Collins *v.* People, 39 Ill. 233.

[2] Stegar *v.* The State, 39 Ga. 583.

[3] People *v.* Beck, 21 Cal. 385.

[4] Rex *v.* Wardle, Russ. & Ry. 9; Rex *v.* Summers, 2 East P. C. 785; Rex *v.* Darnford, 2 East P. C. 785.

[5] Bishop First Book, § 56.

mon law in all the colonies which now compose our older States; and the third is early enough to have been so in Georgia, but not in the colonies generally. There are, in our States, few, if any, traces of the offence of robbery in a dwelling-house; but there are, among us, localities in which highway robbery appears to be an aggravated form of robbery.[1]

§ 526. **Highway Robbery, continued.** — The statutes on this subject have the expression "in or near any public highway."[2] In spite of the general doctrine in criminal pleading that the allegation in an indictment should not be in the disjunctive even though the statute on which it is drawn is,[3] there is old authority for the use of the disjunctive in the present instance. Thus, says Lord Hale, "an indictment of robbery *in vel prope altam viam regiam*, though in the disjunctive, is usual at Newgate; for, if it be either in or near it, though an indictment ought to be certain, yet this is not the substance of the indictment, nor that which makes the crime, but only to ascertain the court as to the point of clergy to serve the statute."[4] The form adopted by Chitty has merely the words "in the king's highway there."[5] It would seem, on principle, that "in the highway" is one place, and "near the highway" is another; therefore it would not be strictly correct to say "in *and* near," and we must either adopt the old form or employ different counts if we would charge the offence within the full statutory bounds. Probably, therefore, a modern court would hold the old form to be adequate. At all events, if the charge is, that the offence was committed "in" the highway, it is not supported by showing a robbery "near" it.[6] And the one form only may properly be used, and so the indictment may, according to the evidence, charge the offence to have been committed in the highway, or near the highway.[7]

§ 527. **Robbery with Dangerous Weapon.** — The statutes of some of our States, and of England, have made it a heavier offence than common robbery, to take from one money or goods

[1] The State *v.* McCune, 5 R. I. 60; The State *v.* Cowan, 7 Ire. 239.

[2] The State *v.* Cowan, 7 Ire. 239; ante, § 425.

[3] Crim. Proced. 2d ed. I. § 434–436, 585–592; II. § 224, 438–440, 647.

[4] 1 Hale P. C. 535; 2 East P. C. 784.

[5] 3 Chit. Crim. Law, 806.

[6] The State *v.* Cowan, supra.

[7] The State *v.* Anthony, 7 Ire. 234.

by the use of a dangerous weapon. Thus, in Massachusetts: "Whoever assaults another and feloniously robs, steals, and takes from his person money or other property which may be the subject of larceny, such robber being armed with a dangerous weapon, with intent if resisted to kill or maim the person robbed; or, being so armed, wounds or strikes the person robbed; shall be punished by imprisonment in the State prison for life."[1] The form of indictment and the proofs on such a statute will in most respects be obvious; on this statute it was held not to be necessary either to charge or prove, that the wounding or striking was done with the dangerous weapon with which it is alleged the defendant was armed. "There is," said Bigelow, C. J. "no provision, either express or implied, that the striking or wounding is to be inflicted with the weapon with which the robber is armed. The gist of the crime is in committing a robbery while armed with a dangerous weapon, and in striking and wounding the party robbed, by whatever means the blows or wounds may be inflicted."[2] More might be said, relating to statutes of this sort, but it is deemed best to pass on.

§ 528. *Degrees in Robbery:* —

Missouri. — The statutes of some of the States have made what are termed degrees in robbery. The provisions on this subject are not uniform; those of Missouri are the following: —

"Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or putting him in fear of some immediate injury to his person, shall be adjudged guilty of robbery in the first degree.

"Every person who shall be convicted of feloniously taking the personal property of another, in his presence and from his person, which shall have been delivered or suffered to be taken through fear of some injury to his person or property, or to the person of any relative or member of his family, threatened to be inflicted at some different time, which fear shall have been produced by the threats of the person so receiving or taking

[1] Gen. Stats. c. 160, § 22.

[2] Commonwealth *v.* Mowry, 11 Allen, 20, 24.

such property, shall be adjudged guilty of robbery in the second degree.

"If any person shall, either verbally or by a written or printed communication, accuse, or threaten to accuse another of a crime against nature or any other felony whatever, or threaten to do any injury to the person or property whatever of any one, with a view or intent to extort or gain any money or property of any description, belonging to another, and shall, by intimidating him with said accusation or threat, extort or gain from him any money or property, every such offender shall be deemed guilty of robbery in the third degree."

The next section provides the punishment for each of these three degrees.[1]

§ 529. **Continued — Construction — Indictment.** — The reader perceives, that, though nominally there are here three degrees of robbery, yet robbery of the first degree comprehends all, or nearly all, which is embraced in the common-law offence. Probably if the provision stood alone, it would be held to be bounded in construction precisely where the common law is;[2] but, as robbery effected by a charge of sodomy is here included in robbery of the third degree, doubtless the courts would hold it to be excluded from the first degree, since the statute does not in terms embrace it. The following form of the indictment for robbery of the first degree appears to be approved: —

"That A, &c., on, &c., at, &c., in and upon one B, with force and arms, feloniously did make an assault, and the said B in bodily fear of some immediate injury to his person then and there feloniously did put, and one horse, of the value of one hundred dollars, the property of the said B, then and there feloniously did rob, steal, take, and carry away," &c.

But it is held, that, on this indictment, there cannot be a conviction for robbery in the second degree. There may, however, be a conviction for grand larceny. These two degrees of robbery are not such, in their nature, as to be included within each other.[3] If the indictment should employ the words "by putting him in fear of some great bodily harm," instead of the statutory phrase "by putting him in fear of some immediate

1 Wagner Stats. p. 456, § 20–22. Ante, § 519; The State *v.* Davidson, 38 Misso. 374.

3 The State *v.* Jenkins, 36 Misso. 372; The State *v.* Farrar, 38 Misso. 457.

injury to his person," it would, though not to be commended, still be in law sufficient.[1]

§ 530. **New York.** — The statute of New York, from which the Missouri one seems to be in part copied, makes two degrees of what it terms robbery, corresponding to the first and second degrees in Missouri. Here, it is perceived also, the first degree is properly robbery,[2] while the second degree is a new offence under the same name. But it is not necessary to discuss this statute here.[3]

§ 531. *Kindred Statutory Offences:* —

In General — Garroting. — The reader, by consulting the statutes of his own State, will find more or less provisions analogous to the foregoing; but it is believed that the foregoing expositions, and others to be found in this volume, will satisfy him in respect of them. A very useful provision has been made in England, to suppress garroting, and the like, as follows: "Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall, by any means calculated to choke, suffocate, or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any such cases thereby to enable himself or any other person to commit, or with intent in any such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony."[4]

II. *Burglary and its Affinities.*

§ 532. **General View.** — Burglary, at the common law, is a particular kind of indictable attempt to commit a felony. And though attempts to commit felony are, at the common law, in general mere misdemeanors, this attempt is a felony. It consists of an unlawful breaking and entering, in the night time, into another's dwelling-house, with the intent to commit a felony therein.[5] This common-law doctrine has been from time to

[1] The State *v.* Davidson, supra.

[2] And see McCloskey *v.* People, 5 Parker C. C. 299, 306.

[3] For a form of the indictment for robbery of the first degree, see Quinlan *v.* People, 6 Parker C. C. 9; also, People *v.* Hall, 6 Parker C. C. 642.

[4] 24 & 25 Vict. c. 100, § 21. Further punishment provided by 26 & 27 Vict. c. 44.

[5] Crim. Law, 5th ed. II. § 90, 112, 120.

time expanded, so to speak, by statutes which have rendered it indictable in like manner to break into shops and other places besides dwelling-houses for the like ulterior object. But the statutes have not affected fundamental doctrines; the consequence is, that the author's discussions in his other works, under the title "Burglary and other Breakings," have superseded the necessity of minute elucidations here.

§ 533. **Particular Words.** — The meaning of particular terms employed in these statutes becomes important, — such as "night time," [1] "dwelling-house," [2] "house," [3] "curtilage," [4] "out-house," [5] "building," [6] "warehouse," [7] "storehouse" and "store," [8] "shop" and "junk-shop," [9] "inn," [10] "break" and "forcibly break." [11] These have been discussed in the foregoing pages, together with some others which may be found by consulting the index. Though the reader would gain some advantage from seeing here a collection of statutes with their particular expositions, it is deemed best, on the whole, not to pursue the subject further at the present time.

III. *Arson and its Affinities.*

§ 534. **Arson at Common Law.** — At the common law, arson is a felony, and it consists in the malicious burning, not of another's "dwelling-house," but of his "house." [12] The meaning of the word "house" has already been discussed in this volume; [13] so also has that of the word "burn." [14] Unlike burglary, it is immaterial whether the act is committed in the night or the day.

§ 535. **Under Statutes.** — Something of the offence under statutes was said in the work on the Criminal Law. [15] And in the work on Criminal Procedure there is given, in connection with some discussions, a form of the statutory indictment. [16]

[1] Ante, § 276.
[2] Ante, § 277–288.
[3] Ante, § 277, 289.
[4] Ante, § 286.
[5] Ante, § 291.
[6] Ante, § 292.
[7] Ante, § 293.
[8] Ante, § 294, 295.
[9] Ante, § 295, 296.
[10] Ante, § 297.
[11] Ante, § 312, 313.
[12] Crim. Law, 5th ed. II. § 8, 11, 18.
[13] Ante, § 213, 277, 289.
[14] Ante, § 310.
[15] Crim. Law, 5th ed. II. § 17 and note.
[16] Crim. Proced. 2d ed. II. § 35.

Though statutory arsons are numerous, and the proceedings against the offender are more often on a statute than at the common law, still almost all the principles involved in statutory arsons have been discussed in the author's other works, in expositions of common-law arson. The meaning of various words in the statutes relating to this offence are given in the earlier parts of this volume, and they may be found by consulting the index.

§ 536. **Indiana Statute.** — As a specimen of the departures, to be found in the statutes, from common-law arson, while still the principles of the common-law control the statutory offence, the Indiana enactment may be quoted, as follows: "Every person who shall wilfully and maliciously set fire to [1] the dwelling-house,[2] out-house,[3] barn,[4] stable, boat, water-craft, mill, mill-house, distillery, manufactory, mechanic's or artificer's shop,[5] storehouse [6] or room occupied as a shop or office for professional business, or building [7] of any kind, or printing-office of another, or any public bridge; [8] court-house, jail,[9] market-house, church or meeting-house, seminary or college edifice, or building thereto belonging, or to any cord-wood [10] in piles, or ricks or stacks or shocks of grain or hay,[11] or any fence or growing grain of the value of twenty dollars; or to any house,[12] shop,[13] wood-house, water-station or other public building connected with any railroad, or shall in like manner set fire to any bridge,[14]

[1] Ante, § 311; Crim. Proced. 2d ed. II. § 46, 47; Rex *v.* Smith, 4 Car. & P. 569; The State *v.* Johnson, 19 Iowa, 230; Mary *v.* The State, 24 Ark. 44.

[2] Ante, § 277–288.

[3] Ante, § 291.

[4] The State *v.* Laughlin, 8 Jones, N. C. 354, 455; The State *v.* Jim, 8 Jones, N. C. 459; The State *v.* Cherry, 63 N. C. 493; The State *v.* Johnson, supra; Commonwealth *v.* Hamilton, 15 Gray, 480.

[5] Ante, § 295, 296.

[6] Ante, § 294, 295.

[7] Ante, § 292; The State *v.* O'Connell, 26 Ind. 266.

[8] Ante, § 301.

[9] Ante, § 289; Phillips *v.* The State, 29 Ga. 105.

[10] Ante, § 222.

[11] Ante, § 217. The Ohio statute "makes it penal to set fire to, or burn, stacks of wheat, but says nothing about shocks." It was thereupon held that an indictment for burning stacks of wheat is not supported by evidence of burning shocks of wheat. "The shock," said Caldwell, J. "is the term applied to the small collection and arrangement of a few sheaves together, in the field, in such a manner as to protect them against the weather for a few days, until the farmer has time to gather them into his barn, or place them in the large conical pile, called a stack." Denbow *v.* The State, 18 Ohio, 11.

[12] Ante, § 213, 277, 289.

[13] Ante, § 295, 296.

[14] Ante, § 301.

or any part of the structure of any railroad; and every person who shall set fire to any building[1] or structure, whether finished or unfinished, whatever, or any goods,[2] wares,[3] merchandise, or other chattels[4] which shall be at the time insured against loss or damage by fire, with intent to defraud the insurer,[5] whether such person be the owner of the property burnt or not, shall be deemed guilty of arson, and upon conviction shall be fined not exceeding double the value of the property destroyed, and be imprisoned in the State prison not less than one nor more than ten years; and, should the life of any person be lost thereby, such offender shall be deemed guilty of murder in the first degree, and shall suffer death, or imprisonment in the State prison during life." [6]

§ 537. **Continued — Interpretation of Statutes relating to Arson — Form of Indictment.** — Now, the interpretation of the various statutes is not unfrequently attended with difficulty, but there are few or no particular difficulties pertaining specially to this class of statutes. For example, the foregoing Indiana enactment, like many other passages to be found in our American statutory laws, was evidently drawn, not by a competent lawyer, but by some stump orator "set fire to" by a great crisis; and, like stump speeches in general, it is better adapted to bewilder than to instruct. Let us not try to interpret it ourselves; what Bicknell[7] says of it, and of the form of the indictment thereon, is the following: "This statute distributes the subject of arson into five different classes of property: 1. Buildings and structures of individuals and private corporations; 2. Public buildings, including the property of the community, and churches, meeting-houses, seminaries, college edifices, and buildings thereto belonging; 3. Personal property; to wit, cord-wood in piles, and ricks or stacks or shocks of grain or hay, and fences and growing grain of the value of twenty dollars; 4. The structure of any railroad and any building, bridge, or other structure therewith connected; 5.

[1] Ante, § 292.
[2] Ante, § 344, 345.
[3] Ante, § 293.
[4] Ante, § 344, 345.
[5] Crim. Law, 5th ed. II. § 12, 15; People *v.* Hughes, 29 Cal. 257; People *v.* Schwartz, 32 Cal. 160; Dedieu *v.* People, 22 N. Y. 178, 4 Parker, C. C. 593.
[6] Bicknell Crim. Pr. 349, referring to Laws, 1867, p. 106.
[7] Bicknell Crim. Pr. 349, 350.

Structures, finished or unfinished, and personal property insured against loss by fire. As to the first class of property, it does not include unfinished houses or barns, which have never been actually occupied or used as such. The language of the statute is held to embrace such building only as has been actually occupied for its appropriate purpose.[1] And it will be observed that the value of the property fired is of the essence of the offence in one of the classes only; namely, the third class; that is to say, it is not arson to fire a heap of cord-wood or a stack of hay of less value than twenty dollars, but such firing will be arson if the value of the property fired exceed twenty dollars. As to the other three kinds of property, the value is not of the essence of the offence, but some value of the property must be charged in the indictment; and the value of the part destroyed by the burning must also be stated,[2] because a part of the penalty is a fine not exceeding double the value of the property destroyed.[3] Therefore the form given in the Revised Statutes[4] is good for nothing. The proper form is as follows: —

"That [omitting here the introduction, &c.] A. B., on the first day of August, A. D. 1864, at said county, feloniously, wilfully, and maliciously set fire to a dwelling-house of C. D., there situate, of the value of one thousand dollars, and then and there and thereby feloniously, wilfully, and maliciously burned and destroyed a part of said dwelling-house of the value of three hundred dollars, to the damage of the said C. D., of three hundred dollars, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana."

§ 538. **Applications of Common-law Doctrines.** — Now, from a consideration of principles already unfolded in this volume, it follows that, though the arsons created by this statute and other like enactments found in the other States are in the main such as were not known to the common law, yet they involve no new principles, — those unfolded in the works on Criminal Law and Criminal Procedure being applicable to them. In some of the States, there are various statutory degrees of arson; but it is believed that the principles govern-

[1] 20 Ind. 242; 8 B. & C. 461; 26 Ind. 266.

[2] See ante, § 444.

[3] 7 Blackf. 168.

[4] 2 R. S. 357, No. 59, 2 G. & H. 387.

ing them have already been pretty well explained in this volume and elsewhere by the author.

IV. *Riot and its Affinities.*

§ 539. **Common-law Offences — Riot — Rout — Affray — Unlawful Assembly.** — The common-law offences of riot, rout, affray, and unlawful assembly are very analogous to one another. If three or more persons congregate to do some unlawful act, this is called an unlawful assembly; or, at least, it is so when its object is riotous; and, when it is not, it is indictable either as an unlawful assembly, or as an attempt or conspiracy to do the ulterior intended mischief.[1] If the three or more persons, being together, take some step toward the commission of a riot, but do not go far enough to become guilty of the complete offence, what they do is called a rout.[2] Lastly, if the three or more assembled persons wrongfully perform such an act or series of acts as is calculated to excite terror or apprehension of danger in the minds of other persons, or generally if they commit violence, they become guilty of riot.[3]

§ 540. **Continued — Affray.** — Affray is like these; yet it differs in requiring only two persons instead of three, and in being more nearly related to assault and to duelling. It consists in the fighting together, of two or more persons, either by mutual consent or otherwise, in some public place, to the terror of the people.[4]

§ 541. **Continued — Forcible Entry and Detainer — Forcible Trespass — Disturbing Meetings.** — These several common-law offences, which need not be particularly explained here, are not only analogous to one another, but they are analogous also to riot.[5] And the general doctrine to be drawn from the whole is, that any actual or even attempted violence, of the legal standard in magnitude, creating a perturbation in the public repose, is indictable at the common law.

§ 542. **Statutes.** — These common-law offences have been by

[1] Crim. Law, 5th ed. II. § 1256–1258.
[2] Ib. § 1183–1186.
[3] Ib. § 1143 et seq.
[4] Ib. § 1–7.
[5] Ib. § 301 et seq., 480 et seq., 517 et seq., Crim. Proced. 2d ed. II. § 284 et seq., 369 et seq., 389 et seq.

statutes confirmed, and in some respects extended, in our several States; but it is deemed best not to add any thing here to what is said in the author's other works.

CHAPTER XXII.

PUBLIC NUISANCES AND THEIR AFFINITIES.

543. Introduction.
544–551. Common-law Nuisances.
552–558. Statutory Nuisances.
559–566. Analogous Offences.

§ 543. **How the Chapter divided.** — We shall consider, I. Common-law Nuisances; II. Statutory Nuisances; III. Analogous Offences.

I. *Common-law Nuisances.*

§ 544. **General View.** — The subject of nuisance, at the common law, divides itself into public and private nuisances, the former being indictable, and the latter actionable only. In determining what is indictable, we are obliged to take into the account many considerations; and the consequence is, that, under some circumstances, the question becomes difficult, though under others it is plain and easy. Hawkins defines an indictable nuisance — or, in other words, a "common nuisance" — to be "an offence against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires."[1] Now, if this definition, which is perhaps as good as any to be found in the books, were accurate, it would still give us but little practical help in determining whether a particular act or neglect is indictable or not; for when may a thing be said to annoy "all" the subjects of the government? and what does the "common good require"? and is one at his peril compelled to do every thing which a judge may deem

[1] 1 Hawk. P. C. Curw. ed. p. 692, § 1.

to be demanded by the common good? Perhaps the author of this volume, in his companion work on the Criminal Law, was no more successful in furnishing practical help to the reader than preceding writers have been. He there observed, that "all acts (and a neglect to do what the law requires of one is an act,[1] as well as the doing of what the law forbids) which tend directly to create a sort of general evil in the community at large, may be deemed nuisances, when they are of such magnitude as to require the interposition of the judicial tribunals. But," it was added, "in determining what are such acts, we are to look to the adjudications; because justice must travel in a uniform way, while yet it does bear the burden of a real equity." [2]

§ 545. **Limits of the Doctrine.** — It is, therefore, impossible to state in exact and brief words, such as should constitute a definition, what are the limits of the doctrine of indictable nuisance. And for a more extended description, the reader is referred to various disquisitions to be found, by consulting the Index, in the author's work on the Criminal Law. Still, as this subject is important, the author will here bring together various points picked out principally from other books of the law.

§ 546. **Continued.** — Gabbett, whose capacity and diligence in collecting the old learning from the books are very considerable,[3] observes,[4] "that all disorderly inns or alehouses, bawdy-houses, gaming-houses, unlicensed or improperly conducted play-houses, booths and stages for rope-dancers, mountebanks, and the like are public nuisances, either by reason of their endangering the public peace, or as they affect public morals, or, perhaps, as being productive of idleness, or attended with public inconvenience; and it seems to be equally clear, that any thing which will endanger the public health, as by exposing persons infected with contagious disorders in places of public resort, is a public nuisance and indictable as such. All scandalous indecencies, or open breaches of morality, exhibited in the face of the people, may be here also men-

[1] Crim. Law, 5th ed. I. § 433.
[2] Ib. § 1072.
[3] Crim. Law, 5th ed. I. § 83; II. § 506.
[4] 1 Gab. Crim. Law, 744–750.

tioned as nuisances of an odious and noxious description.[1] . . . Offensive trades and manufactures, which are set up in such inconvenient parts of a town that they cannot but greatly incommode the neighborhood, seem, according to the better opinion, to be common or public nuisances. It was so adjudged in a case where a brew-house was erected near Serjeant's Inn, London;[2] and also in Pierce's Case, where a soap-boilery was erected to the annoyance of the neighborhood;[3] and in Wigg's Case, where the offence was keeping swine in a town.[4] And though it was holden in Rankett's Case,[5] that making candles in a vill was no nuisance, because the needfulness of them shall dispense with the noisomeness of the smell; yet the reasonableness of this opinion has been justly questioned; because it cannot be pretended that it is necessary to make them in the heart of a town.[6] And, accordingly, in Tohayle's and Pragnell's Cases, erecting a tallow furnace was held to be a nuisance.[7] . . . The principle established in these cases seems to apply, not only to such noxious smells as corrupt the air, or render it unwholesome or offensive, but also to such noises as are common and public annoyances, and interfere with the enjoyment of life. In a late case where, upon an indictment against a tinman for the noise made by him in carrying on his trade, it appeared that the noise only affected the inhabitants of three numbers of the chambers in Clifford's Inn, and that by shutting the windows the noise was in a great measure prevented, it was ruled by Lord Ellenborough, C. J. that the indictment could not be sustained, as the annoyance was at most a private nuisance.[8] But in Smith's Case, the defendant was convicted on an indictment for making great noises in the night with a speaking trumpet, to the disturbance of the neighborhood, and fined accordingly.[9] And in White and Ward's Case,[10] it was said

[1] 4 Bl. Com. 65; 1 East, P. C. 1.
[2] 1 Vent, 26.
[3] Rex *v.* Pierce, 2 Show. 327.
[4] Reg. *v.* Wigg, 2 Ld. Raym. 1163.
[5] Rankett's Case, 2 Rol. Abr. 139.
[6] 1 Hawk. c. 32, p. 694, § 10. And see Crim. Law, 5th ed. II. § 1130–1142.
[7] Tohayle's Case, cited Cro. Car. 510; Morley *v.* Pragnell, Cro. Car. 510.
[8] Rex *v.* Lloyd, 4 Esp. 200. As to how many must be affected by a nuisance to render it indictable, see Crim. Law, 5th ed. I. § 243, 244, 1078.
[9] Rex *v.* Smith, 1 Stra. 704.
[10] Rex *v.* White, 1 Bur. 333.

that the existence of the nuisance depends upon the number of the houses, and concourse of people, affected or liable to be affected by it.

§ 547. **Continued.** — "Another species of noisy nuisance," he continues, "is that of a common scold, which is an offence confined by our law to the female sex, or to such troublesome, angry women, as, by their brawling and wrangling amongst their neighbors, break the public peace, increase discord, and become a public nuisance to the neighborhood.[1] . . . Eavesdroppers, though not a noisy nuisance, do, by their slanderous and mischievous tales, also promote discord, and are indictable as a common nuisance.[2]

§ 548. **Continued.** — "Upon the principles already laid down, any thing which is productive of imminent danger, or which causes reasonable terror to the inhabitants of a neighborhood, may be prosecuted as a public nuisance. Thus to erect gunpowder mills, or to keep gunpowder magazines in or near a town, is, it seems, a nuisance by the common law, for which an indictment or information will lie. And, therefore, where R. Williams was indicted for keeping two barrels of gunpowder near the town of Bradford, he was convicted accordingly.[3] And in Taylor's Case the court granted an information against the defendant as for a nuisance, on affidavit of his keeping great quantities of gunpowder, to the endangering the church and houses where he lived.[4] . . . . It is said that a mastiff going in the street unmuzzled, being, from the ferocity of his nature, dangerous, and cause of terror to his majesty's subjects, is a common nuisance; and consequently that the owner may be indicted for knowingly suffering him to go at large; but, as dogs of this breed are frequently quiet and gentle in their nature and habits, it seems that, in order to sustain such an indictment, it is necessary that it should appear and be alleged that the dog was of a fierce and ferocious nature, and that people could not pass, &c., through the highway where the dog was kept, without danger of being bit, &c.[5]

[1] Crim. Law, 5th ed. I. § 1101–1105.

[2] Ib. § 1122–1124.

[3] Burn's Justice, see title "Gunpowder."

[4] Rex *v.* Taylor, 2 Stra. 1167.

[5] Buxendin *v.* Sharp, 2. Salk. 662; Smith *v.* Pelah, 2 Stra. 1264; Beck *v.* Dyson, 4 Campb. 198.

§ 549. **Continued.** — "Furiously driving carriages or horses in the public highways, and thereby endangering the lives of his majesty's subjects, seems to be an offence which may be also the proper subject of an indictment, as a species of public nuisance. In the case of Williams *v.* The East India Company, where the plaintiff brought an action against the defendants who had chartered his ship, and put on board a package containing oil and varnish of a combustible and inflammable nature, by which a loss happened, without giving due or sufficient notice or intimation thereof, to the captain or any other person employed in the navigation thereof, it was said by Lord Ellenborough, C. J. when pronouncing judgment in this case, that considering the probable danger thereby occasioned to the lives of those on board, it amounted to a species of delinquency in the persons concerned in so putting such dangerous article on board, for which they were criminally liable, and punishable for a misdemeanor at least.[1] And this principle seems to be equally applicable to the case of furiously driving on the public highways, which unquestionably endangers the lives of his majesty's subjects, and, in many instances, has been attended with grievous, and even fatal consequences."

§ 550. **Continued.** — Of the like sort with the foregoing, though not always treated of under the title Nuisance, yet plainly nuisances in fact, are such publicly injurious acts, as selling unwholesome food not fit to be eaten ;[2] making water unwholesome, or supplying it to the people of a town to be drank,[3] and the like ; and publishing obscene books and pictures.[4]

§ 551. **Conclusion.** — The foregoing sections will furnish the reader with a general idea of the doctrine of nuisance at the common law. It is not best to repeat here what is said in the author's other works, where the matter is drawn out more into detail. The reader should bear in mind, that the foregoing are only illustrations of indictable nuisances; and that various other perturbations of the public repose, of the like

[1] Williams *v.* East India Co., 3 East, 192.

[2] The State *v.* Smith, 3 Hawks, 378; People *v.* Parker, 38 N. Y. 85; Goodrich *v.* People, 3 Parker C. C. 622; 1 Russ. Crimes, Grea. ed. 109.

[3] Crim. Law, 5th ed. I. § 491; Stein *v.* The State, 37 Ala. 123; 1 Rus. Crimes, Grea. ed. 110.

[4] Commonwealth *v.* Holmes, 17 Mass. 336; Commonwealth *v.* Sharpless, 2 S. & R. 91.

sort, are at the common law indictable also, and for like reasons.

II. *Statutory Nuisances.*

§ 552. **General Views.** — While the common-law doctrines, as stated under the last sub-title, prevail wherever common-law crimes are known in the United States, they are in most or all the other localities made of force by statutes; such, for example, as the Indiana one, which provides, "that every person who shall erect, or continue and maintain, any public nuisance, to the injury of any part of the citizens of this State, shall be fined not exceeding one hundred dollars."[1] At the same time, in localities where these common-law doctrines are in force, their uncertain limits render it highly proper, while it is usual, to enact various statutes giving shape and bounds to the doctrines, or making particular things nuisances under special penalties. And, while most of these statutes either confirm or enlarge the common-law offence, there may be, and sometimes is, a statute contracting its bounds; for what the statutory law allows cannot be indicted as nuisance.[2] These statutes are so numerous and varied that the author cannot, with a due regard to space, discuss them all in detail; nor is this necessary, since the principles to be applied to one statute are in the main applicable to another. Let us gather up some views which are at hand.

§ 553. **Creating Nuisance by General Provision.** — Says Russell: "There are some offences which are declared to be nuisances by the enactments of particular statutes. And where a statute declares a particular thing to be a common nuisance, it is indictable as such. An act of Parliament prohibited the erection of any building within ten feet of a road, and declared that, if any such building should be erected, it should be deemed a common nuisance. By another clause, justices were empowered to convict the proprietor and occupier of such building. It was held, that the party who erected a building

[1] Bicknell Crim. Pr. 398, referring to 2 R. S. 428, § 8; 2 H. & G. 460. That this is a valid enactment he refers to 27 Ind. 430. See, also, Crim. Law, 5th ed. I. § 35 and note. See ante, § 363.

[2] People *v.* Law, 34 Barb. 494; Commonwealth *v.* Boston, 97 Mass. 555.

contrary to the act might be indicted for a nuisance."[1] This sort of statute is not uncommon in the United States, and the like doctrine concerning it prevails in our courts.

§ 554. **Continued — Whether constitutional.** — But as, in this country, the legislative power is more or less restrained by written constitutions, it becomes under some circumstances a nice question whether a statute declaring a particular thing to be a nuisance, and as such to be attended with the ordinary common-law consequences of a nuisance, is constitutional. If a statute merely makes indictable a wrongful act which it names, it demands no special consideration here, though it calls the act a nuisance; because a mere name is nothing, and the legal principle is the same whether the crime is called by one name or another. But the general idea of a nuisance is, that it is subject to some special consequences, particularly to abatement, even *in pais*, and without legal proceedings. And though the legislature may authorize the punishment of a man for a particular act, through a prosecution in court, it may not have authority to cause his property to be taken from him by abatement, without accusation, trial, or conviction.

§ 555. **Whether Constitutional, continued.** — In the author's work on the Criminal Law, a chapter is devoted to the discussion of this and some kindred questions.[2] It is not best to repeat here what is said there. It may, however, be stated in brief, that, unless there is some special provision in the constitution of the State, not generally introduced into this instrument, it is competent for the legislature to render subject to destruction by abatement, or otherwise liable to forfeiture, any property which is found in a situation declared to be illegal, either with or without judicial proceedings had. But it is not competent to punish a man for what he does, in a matter disconnected from the situation or act of his property, by taking the property from him without due conviction for the offence. This subject will be adverted to again, in a future chapter, when we come to consider the doctrines governing liquor nuisances under the statutes.

[1] 1 Russ. Crimes, Grea. ed. 327, referring to Rex *v.* Gregory, 5 B. & Ad. 555. See The State *v.* Brown, 16 Conn. 54.

[2] Crim. Law, 5th ed. I. § 816 et seq.

§ 556. **Continued — Bowling Alleys — General Views.** — A good illustration of a statutory nuisance, competent in every respect for the legislature to provide for, may be seen in a New Hampshire case. A statute had made bowling alleys, situated within twenty-five rods of a dwelling-house, public nuisances; and, though the defendant objected that it is a judicial function, not a legislative, to determine what is a nuisance, the court overruled the objection.[1] Indeed, if legislation could not control things of this sort, its arm would be powerless to regulate and protect the community under a great variety of circumstances. Whether or not this particular provision was wise is another question, not now to be discussed; but, if legislation in our States would wisely interfere to regulate many more things of this sort, and do less overwork in some other directions, it would prove itself to be a most beneficent power. For example, it should provide means whereby, in localities where the principal owners of the soil desire, and the public good will be promoted, protection may be given to the longing for repose and for beauty, and men may erect their dwellings without the fear of the incoming of noise, filth, and foul sights, of the minor sort not reached by the general laws; while, in other localities, noisy, and perhaps loathsome, yet necessary, industrial establishments may be erected, without the danger of being driven away by the incoming of inhabitants. Repose and noise, cleanliness and filth, the pleasing and the repulsive to the sight, should each have its time and place, and it belongs to the law-making power to divide the one from the other. Thus it will imitate Him who has divided from one another light and darkness, sea and dry land, storm and sunshine, giving to each its own time and its place.

§ 557. **Follow Statute — Common Law — Gambling-house — Bawdy-house.** — It would be easy to present here almost endless illustrations of the doctrines which have been already several times urged in this volume, that the indictment should follow the words of the statute defining a crime; and that, when a crime is created by the use of a common-law term, the common-law rules respecting it should likewise be regarded. Thus, as to the former rule, where the allegation was, that, at a

[1] The State *v.* Noyes, 10 Fost. N. H. 279.

time and place named, the defendant "did keep and maintain a certain tenement, then and there used for illegal gaming, &c., whereby, and by force of the statute in such case made and provided, the said tenement then and there kept and maintained by the said, &c., and then and there used and resorted to as aforesaid, was then and there a common nuisance," &c., this was held to be an insufficient charge of keeping a "common gaming-house" at the common law.[1] Neither did it set out an offence, as it was doubtless intended to do, within a statute declaring that "all buildings, places, or tenements, resorted to for prostitution, lewdness, or illegal gaming, or used for the illegal keeping or sale of intoxicating liquors, shall be deemed common nuisances," and providing for the punishment of the keepers.[2] The reason was, that the material statutory words, descriptive of the place and the offence, are "resorted to," and neither these nor any equivalent for them were employed in the charging part of the indictment.[3] Again, an indictment charged that the defendant, at a time and place named, kept "a certain common house of ill-fame, resorted to for the purpose of prostitution and lewdness," — intended to be founded on a statute which appeared on examination to have been repealed. And it was held that the proceeding could not be maintained on the existing statute, which, nearly in the terms of the one above quoted, declared "all buildings, places, or tenements used as houses of ill-fame, resorted to for prostitution, lewdness, &c., to be common nuisances, and are to be regarded and treated as such," and provided for the punishment of the keepers;[4] because, under this statute, the indictment must in some form allege, as the present one did not, that the house was a common nuisance.[5] The reason for this decision does not appear in the report; and, assuming it to be sound, as the author believes it on the whole perhaps to be, we shall derive instruction from inquiring what the true reason is, and what it is not. It is not simply because the words "common

[1] For a form of such an indictment, see Crim. Proced. II. § 488.

[2] Mass. Gen. Stats. c. 87, § 6, 7.

[3] Commonwealth *v.* Stahl, 7 Allen, 304.

[4] Mass. Stat. 1855, c. 405, § 1, 2.

[5] Commonwealth *v.* Davis, 11 Gray, 48, 51; s. p. Commonwealth *v.* Floyd, 11 Gray, 52, note.

nuisance" are in the statute, and are there descriptive of the offence; because, as the words are there used, they express merely the law's conclusion from the statutory facts set out in the earlier part of the quoted sentence; and we have seen,[1] that, in general, conclusions of law like this need not constitute a part of the allegation. But still the statute expressly makes the forbidden acts a "common nuisance," which are common-law words; and thus we are conducted to the true reason for the decision, namely, that, by the common-law rules, every indictment for nuisance must perhaps conclude "to the common nuisance," or, at least, must in some way use the term "common nuisance," or must in this direction be more expanded in the allegations than this one was.[2] The repealed statute, upon which it was supposed this indictment was good, without the allegations required in a common-law indictment for nuisance,[3] was, "every person, who shall keep a house of ill-fame, resorted to for the purpose of prostitution or lewdness, shall be punished," &c.[4] Under an enactment like this, therefore, it appears that the pleader need not contemplate the offence as a nuisance.

§ 558. **Conclusion.** — In the work on the Criminal Law,[5] and in that on Criminal Procedure,[6] more or less may be found relating to statutory nuisances; and, though some advantage might be derived from entering further into particulars in this place, it is deemed best on the whole to close the discussion here.

III. *Analogous Offences.*

§ 559. *At Common Law:* —

Name of Offence, &c. — When we understand that a particular thing is indictable, it is not always quite certain whether it is to be called a nuisance or not. Neither is it ever of any legal consequence to know the name of a common-law misdemeanor. The name does not appear in the indictment, and it need not in the proofs; and, when we have ascertained

[1] Ante, § 421, 506.

[2] Crim. Proced. 2d ed. II. § 105–108, 273–276, 488, 862–865.

[3] 11 Gray, 52.

[4] Mass. R. S. c. 130, § 8.

[5] Crim. Law, 5th ed. I. § 831–835, mingled with the common-law discussions, § 1071–1151, and at various other places.

[6] Crim. Proced. 2d ed. II. § 868, 869, and at various other places.

that the offence is not a felony, no further inquiry as to its name is of practical importance.

§ 560. **Analogous Offences enumerated.** — Of ascertained common-law offences, akin to nuisance, though not generally called such, are riot, rout, unlawful assembly, affray, forcible entry and detainer, forcible trespass, and disturbing meetings, mentioned in the last chapter.[1] The offences of blasphemy and profaneness,[2] though embracing perhaps more than one criminal element, are, in the main, indictable for the same reason as those which are called nuisances; and the same is clearly true of Sabbath-breaking,[3] to the extent to which it is to be deemed a common-law offence. So barratry, or common barratry, as it is usually called, is of the like sort.[4] But it is of no consequence to attempt a complete enumeration.

§ 561. *Under Statutes:* —

General View. — The statutes which might be ranged under this head are very numerous; but they are for the most part such as differ in the different States, while yet, as to most of them, the foregoing discussions of this volume will furnish all needful rules for their interpretation, and for the procedure upon them. One of these statutes has been already, as respects its most important features, considered in this volume; namely, one of the Massachusetts enactments to restrain the sale of adulterated milk.[5] Indeed various others have been, and will be, in other connections, brought more or less prominently before the reader, and the discussions on them may be found by consulting the Index.

§ 562. **Illegal Tolls for grinding Grain — False Toll-dish.** — There is a North Carolina case, which arose on the State statute regulating millers' tolls, of considerable interest and importance. The statutory provisions are the following: —

"All millers of public mills shall grind according to turn, and shall well and sufficiently grind the grain brought to their mills, if the water will permit, and shall take no more toll for grinding than one eighth part of the indian corn and wheat,

[1] Ante, § 539–541.

[2] Crim. Law, 5th ed. II. § 73–84; Crim. Proced. 2d ed. II. § 123–125.

[3] Crim. Law, 5th ed. I. § 499; II. § 950; Crim. Proced. 2d ed. II. § 812 et seq.

[4] Crim. Law, 5th ed. II. § 63 et seq. Crim. Proced. 2d ed. II. § 98 et seq.

[5] Ante, § 358, 385.

and one fourteenth part for chopping grain of any kind, and every miller and keeper of a mill, making default therein, shall, for each offence, forfeit and pay five dollars to the party injured.

"All millers shall keep in their mills the following measures, namely, a half bushel and peck of full measure, and also proper toll-dishes for each measure; and every owner, by himself, servant, or slave, keeping any mill, who shall keep any false toll-dishes contrary to the true intent and meaning of this chapter, shall be deemed to be guilty of a misdemeanor." [1]

Upon this a mill owner, not satisfied with the statutory toll, but demanding more, kept openly and without fraud or reserve, a toll-dish larger than the above provisions permitted. And it was held to be a "false toll-dish" within the meaning of this statute.[2]

§ 563. **Continued — Form of the Indictment.** — As to the form of the indictment for keeping a false toll-dish, the learned judge who delivered the opinion in the case observed, that the following would be a good one: —

"That A. B., on the first day of January, A.D. 1857, and from that day, &c. was and has been the owner of a certain public mill, situate in the said county, for the purpose of grinding wheat and corn for toll, and that on the 1st day of August, A.D. 1857, and on divers other days, &c. the said A. B., in his mill aforesaid, did keep a false toll-dish of the contents of more than one eighth of a half bushel and peck of full measure, to wit, of the contents of one seventh part of a half bushel, contrary to the form, &c."

A form much more cumbersome, and not to be commended, was, by rejecting a part as surplusage, sustained as adequate; and, after disposing of one objection to it, the learned judge goes on to say: "The other objection, that the indictment does not aver the contents of the false toll-dish, so that the court may know that it was more than one-eighth of a half bushel, is untenable. We think it sufficient to aver, that it was a false toll-dish, contrary to the form of the statute. The court knows, from the statute, that one-eighth is the proper measure; so, of course, a false toll-dish is one the contents of which is more than one-eighth, and *cui bono* aver under a *videlicet* that it was one-seventh, when the averment would be sustained by

[1] Rev. Code, c. 71, § 6, 7.

[2] The State *v.* Perry, 5 Jones, N. C. 252.

proof of a measure of the contents of one-fifth, or any other measure more than one-eighth?"[1]

§ 564. **Regulations as to the Use of Property — Natural and Constitutional Rights.** — The foregoing statutory provisions are of a sort about which there has been a good deal of dispute in the community. No one contends that it is not competent for legislation to forbid any improper use of fists, by those who possess them; as, that a man shall not give to his neighbors, with his fists, black eyes, and the like. But it is urged by many, that, though legislation may properly give direction to the action of the bodily members of a man, it cannot thus restrain the use of his property. In reason, however, and according to established legal doctrine, the property is as much within legislative control as the person. Thus, though a contract is a voluntary arrangement of a particular kind between two or more individuals, yet, from early periods, the statutory laws, such, for example, as the Statute of Frauds, have made special arrangements concerning contracts; and, if parties will not abide by them, their contracts will not be enforced by the courts. Consequently, for example, if a man wishes to sell a piece of real estate, he must make a writing as evidence of the sale, or the title will not pass. And all other arrangements relating to property, whether real or personal, must conform to such rules as the legislature may see fit to prescribe. And legislative directions respecting property are in many respects absolutely essential to the order and repose of the community. No man in North Carolina was obliged to establish a mill for grinding grists of grain; yet, if one chose to do so, he was properly compellable to conform to legislative regulations in the use of his mill. In like manner, in those States in which usury laws exist, no person is required to loan his money if he prefers to keep it in his own possession; yet, when one elects to loan it, he must be content with the interest which the law permits him to receive. How far laws of this sort are wise, is not matter

[1] The State *v.* Perry, 5 Jones, N. C. 252, opinion by Pearson, J. In The State *v.* Nixon, 5 Jones, N. C. 257, there is another form of the indictment on this same section, and the charge was held not to be sustained by proof that the defendant took one sixth part of each half bushel of corn with a half gallon toll-dish, that being the true measure of the toll-dish under the act.

now under discussion, but the legislative power is plain. All men, who have power, will do, even in their private affairs, foolish things; but the wisdom or folly of a particular act has nothing to do with the rightfulness of the power, or its binding nature when done.

§ 565. **Continued — Use of the Soil — Sand, &c., from a Sea-beach.** — In further illustration of this doctrine it may be observed, that a statute in Massachusetts made indictable "any person who shall take, carry away, or remove, by land or by water, any stones, gravel, or sand from any of the beaches in the town of Chelsea, excepting," &c. And when one was prosecuted under this statute for taking and carrying away a quantity of sand and gravel, admitted to be his own soil, he objected that the statute was not meant to apply to the owner; or, if it did, then it was in violation of the provision of the constitution, that "no part of the property of any individual can, with justice, be taken from him or applied to public uses without . . . reasonable compensation therefor,"[1] the statute, in this instance, not providing for compensation. But, as the evident purpose of the statute was to preserve the harbor of Boston, and its intent would be as much violated by the owner doing the forbidden act as by any third person doing it, the court decided against the defendant on this point. On the other point the decision was the same, Shaw, C. J. observing: "All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community; under the maxim of the common law, *sic utere tuo ut alienum non lædas*. When the injury is plain and palpable, it may be a nuisance at the common law, to be restrained and punished by indictment; as, where one bordering on a navigable river should cut away the embankment on his own land, and divert the watercourse so as to render it too shallow for navigation. But there are many cases where the things done in particular places, or under a particular state of facts, would be injurious, when, under a change of circumstances, the same would be quite harmless; as, the use of a warehouse for the storage of gunpowder in a

[1] Const. Mass. part 1, art. 10.

populous neighborhood, or for the storage of noxious merchandise, or the use of buildings for the carrying on of noxious trades dangerous to the safety, health, or comfort of the community. Whereas, in other situations, there would be no public occasion to restrain any use which the owner might think fit to make of his property. In such cases, we think it is competent for the legislature to interpose, and by positive enactment to prohibit a use of property which would be injurious to the public under particular circumstances, leaving the use of similar property unlimited where the obvious considerations of public good do not require the restraint. This is undoubtedly a high power, and is to be exercised with the strictest circumspection, and with the most sacred regard to the right of private property, and only in cases amounting to an obvious public exigency. Still, we think, the power exists, and has been long exercised in cases more or less analogous. The right to restrain owners of land in towns from erecting wooden buildings, except under certain restrictions, has never been doubted, or, if it has been, the doubt has long since been removed. So of the like nature are all laws to regulate and restrain the erection and use of furnaces and steam-engines, and buildings designed for carrying on dangerous or noxious trades. The protection and preservation of beaches, in situations where they form the natural embankments to public ports and harbors and navigable streams, is obviously of great public importance; although, on many parts of the coast, the situation of the shores is such that the removal of sand and gravel, by the owner, would not be of the least injury to anybody." [1]

§ 566. **Conclusion.** — This subject admits of indefinite extension; but it is deemed best that the discussion should close here.

[1] Commonwealth *v.* Tewksbury, 11 Met. 55, 57, 58.

CHAPTER XXIII.

OBSTRUCTIONS OF GOVERNMENTAL ORDER.

567. Introduction.
568, 569. Obstructions at Common Law.
570–574. Obstructions under Statutes.

§ 567. **Scope of this Chapter — How divided.** — It is not proposed to repeat, in this chapter, much of what is said in the companion works on the Criminal Law and Criminal Procedure. What will be here attempted will be the bringing together of a few points, in connection with some illustrative statutory provisions. We shall consider, I. Obstructions at the Common Law; II. Obstructions under Statutes.

I. *Obstructions at the Common Law.*

§ 568. **Enumerated.** — In the work on the Criminal Law, the various indictable forms of obstructing the government, in its several functions, were stated and discussed. Without undertaking to repeat all, the following may be mentioned: The great offence, which absorbs all others, is treason; the limits of which, though it existed at the common law, are defined with us by constitutional provisions and by statutes.[1] Then we have such acts as corrupt justice in the courts; among which may be mentioned, perhaps, barratry,[2] though its appropriate place is among the nuisances; champerty, maintenance, and the buying and selling of pretended titles;[3] indictable contempts of court;[4] embracery, being an attempt corruptly to influence a jury;[5] certain kinds of malfeasance and nonfeasance in office;[6] perjury and subornation of perjury, together with various tamperings with witnesses;[7] and various other things, of the analogous sort, which, as they impede

[1] Crim. Law, 5th ed. I. § 177, 456; II. § 1202 et seq.
[2] Crim. Law, 4th ed. II. § 63 et seq.
[3] Ib. II. § 121–140.
[4] Ib. II. § 264–267.
[5] Ib. II. § 384 et seq.
[6] Ib. I. § 459 et seq.; II. § 972–977.
[7] Ib. I. § 468; II. § 1014 et seq. 1197, 1198.

justice in the courts, are therefore indictable at the common law. Of the like nature, are such offences as prison breach, rescue, and escape,[1] bribery,[2] and some others. In a certain sense, under this head, forgery [3] may be included, together with some of the forms of conspiracy; but, for the most part, these are mere private cheats of the indictable sort.

§ 569. **Limits of Doctrines.** — In the nature of things, the doctrines limiting the indictable field under this head must, at some places, be vague, and they are found to be so in fact; while, at other places, they are reasonably distinct and precise. The consequence is, that here, as elsewhere in the criminal law, there is room for statutory definings, and for extensions of the indictable field.

II. *Obstructions under Statutes.*

§ 570. **General View — What discussed elsewhere.** — In the works on Criminal Law and Criminal Procedure, various statutory obstructions of governmental order, as well as common-law obstructions, were discussed. Thus, something was there said, not only of extortion at the common law, but of statutory extortions,[4] of resistance to officers in violation of various statutes,[5] of statutory perjuries,[6] and of some other statutory offences coming under this head; while still other discussions of the statutes are interspersed with those on the common law. What remains to be said in this chapter is merely of a fragmentary nature.

§ 571. **Perjury — Oath to obtain Marriage License.** — Though there are various statutes, State and National, relating to perjury, the interpretations of most of them are plain, and it is plain that they leave the doctrines on this head as they stood at the common law. Still, the statutory words should always be attended to; and it will sometimes be evident that a common-law doctrine has been changed by them. Thus, by the common law, a false swearing, to be perjury, must be in a judicial pro-

[1] Crim. Law, 4th ed. II. § 1064 et seq.
[2] Ib. II. § 85.
[3] Ib. II. § 521 et seq.
[4] Crim. Law, 5th ed. II. § 403, 404; Crim. Proced. 2d ed. II. § 364.
[5] Crim. Law, 5th ed. II. § 1009–1013; Crim. Proced. 2d ed. II. § 879–898.
[6] Crim. Law, 5th ed. II. § 1051–1053.

ceeding or a course of justice.[1] Consequently, where, in England, one made a false oath before a surrogate to procure a marriage license, this was held not to be perjury.[2] But Bicknell points out that it would be otherwise under the statutes of Indiana, where an oath is taken before the clerk of the court to procure a marriage license; because this officer has by statute authority to require and administer an oath in such a case, and one of the provisions relating to perjury is, that "every person who shall wilfully, corruptly, and falsely, before any officer authorized to administer oaths, under oath or affirmation voluntarily make any false certificate, affidavit, or statement of any nature, for any purpose, shall be deemed guilty of perjury."[3]

§ 572. **Continued — Course of Justice — Oath before Fence-viewers.** — Differing somewhat from this Indiana provision, is one in Massachusetts, as follows: "Whoever, being lawfully required to depose the truth in any proceeding in a course of justice, commits perjury, shall be punished, if the perjury is committed on the trial of an indictment for a capital crime, by imprisonment in the State prison for life or any term of years, and if committed in any other case, by imprisonment in the State prison not exceeding twenty years."[4] This provision is followed by another somewhat like the Indiana one quoted in the last section; but this provision, the reader perceives, adopts, in the partial definition which it gives of the offence, the language of the common law.[5] It in effect, there-

[1] Crim. Law, 5th ed. II. § 1017.

[2] Rex *v.* Foster, Russ. & Ry. 459.

[3] Bicknell Crim. Pr. 382, 383. The provision here quoted is § 41 of the act defining felonies, and it contemplates a case where the oath or affirmation was not required by law, but was voluntarily made by the party; and, in this case, it is not necessary that the false statements should be material to any issue. But § 40 of the same act is different; it provides, that "any person who, having taken a lawful oath or affirmation in any matter in which by law an oath or affirmation may be required, shall, upon such oath or affirmation, swear or affirm wilfully, corruptly, and falsely touching a matter material to the point in question, shall be deemed guilty of perjury." And under this provision it must appear in the allegation, either by express averment, or from other facts averred, and in the proofs, that the false swearing was "touching a matter material to the point in question." The State *v.* Flagg, 25 Ind. 243; The State *v.* Thrift, 30 Ind. 211. For the interpretation of a somewhat similar provision to the one in the text, see Jones *v.* Daniels, 15 Gray, 438, 439.

[4] Mass. Gen. Stat. c. 163, § 1.

[5] Crim. Law, 5th ed. II. § 1015 and note.

fore, merely provides a punishment for the common-law offence. Yet, without probably departing from the common-law rules the court held under it, that perjury may be committed by giving false testimony before a board of fence-viewers, the witness having been sworn in their presence by a justice of the peace in pursuance of a statutory authority. But this, unlike the proceeding for taking out a marriage license, was in a course of justice. The duties of fence-viewers, it was observed by the learned judge, "require them to adjudicate upon controverted rights of parties. They have the minor duty of deciding whether fences actually existing are good and sufficient fences. They have also the much larger jurisdiction of assigning to contiguous owners of real estate their respective shares of fences to be by them severally maintained, which assignment, in the language of the statute, 'shall be binding upon the parties and upon all the surrounding occupants of the lands,' and 'the several owners of such lands and their heirs and assigns for ever shall erect and support said fences agreeably to such division.' They have also the duty of apportioning the fences to be supported by the various proprietors of general fields."[1] It may be observed, that, upon this statute, the indictment must show whether the perjury was in a capital case or not; or, at least, it must if the higher punishment is to be inflicted.[2]

§ 573. **Bribery — Surplusage in Statute.** — A statute of the United States[3] provides, that, if one shall bribe an officer of the United States, "and shall thereof be convicted," he shall be liable to be indicted, convicted, and punished. And, though no one can be convicted until he has been first indicted, and so the statute would seem to nullify itself, this folly cannot be attributed to the legislature. Therefore it was held, that the words "and shall thereof be convicted" must be rejected, in the construction, as surplusage.[4]

§ 574. **Conclusion.** — This discussion may seem inadequate; but the writer deems, on examining the material before him, that the remaining pages of this volume can be more profitably filled with other discussions which crowd upon the attention.

[1] Jones *v.* Daniels, 15 Grey, 438.
[2] Ante, § 370–372, 444, 457.
[3] Act of July 13, 1866, § 62.
[4] United States *v.* Stern, 5 Blatchf. C. C. 512. And see ante, § 79–82, 146.

BOOK V.

OFFENCES MORE PURELY STATUTORY.

CHAPTER XXIV.

INTRODUCTORY VIEW.

§ 575. **Scope of this Discussion.** — It is proposed, in the series of chapters on which we are now entering, to present what may be deemed a full discussion of various leading statutory offences, chiefly, but not wholly, of the minor sort, not treated of in the last Book, or in the author's other works as they appear in their last editions. Those which are brought under review in the places thus referred to are such as have grown out of attempts to expand and improve the common law. Those which follow in the present series of chapters may be regarded rather as independent creations. Such is the manner in which the distinction lies in the author's own mind; yet all such divisions necessarily run into one another, and no two authors would draw the line separating the one class from the other at all points at precisely the same place. Yet even as the present author views the distinction, it is meant to be somewhat arbitrary; his principal purpose being the practical one of bringing together here the more purely statutory crimes, and chiefly those of the minor and popular sorts, which have not been discussed by preceding writers on the criminal law.

§ 576. **How treated of.** — Shall we separate the law and procedure in the following discussion? This question is not free from embarrassment; but, on the whole, it is deemed best to do so in part. When there is little to be said about an offence, or

it is not complicated, it may be fully disposed of in one chapter. But when the offence is complicated, or incumbered with many points, we shall first consider the law, and then in a separate chapter the procedure. The alphabetical arrangement will not here be followed, but one which will group the subjects having an affinity to one another.

CHAPTER XXV.

POLYGAMY.

577, 578. Introduction.
579–597. Law of the Offence.
598–613. The Procedure.

§ 577. **Definition — Name — Bigamy — Polygamy.** — The offence of polygamy consists in entering into the form of a marriage, by one who, or whose partner in the matrimonial ceremony,[1] is bound by a prior marriage undissolved by death or divorce. It is not known under the ancient common law, and is, therefore, purely statutory.[2] It is often, and perhaps more frequently, termed in our books bigamy. According to the canonists, 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 the offence might be committed, so as to create an incapacity for orders.[3] Consequently it prevents confusion, and preserves equally well the proprieties of our language, to use the word polygamy when we are speaking of the act made criminal by our statutes.[4]

§ 578. **How the Chapter divided.** — We shall consider, I. The Law of the Offence; II. The Procedure.

[1] As to this clause of the definition, see post, § 594.

[2] Crim. Law, I. § 502.

[3] Poynter Mar. & Div. 142; 4 Bl. Com. 163, note.

[4] Shelford Mar. & Div. 224; 1 East P. C. 464; 20 Howell St. Tr. 358, note.

I. *The Law of the Offence.*

§ 579. **Historical View — Stat. Jac. 1.** — In England, polygamy was always punishable canonically, but it seems not to have been a civil offence until the reign of James I.[1] In the first year of his reign, Stat. 1 Jac. 1, c. 11 (A. D. 1604), made it felony when committed "within his majesty's dominions of England and Wales;" but an exceptive clause of the statute exempted from its operation persons 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,[2] persons whose marriages had been or should thereafter be judicially declared void, and persons married within the age of consent. This statute has been the model for all subsequent criminal legislation upon the subject, both English and American. It provided (to state it more fully, but omitting the preamble), § 1. "That, if any person or persons, within his majesty's dominions of England and Wales, being married, or which hereafter shall marry, do at any time after the end of the session of this present Parliament, marry any person or persons, the former husband or wife being alive, that then every such offence shall be felony," &c. § 2. "Provided always, that this act, nor any thing therein contained, shall extend to any person or persons whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent him or herself the one from the other by the space of seven years together, in any parts within his majesty's dominions, the one of them not knowing the other to be living within that time." § 3. "Provided also, &c., that this act, nor any thing herein contained, shall extend to any person or persons that are or shall be at the time of such marriage divorced by any sentence had, &c., in the ecclesiastical court, or to any person or persons where the former marriage hath been or hereafter shall be by sentence in the ecclesiastical court declared to be void and of no effect, nor to any person

[1] Poynter Mar. & Div. 144. East says, that until this time it was left of "doubtful temporal cognizance;" but so early as Stat. 4 Edw. 1, c. 5, *de bigamis*, it was treated as a capital offence, and ousted of clergy by that statute. 1 East P. C. 464.

[2] Rex *v.* Lolley, Russ. & Ry. 237.

or persons for or by reason of any former marriage had or made, &c., within age of consent."

§ 580. **Stat. Jac. 1, continued — Whether Common Law with us.** — If we observe the date of this enactment, we shall perceive that it is two years anterior to the earliest colonial settlement in this country, — that at Jamestown, Virginia, in 1606.[1] The substance of it is adapted to our institutions; and, but for its peculiar phraseology, it must have been accepted as common law with us. And it was so accepted in the Maryland Colony, prosecutions under it having been had as early as 1682. Afterward, in 1706, a colonial statute expressly made it of force;[2] and thus it became law in so much of the District of Columbia,[3] now constituting the whole, as formerly belonged to the State of Maryland.[4] But it is not mentioned by the judges among the British statutes in force in Pennsylvania;[5] and there is little if any further recognition of it as a part of our common law. The difficulties are, that, by its terms, it is made local to England and Wales; and that the efficacy of a part of what is in its provisions depends on the action of ecclesiastical courts, which were never established in this country.

§ 581. **Subsequent English Legislation.** — In England, later legislation has corrected some obvious defects in this statute of James; particularly is a mere divorce from bed and board no longer a protection against the penal consequences of a second marriage, while a seven years' residence beyond sea is no protection where the absent party is known to the other to be living.[6] Thus, Stat. 9 Geo. 4, c. 31, § 22, which prevailed in England until quite recently, is as follows: "If any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof shall, &c.; and any such offence may be dealt with, inquired of, tried, determined, and punished in the county where the

[1] Bishop First Book, § 56.
[2] Kilty Rep. Stats. 170.
[3] Crim. Law, 5th ed. I. § 203.
[4] United States *v.* Jennegen, 4 Cranch C. C. 118.
[5] Report of Judges, 3 Binn. 599, 622, 623.
[6] Shelford Mar. & Div. 226; Rogers Ec. Law, 2d ed. 634.

offender shall be apprehended or be in custody, as if the offence 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." The present English statute is 24 & 25 Vict. c. 100, § 57; but it differs from this statute of George in no essential particulars, the revisers having made merely some slight verbal changes.

§ 582. **American Legislation.** — In most, perhaps all, of the United States, there are statutes, varying more or less from each other and from the English statutes, but substantially in accordance with the present amended English enactments. Some of the American statutory forms will more particularly appear as we proceed.

§ 583. *Construction and Effect of the Statutes:* —

"Divorce." — As already intimated, the "divorce" which would free one from the penalties of the statute of James includes as well the divorce from bed and board 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."[1] But there are not many modern statutes, perhaps not any, upon which this question would arise.

§ 584. **"Within Age of Consent."** — The construction of this exception is, "that," as Hawkins observes, "not only such person as was within such age, but also the other who was above it, is within the exception of the statute; because

[1] 1 Hawk. P. C. Curw. ed. p. 686, § 5.

the power of disagreeing to such marriage is equal on both sides." [1]

§ 585. **Place of the First Marriage.** — Marriage being an institution of international law, and it being, therefore, the custom of the courts to recognize foreign marriages the same as domestic ones, the place where the first marriage was celebrated, whether at home or abroad, becomes immaterial; [2] "because," says Hawkins, "it is the latter marriage that makes the offence." [3] But there may be special cases, exceptions to the general law, in which a marriage deemed good abroad will be invalid at home. Thus, if, by the foreign law, a marriage is permitted to be good which our courts deem to be incestuous, not merely in consequence of some local statutory prohibition, but by the law of nature also, it will not be accepted with us as valid.[4] It is plain, therefore, though the author is not able to cite any case to the point, that if after such a marriage abroad the party marries again here, the act is not polygamy by our laws. *A fortiori*, if the marriage is void by the foreign law as well as by our own, a second marriage here will not be polygamous. Thus, says Lord Hale, where "A takes B to husband in Holland, and then in Holland takes C to husband, living B, and then B dies, and living C she marries D, this is not marrying a second husband, the former being alive; for the marriage to C, living B, was simply void, and so he was not her husband. But, if B had been living, this had been felony to marry D in England." [5] When facts like these transpire all in our own country or State, the result is the same.[6]

§ 586. **Place of the Second Marriage.** — Leaving out of view particular statutory terms which have been employed to render nugatory the proposition now to be stated, "it is," as observed in the last section, in the words of Hawkins, "the latter marriage that makes the offence;" therefore an offender

[1] Ib. § 6. For the American doctrine relating to the age of consent, and marriages within age, see 1 Bishop Mar. & Div. § 143–153.

[2] 1 Bishop Mar. & Div. § 351, 353, 355, 361, 363; Anonymous, J. Kel. 79; Commonwealth *v.* Johnson, 10 Allen, 196.

[3] 1 Hawk. P. C. Curw. ed. p. 687, § 7.

[4] 1 Bishop Mar. & Div. § 376 et seq.

[5] Madison's Case, 1 Hale P. C. 693.

[6] The State *v.* Moore, 3 West. Law Jour. 134.

can be indicted and convicted only in the country and in the very county wherein the latter marriage ceremony took place.[1] Consequently, says Lord 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 offence was committed out of this kingdom."[2]

§ 587. **Continued — Special Statutory Provisions.** — It is obvious that the effect of the foregoing doctrine, if there were nothing to counteract it, would be to enable parties to escape the penalties of the statute by having their second marriages celebrated beyond the jurisdiction of the country. Therefore the present English statute, as we have seen,[3] makes it polygamy for a British subject to enter into a second marriage, subsisting the first, "whether the second marriage shall have taken place in England or elsewhere;" and, to get rid of the common-law difficulty as to a jurisdiction to try the offence, provides, that it may be dealt with "in the county where the offender shall be apprehended or be in custody." And where the defendant was an Englishman and the two marriages were in Scotland, it was held that he was properly convicted under this provision.[4] It is obvious that this statute, limited as it is in its operation to British subjects, is proper and just, and conformable to the law of nations, on a principle elsewhere discussed. But if it were not thus limited, it could not properly make punishable the subject of another government for what was done on foreign soil.[5]

§ 588. **Continued — American Forms of the Provision — Continuing to cohabit — Where apprehended.** — Upon this point, the American legislation has not, in general, precisely imitated the English. Thus, in Tennessee, the statute is as follows: "If any person 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, such person

[1] Anonymous, J. Kel. 79; United States *v.* Jernegan, 4 Cranch, C. C. 1; People *v.* Mosher, 2 Parker, 195; Putnam *v.* Putnam, 8 Pick. 433; 1 Hawk. P. C. Curw. ed. p. 687, § 7.

[2] 1 Hale P. C. 692.

[3] Ante, § 581.

[4] Reg. *v.* Topping, Dears. 647, 7 Cox C. C. 103, 36 Eng. L. & Eq. 614.

[5] Crim. Law, 5th ed. I. § 109–123 and notes, particularly the note to § 115, par. 7–9; People *v.* Mosher, 2 Parker C. C. 195.

shall," &c. Now, in this State, the constitution guarantees to defendants the right to be tried in the county where the offence took place. But though there is, therefore, and can be, no jurisdiction out of the county, if a second marriage, living a former husband or wife, has taken place abroad, or in another county in Tennessee, an offender may be indicted and convicted in a county in which there was a "cohabitation" under it.[1] This is not an unfrequent form of the statute in our States. But where, in New York, the statute, after having made punishable "every person, having a former husband or wife living, who shall marry any other person, whether married or single," proceeded to enact, that "an indictment may be found against any person for a second, third, or other marriage herein prohibited, in the county in which such person shall be apprehended; and the like proceedings, trial, judgment, and conviction may be had in such county, as if the offence had been committed therein;"[2] this was held to be merely a provision regulating the venue. Therefore when a defendant, who had a wife living in Pennsylvania, married another woman in Canada, and came and cohabited with her in New York, it was adjudged, not by the court of last resort, but, without doubt, correctly, that no offence under the statute was committed.[3]

§ 589. **The First Marriage.** — We have already seen, that, if the first marriage is void, the second is not polygamous.[4] But, recurring to the peculiar distinction of void and voidable in marriage, differing materially from the distinction in other

[1] Finney *v.* The State, 3 Head, 544. In this case, Caruthers, J. in delivering the opinion of the court, observed: "We think it clear, that, by this section, 'to continue to cohabit with such second husband or wife, in this State,' is a distinct and complete offence, and as much cognizable in the county where it occurs, as the crime of bigamy is in the county where the second marriage took place. . . . They are two distinct offences. To make out the case for unlawful cohabitation, the offence of bigamy must be proved by establishing both the marriages, and that at the time of the second the former had not been dissolved by divorce, or death, either actual or presumed. This new offence was created to prevent the scandal and evil example of permitting men and women to cohabit in any community of this State, upon an unlawful second marriage, when the first, as well as the last, or either, may have taken place in any other State or country." p. 546.

[2] 2 R. S. 687, 688, § 8, 10.

[3] People *v.* Mosher, 2 Parker, C. C. 195. For another view of the proper proceeding on facts like these, see post, § 593.

[4] Ante, § 585.

departments of the law, if the first marriage is merely voidable and not void, and if it is not dissolved by judicial sentence, it is sufficient to sustain the charge of polygamy when one of the parties to it enters into a second formal marriage.[1] What are voidable marriages, what are void, and what are in the full sense valid, are questions discussed in the author's work on the law of Marriage and Divorce, and they need not be entered into here.

§ 590. **The Second Marriage.** — Of course, the second marriage is not, like the first, a voidable or valid one, but it is void. The Irish court has held that it must be such as, but for the impediment of the first, would be good in law.[2] This doctrine the English tribunal has overruled; holding, in a case where by reason of too near an affinity the second marriage would be void under a statute if the first did not subsist, that still the offence of polygamy was committed. The ground on which the English court proceeded was, that, as the word "marry," in the penal part of the statute, could not have its first and true meaning as pointing to a valid union, and so must be bent by construction, it should receive such form in the interpretation as will best respond to the spirit and purposes of the enactment. "When it becomes necessary," said Cockburn, C. J. speaking for the whole court, "to seek the meaning of a term occurring in a statute, the true rule of construction 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 least 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

[1] 1 Bishop Mar. & Div. § 105, 116.

[2] Reg. v. Fanning, 17 Irish Com. Law, 289, 10 Cox, C. C. 411.

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 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."[1]

§ 591. **Continued.** — In anticipation of the doctrine thus finally reached by the English tribunal, it had been already held, by single judges, that, if parties to a polygamous marriage consent to make some slip in the form, such as would render it still invalid if the impediment of prior marriage did not exist, this will not avail the wrong-doer indicted for polygamy.[2] And suppose, as in the case finally adjudged, the second marriage would be void on the ground of too near consanguinity or affinity, were no former husband or wife living, it is still a violation of the statutes against polygamy.[3]

§ 592. **Continued. — How in United States.** — In our own country, this question has not been much considered. It is obvious, and it appears indeed to have been held, that, in those States in which the validity of a marriage does not depend on any precise forms, but mutual consent however informal will superinduce the marriage status, the second marriage need not, more than the first, be a formal one.[4] And it is the same where the marriage is by law good though celebrated by an unauthorized person: in this case, a polygamous marriage of

[1] Reg. *v.* Allen, Law Rep. 1 C. C. 367, 374, 375. 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, 29 Law J. N. S. P. M. & A. 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. c. 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 the form of marriage resorted to specially inapplicable to their individual case." p. 376.

[2] Rex *v.* Penson, 5 Car. & P. 412.

[3] Reg. *v.* Brawn, 1 Car. & K. 144.

[4] Hayes *v.* People, 5 Parker C. C. 325.

the like kind is sufficient to sustain the indictment.[1] It is sufficient also where the defendant, meaning seduction, conceals the fact of the prior marriage, intending to make his victim believe a valid marriage ceremony is being performed, and thus enters into what would be a valid marriage were it not for the existence of the prior marriage.[2] And it is the same whatever be the defect in the ceremony, if the defect is not such as in other cases would make the marriage invalid.[3] But it is perceived that these adjudged points leave untouched the broader question which has been agitated on the other side of the Atlantic. In principle, while much may be said in favor of the Irish as well as the English view, it seems to the writer that the following, which is not exactly either, but is more nearly like the English, ought to be accepted as satisfactory. The primary purpose of the statute was, as indicated by the Irish decision, to make that indictable which would be a valid marriage but for the existence of the prior matrimonial union; but the inducement to this primary purpose was to prevent the public exhibition of a breach of the order and decency which the matrimonial laws were intended to establish. Whatever, therefore, constitutes a *practical* marriage, in distinction from a mere intentional and proclaimed illicit cohabiting together by the parties, such as is itself indictable under another head,[4] is sufficient in violation of the statute against polygamy. It being understood that the marriage which the statute was enacted to punish was not meant to be such as would be binding on the parties and third persons as marriage, and thus superinduce the status, we may here resort to the exposition of the English judges, and draw thence the result, that any thing which the community, prompted by the acts of the parties, accepts, in ignorance of the fact of the prior union, as marriage, comes within the prohibition.

§ 593. **Continued — Marriage by Cohabitation.** — If a man and woman, having in a foreign country entered into a marriage which they meant for valid, while really it was invalid by reason of some defect of form required by the law

[1] Robinson *v.* Commonwealth, 6 Bush, Ky. 309.

[2] Hayes *v.* People, 25 N. Y. 390.

[3] Carmichael *v.* The State, 12 Ohio State, 553.

[4] Crim. Law, I. § 38, 501, 502.

of the place, should then come and reside in one of those States of our Union in which mere mutual consent without formal solemnization makes the union matrimonial, and should there live together as husband and wife, the mere living together with the actual or implied renewing of the matrimonal consent would be tantamount to a marriage ceremony in the new locality, and make them husband and wife *de jure*. Such is the clear and undoubted deduction of legal principle; and, though it may not rest so absolutely on authority as some other things, it is difficult to suppose that any court, if made to understand the proposition, could so far depart from sound doctrine as to decide the other way.[1] This being so, then, whatever view may be taken of the suggestions of the last section, if, in a case like the New York one mentioned a few sections back,[2] a party who has committed polygamy in a foreign country comes with the other party to the polygamous marriage into one of these States of our Union, and there the two live together as husband and wife, holding themselves out to be such, they do what would make them married persons *de jure* but for the prior marriage, and are therefore, on principle, indictable for polygamy in the new locality.[3] The New York case, thus alluded to, possessed the elements of fact necessary to make this point available against the defendant; but they were not embraced in the indictment or brought in legal form to the attention of the court, therefore the case is not an adjudication adverse to this view. In England, and in States whose matrimonial laws, like the English, require a formal solemnization to constitute marriage, this question could not arise.

§ 594. **How as to the Party competent to marry.** — In terms, the statutes which we are considering — for the most part, not quite all of them — make punishable only the party to the polygamous marriage in whose case the impediment exists. How is it, in point of law, with the other party? If this party did not know of the existing impediment, then the principle, that, in respect of crime, one must be judged of by the facts as

[1] 1 Bishop Mar. & Div. § 227, 229, 246–252, 266, 457, 458, 504, and particularly 508, 511.

[2] Ante, § 588.

[3] And see, as illustrative, Crim. Law, 5th ed. I. § 137–143.

they appear to him, and his act is not to be deemed criminal unless his mind were so,[1] would exempt him from punishment.[2] And as in most instances such party is a dupe of the other, and is not in law guilty, it is seldom in practice that he is included in the indictment. Still, this has been done; but, in the only case of this sort now before the writer, the indictment was drawn on Stat. 9 Geo. 4, c. 31, § 22,[3] which expressly makes punishable persons "counselling, aiding, or abetting such offender;" and the allegation was that of "counselling."[4] Now, by the ordinary principles of the common law, the morally guilty participant in a crime, being present at the very fact, aiding and abetting at it, is indictable equally with the other as a principal in the second degree.[5] This doctrine extends, as we have seen,[6] as well to statutory crimes as to crimes at the common law. And, upon this point, it has been adjudged that a third person, an unmarried man, who is present aiding and abetting a friend in committing polygamy, may be convicted thereof as principal in the second degree.[7] To this general doctrine, of the result of thus weaving by interpretation a statute and the common law together, there are two exceptions; the one, where the offence is quite small and not *malum in se*, there, as in the case of selling liquor without license, the person present and abetting the act is not generally deemed to be indictable;[8] the other, where the particular words of the statute are such as to lead to the inference that the general rule of interpretation is meant to be excluded.[9] Do these statutes of polygamy come within the general rule, or one of its exceptions? In the absence of adjudication, it is difficult to discover any principle which will bring them within an exception. The case, indeed, seems to be almost exactly like one mentioned by the author in his work on the Criminal Law, thus: The statute of 25 Edw. 3, stat. 5, c. 2, made it high treason "if a man do violate the king's companion, or

[1] Ante, § 351, 355–357.

[2] Reg. *v.* Brawn, 1 Car. & K. 144.

[3] Ante, § 581.

[4] Reg. *v.* Brawn, supra; mentioned, but briefly alluded to, as to this point, in Reg. *v.* Allen, Law Rep. 1 C. C. 367, 370.

[5] Crim. Law, 5th ed. I. § 648–654.

[6] Ante, § 139.

[7] Boggus *v.* The State, 34 Ga. 275.

[8] Crim. Law, 5th ed. I. § 657–659, 759–764.

[9] Ante, § 145. And see, as illustrative, Hatfield *v.* Gano, 15 Iowa, 177.

the king's eldest daughter unmarried, or the wife of the king's eldest son and heir;" and the construction was, that the woman, if consenting, was guilty as well as the man.[1] In Georgia, — and the same may be true in some of the other States, — this question is put to rest by the form of the provisions themselves, as follows: "If any person or persons within this State, being married, do or shall at any time hereafter marry any person or persons, the lawful husband or wife being alive, and knowing that such lawful husband or wife is living, such person or persons so offending shall," &c. "If any man or woman being unmarried shall knowingly marry the wife or husband of another person, such man or woman shall, on conviction, be punished," &c.[2]

§ 595. *The Exceptions:* —

Beyond Seas. — The statute of James contained, as we have seen,[3] the provision that its penalties should not extend "to any person or persons whose husband or wife shall be continually remaining beyond the seas for the space of seven years together." Upon this, the reader perceives, and so was the adjudged law, that, if the statutory absence beyond seas existed, and was continued seven years, the party marrying again was protected by this exception, even though the other party was, and was known to be, alive. In such a case, of course, the marriage for civil purposes would be void.[4] This obvious defect has been avoided in the later enactments. In Massachusetts the provision is, that the general inhibition "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 it is held that the last clause qualifies the first as well as the second; consequently, where an Englishman emigrated to Massachusetts leaving his wife behind, and married again here a year or so afterward, he was adjudged to have committed polygamy,

[1] Crim. Law, 5th ed. 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.

[2] Rev. Code, § 4457, 4458.

[3] Ante, § 579.

[4] 1 Hale P. C. 693; 1 East P. C. 466.

though the first wife had always been beyond sea, for he knew she was living within seven years.[1]

§ 596. **"Knowing," &c.** — The reader has observed the terms of the Massachusetts enactment as to the knowledge of the existence of the absent party. The language of the modern English statutes is of the like sort, "and shall not have been known by such person to be living within that time."[2] Now, suppose a man's wife has left him, and he is indifferent to her absence and so does not inquire after her, or purposely refuses to make inquiry, by reason of which he does not know that she is living, but might know if he chose to inquire, — then, if after seven years he marries again, does he commit the statutory offence? If it were a point on which the statute was silent, and the question was thereupon referred, as it should be, to the common law, the answer would be, that the mere carelessness about the matter, or, *a fortiori*, the wilful ignorance, was itself such an evil in the intent as to render him criminal the same as though he had actually known the woman to be living.[3] But the statute is not silent on this question of the intent; it uses the word "knowing," which refers directly to the state of the mind; and this word, like any other in a statute creating crimes, must be construed strictly, when it is relied on to subject a defendant to penal consequences.[4] Therefore, if a defendant did not in fact "know" the former husband or wife to be living, though he might have known had he chosen to inquire, the case falls within the exception of the statute, and he is to be acquitted.[5]

§ 597. **Other Points — Voluntary withdrawing — False Rumor.** — A question of a good deal of importance relating to these exceptions was discussed some chapters back.[6] Other questions, as respects the pleading and evidence, will be disposed of under our next sub-title. Still other questions re-

[1] Commonwealth *v.* Johnson, 10 Allen, 196.

[2] Stat. 24 & 25 Vict. c. 100, § 57; ante, § 581.

[3] Ante, § 351, 357, 358, 360, 362.

[4] Ante, § 190, 194 et seq.

[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. I think, however, that the doctrine of the text is certainly correct, and that in a sense it is sustained by the case cited, though not as absolutely as one might wish.

[6] Ante, § 356 et seq.

main, but the author has not now before him judicial decisions pointing to their solution. The reader, of course, will carefully consider the exact words employed in the statutes of his own State. Thus, in the Massachusetts exception above,[1] one clause covers the case of the married party having "*voluntarily withdrawn* from the other and remained absent for the space of seven years together;" and, for a defendant to avail himself of this exception, the fact must appear, not only that the husband and wife had lived separate during the seven years, but the case must be one in which the absent party "voluntarily withdrew" from the cohabitation; or, in other words, committed something like desertion.[2] In Pennsylvania, the act of March 13, 1815, having provided, that, if a husband or wife, *upon any false rumor in appearance well founded* of the death of the other, when such other has been absent two years, shall marry again, he or she shall not be liable to the pains of adultery, — it was ruled, that, to justify such second marriage by the wife, 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.[3]

II. *The Procedure.*

§ 598. *Indictment:* —

Observations — Form. — There is some difference in the phraseology and minuter provisions of the various statutes against polygamy. The pleader, in drawing the indictment, should have before him the statute on which the prosecution is to be founded, and pursue carefully its terms.[4] Archbold's form is based on Stat. 9 Geo. 4, c. 31, § 22.[5] It is as follows: —

"That J. S., late of the parish of B, in the county of M, laborer, on the first day of April, in the year, &c., at the parish of C, in the county of D, did marry one A. C., spinster, and her the said A. C. then and there had for his wife; and that the said J. S. afterwards, and whilst he was so married to the

[1] Ante, § 595.

[2] See the adultery case of Commonwealth *v.* Thompson, 11 Allen, 23, commented on as respects another view of it, ante, § 357.

[3] Commonwealth *v.* Smith, Oyer and Terminer, Philadelphia, May, 1816, before Rush, President (pamphlet, p. 229), 1 Whart. Dig. 826.

[4] Ante, § 384 et seq.

[5] Ante, § 581.

said A. C. as aforesaid, to wit, on the third day of August, in the year, &c., at the parish of F, in the county of G, feloniously and unlawfully did marry and take to wife one M. Y., and to her the said M. Y. was then and there married, the said A. C., his former wife, being then alive; against the form of the statute in such case made and provided, and against the peace of our lady the now queen, her crown, and dignity. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the tenth day of August, in the year last aforesaid, at the said parish of B, in the county of M aforesaid, was apprehended [*or*, that the said J. S. now is in custody at the said parish of B, in the county of M aforesaid] for the felony aforesaid."[1]

§ 599. **Apprehension of Prisoner.** — Archbold adds: "The averment of the prisoner's apprehension is only necessary where the second marriage did not take place in the county where the defendant is indicted; but, in such case, it has been held to be essential.[2] So it was held also, by a majority of the judges, that, where the indictment is found in a different county from that in which the offence was committed, it must allege that the prisoner was in custody, at the time of the finding of the inquisition, in the county of the finding."[3]

§ 600. **Indiana Statute and Form.** — The Indiana statute is as follows: "If any person, being married, shall marry again, the former husband or wife being alive, and the bond of matrimony still undissolved, and no legal presumption of death having arisen, such person so offending shall be deemed guilty of bigamy, and, upon conviction thereof, may," &c. And the following form of the indictment is adjudged to be sufficient: —

"That A. B., on, &c., at, &c., being married to E. B. and she being alive and the bond of such marriage being still undissolved, and no legal presumption of the death of said E. B. having arisen, did unlawfully and feloniously marry another woman, to wit, one E. L., contrary," &c.[4]

§ 601. **Allegation of First Marriage.** — There are differences of opinion as to how much of allegation is required in these cases. One question relates to the first marriage. It is perceived that the foregoing English form sets it out, with time and place, and the maiden name of the woman, while the Indiana form does not. All the English forms which the

[1] Archb. Crim. Pl. & Ev. 10th Lond. ed. 629.

[2] Rex *v.* Fraser, 1 Moody, 407.

[3] Reg. *v.* Whiley, 2 Moody, 186.

[4] Bicknell Crim. Pr. 483, referring, for the statute, to Felony Act, § 46, 2 G. & H. 452; for correctness of the form, to Hutchins *v.* The State, 28 Ind. 34.

author has examined contain this allegation;[1] and probably the English tribunals have never had occasion to consider whether less will answer or not. The necessity of it seems to be taken for granted. And in a jury case it was ruled by Maule, J. that, where there is a discrepancy between the Christian name of the prisoner's first wife, as laid in the indictment, and as stated in the copy of the certificate produced to prove the first marriage, there must be an acquittal, unless the further proofs explain the discrepancy, or it appears from them that she was known by both names.[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]

§ 602. **Continued. — How in this Country.** — There may be some difference, as to this averment, whether the marriage took place at home or in another State or country. If there is a difference, the allegation of the foreign marriage may undoubtedly be less specific as to time, place, and the like, than

[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 Stat. Jac. 1, c. 11 (ante, § 579), in 1663, and acquitted. It is as follows: —

"That she the said Mary Moders, late of London, Spinster, othrewise 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," &c.

There was no counsel for the prisoner, and no question was made as to the sufficiency of the indictment. Rex *v.* Moders, 6 Howell St. Tr. 273. 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 Howell St. Tr. 355, 371.

[2] Reg. *v.* Gooding, Car. & M. 297.

[3] 3 Chit. Crim. Law, 719, note.

[4] 1 East P. C. 469.

[5] Stark. 62.

[6] Stark. 434, note.

is required where the marriage was in our own State. Still, even in a case where it was in another State, the Vermont court held that the place of its celebration must be alleged in the indictment. Said Redfield, C. J.: "It seems to be regarded as a uniform rule of pleading, applicable to indictments, that every traversable fact must be directly alleged, with time and place. The first marriage, in prosecutions for bigamy, is always traversable, and must be established by positive proof of the very fact of marriage, if such proof is attainable. It is not claimed that such fact is here so alleged, the time and place being both blank."[1] The North Carolina court, on the other hand, held that the place of the first marriage need not be alleged.[2] And in Indiana it was adjudged, that neither time and place nor the maiden name of the first wife need be set out, but the general allegation that the defendant "did unlawfully, feloniously, and knowingly, *being married*, marry," &c. was sufficient.[3] The like has been adjudged in Kentucky.[4] If we inquire what, in principle,

[1] The State *v.* La Bore, 26 Vt. 765, 767.

[2] The State *v.* Bray, 13 Ire. 289.

[3] Hutchins *v.* The State, 28 Ind. 34. Frazer, J. observing: "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. The State *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, 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. The State *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 ante, § 421, 422.

[4] Commonwealth *v.* Whaley, 6 Bush, 266.

should be the doctrine, we find that the case is one which, at the common law, might be decided either way. If the particular form of the allegation should be adjudged necessary, the adjudication would be supported by various analogies in the common-law rules of criminal pleading; and, if the contrary should be adjudged, analogies also might be found to support the adjudication. But, if we turn to guaranties to be found generally in the written constitutions of our States, we shall find, that by them the particular allegation, or something approximating toward it, becomes indispensable. Though the simple averment that the defendant was a married person when he entered into the second marriage covers, in terms, the full statutory inhibition as to this part of the case, still it leaves open to the prosecutor every sort and manner of proof, and gives to the prisoner no notice of any particular matter to which he is to direct his defence, upon this which is really in most instances the most important and delicate part of the controversy.[1] Suppose the provision of the constitution is, as in some of the States, that "no subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him;" then, in reason, though by the terms of the statute the offence consists, not in the first marriage, but the second, yet it does consist in the second, the *former one existing*, and the first is as much in controversy as the second. If, then, the first may be charged in this general way, the second may be; and the whole becomes a mere accusation, without any particulars, that the defendant is guilty of polygamy. Surely this is not setting out the offence "fully and plainly, substantially and formally." Indeed, the very idea of such a constitutional guaranty is, that the things *special to the particular instance* shall be described, instead of a general accusation of having committed a crime bearing a particular name.[2]

§ 603. **Second Marriage.** — It has never been contended that it is adequate to charge the second marriage in the general way, but it is always set out with time, place, and name, as in the foregoing forms. And in a Vermont case, where the in-

[1] Ante, § 373.

[2] See Crim. Proced. 2d ed. I. § 95–112, and particularly 101, 104, 108–111.

dictment was, not for polygamy proper, but for unlawfully continuing to cohabit, under a statute like the Tennessee one before quoted,[1] — the provision being, "if any person, who has a former husband or wife living, shall marry another person, or shall continue to cohabit with such second husband or wife in this State, he shall, except, &c., be deemed guilty of the crime of polygamy, and shall," &c., — it was held, that, if the second marriage was celebrated in another State, the indictment must charge this second marriage to have been unlawful in the State in which it was had; and, if this allegation is omitted, judgment will, on motion, be arrested.[2] But the contrary was held in Minnesota.[3] The true view (and perhaps an examination of the cases will show them not to be adverse to this) plainly is, that the second marriage must appear in the allegations, either by direct averment or by inference of law from what is stated, to be unlawful in the State in which the prosecution is being carried on. One of the methods of making this appear is by alleging its unlawfulness at the place of its celebration, but there are other methods. For example, if a first marriage is charged, and then a second is charged to have been contracted abroad while the first subsisted, this second is invalid with us, and the case is brought within the statute, whether it was lawful or unlawful at the place of its celebration.[4]

§ 604. **Continued. — Variance.** — It being necessary to allege

[1] Ante, § 588.

[2] The State *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 offence 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 offence 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 offence 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." p. 573.

[3] The State *v.* Johnson, 12 Minn. 476.

[4] 1 Bishop Mar. & Div. § 372, 376; Hyde *v.* Hyde, Law Rep. 1 P. & M. 130; ante, § 585.

the second marriage, it, of course, must be so done as to conform in its descriptive matter with the proofs, and thus avoid a variance. Consequently, where, in an English case, the second wife was described as Elizabeth Chant, *widow*, and at the trial it appeared she was not a widow, the variance was held to be fatal. The judges were of opinion, that no addition to her name was necessary; but, since it was given, it became a part of the description of the person, and must be proved as laid.[1]

§ 605. **Exceptions or Provisos. — Negatived.** — It may be a question with some pleaders, whether the indictment should not negative the matter contained in the proviso of the statute. It is seen, that the form given above from Archbold, which corresponds with other English forms in this particular, does not. The general doctrine relating to this subject is discussed in the author's work on Criminal Procedure;[2] and it is there seen, that there are some questions connected with it upon which the authorities are not quite distinct, or, at least, not quite clear. But, on the whole, it may be deemed to be the better view, that whether an exception or proviso requires to be negatived does not depend upon its being called by the one or the other of these two names, or upon its being in the same or a subsequent section[3] with the principal provision. The language of the statute and the particular reason of the special provision should both be taken into view; and, if the exception or proviso, as thus seen, is properly mere matter of defence, it need not be negatived, otherwise it must be.

§ 606. **Continued.** — Thus, applying this doctrine to the particular matter in hand, where the statute is drawn in the Indiana form before quoted,[4] namely, "if any person, being married, shall marry again, the former husband or wife being alive, and the bond of matrimony still undissolved, and no legal presumption of death having arisen, such person," &c., no offence is affirmatively shown within the terms of the provision, neither are the statutory words adhered to,[5] unless the exceptions are negatived, therefore they must be negatived.

[1] Rex *v.* Deeley, 1 Moody, 303, 4 Car. & P. 579.

[2] Crim. Proced. 2d ed. I. § 631–642.

[3] Ante, § 66, 67.

[4] Ante, § 600.

[5] Crim. Proced. 2d ed. I. § 636, 637.

The reason of a proposition like this as commonly stated in the books is, in language not quite intelligible, that the exceptions are in the enacting clause.[1] But where a statute is drawn in the English form before quoted,[2] — speaking now of this particular offence, and not saying how it would be if the offence was of a different nature, — the full affirmative crime appears when the indictment covers the main clause, and does not negative the proviso; therefore, on this statute, the proviso need not be negatived. What is there set down is mere matter of defence.[3] "If it is reasonable," said Lord Denman, C. J. sitting in the English court, "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."[4] And, in North Carolina, if the indictment charges that the first wife was alive at the time of the second marriage, this is held to be sufficient; and it need not be added, that the first marriage was then subsisting. Said the learned judge: "All the precedents produced are so, except that of the Duchess of Kingston's Case."[5]

§ 607. *Evidence:* —

General View. — In the author's work on the law of Marriage and Divorce, not as it appeared in one-volume editions, but as it now appears enlarged into two volumes, there is given a full discussion of the law of the evidence of marriage, not alone in matrimonial causes, but in all judicial causes, before all tribunals, and relating to every issue, both of a civil and criminal sort. After that full discussion, covering the whole ground of inquiry, it seems needless to enter into repetitions here. Still a few points may profitably be stated.

§ 608. **First Marriage.** — The pressure, in point of evidence, in these cases, generally relates to the first marriage. It was so in what is believed to be the earliest reported case, already referred to in a note.[6] There a witness swore, that he was present when the ceremony was performed, and gave away

[1] Bicknell Crim. Pr. 86, 483, referring to 4 Ind. 601; Crim. Proced. 2d ed. I. § 635.

[2] Ante, § 581.

[3] Crim. Proced. 2d ed. I. § 638; The State *v.* Abbey, 29 Vt. 60; The State *v.* Williams, 20 Iowa, 98; Commonwealth *v.* Whaley, 6 Bush, 266; The State *v.* Johnson, 12 Minn. 476.

[4] Murray *v.* Reg., 7 Q. B. 700, 706.

[5] The State *v.* Norman, 2 Dev. 222.

[6] Ante, § 601.

the defendant as bride; but, though his testimony was well enough in form, the jury did not believe him. There is a great difference between the proof required of this first marriage, and the proof of marriage in most other issues. Thus, in general, *semper præsumitur pro matrimonio*, every intendment of the law is in favor of the marriage.[1] And the reasons are, that marriage is a beneficent institution and therefore to be cherished, that virtue rather than vice is always to be inferred from facts which are susceptible of a double meaning; and that, where parties are conducting in a way which would be unlawful if they were not married, but lawful on the assumption of marriage, the presumption of innocence lends also its aid to the more general presumption which favors matrimony. But where, in a case of polygamy, it is sought to prove a prior subsisting marriage, all the weight of presumption which before was in favor of matrimony, presses against this allegation of prior marriage. This prior marriage becomes, more than any other assumed fact in the case, the *corpus delicti*,[2] to be established by something like direct evidence.

§ 609. **Continued.** — Now, out of this condition of the law, which, the reader perceives, exists equally in natural reason as in judicial authority, there has sprung up a great deal of misapprehension. It has been laid down — and correctly, if the expression is rightly understood — that, in these polygamy cases and in one or two others, *a fact of marriage*, in distinction from what comes from mere presumption arising out of cohabitation, must be proved.[3] Now, for an examination of this question in its various aspects, with the authorities, the reader is referred to the author's work on the law of Marriage and Divorce. But, in reason, and according to what the author deems to be the better authority on a question concerning which the judicial utterances are in all sorts of discord, this fact of marriage, which, as a sort of *corpus delicti*, must be clearly made out, may be established by any evidence, even circumstantial, which, *not resting on presumption* (for the

[1] 1 Bishop Mar. & Div. § 457.

[2] Crim. Proced. 2d ed. I. § 1070, 1071.

[3] 1 Bishop Mar. & Div. § 482 et seq. Some of the leading English cases, to this point, are Morris *v.* Miller, 4 Bur. 2057, 1 W. Bl. 632 (as to which see Mar. & Div. supra, § 490–492); Birt *v.* Barlow, 1 Doug. 170; Hemmings *v.* Smith, 4 Doug. 33.

presumptions are all against the marriage), is, on general principles, admissible, and sufficient to satisfy the jury after overcoming the adverse presumptions. Record evidence, and the evidence of witnesses present at the ceremony, will be required where these can be had. But where the circumstances of the particular case show that these cannot be had, and in all cases as confirmatory of them, and in the proper cases as even dispensing with them, it is competent to show the admissions of the party, or his prior cohabitation under pretence of marriage, and various other things of the like import. On the other hand, also, where a statute has, as in many of our States, directed that such evidence shall be received, the statute does not annul the prior legal presumptions against the first marriage; and, in spite of the statute, the proof of the first marriage in a polygamy case differs from the proof of it in most civil causes.[1] But, for more extended views on these points, with the authorities, the reader is referred to the work on Marriage and Divorce.

§ 610. **Continued — The Usual Proof.** — The admissibility and effect of marriage records, of examined copies of the record, of mere certificates by the officiating person to the fact of the marriage, and the like, were considered in the author's other work.[2] The common course of proof is to present the record evidence, and with it evidence to identify the parties; and these are, *prima facie*, sufficient.[3] The testimony of persons present at the marriage is good evidence without the record; though the absence of the record may, under some circumstances, create suspicion.[4] But testimony of this sort to a foreign marriage, by a non-professional witness, has been held in England to be insufficient without proof of the foreign law.[5] On the point of identity, Willes, J. in one case, permitted a photographic likeness of the first husband to be shown to the witnesses present at the first marriage.[6] But the particulars on all these points, with others liable to arise, are best seen in the author's other work.

[1] Case *v.* Case, 17 Cal. 598.

[2] 1 Bishop Mar. & Div. § 460 et seq.

[3] Reg. *v.* Hawes, 1 Den. C. C. 270.

[4] 1 Bishop Mar. & Div. § 494–496; Rex *v.* Moders, 6 Howell St. Tr. 273; ante, § 601, note, 608.

[5] Reg. *v.* Povey, Dears. 32, 6 Cox C. C. 83.

[6] Reg. *v.* Tolson, 4 Fost. & F. 103.

§ 611. **Whether First Husband or Wife alive at Second Marriage.** — Concerning one further question, the practitioner should be on his guard. Suppose the first husband or wife is not directly shown to have been alive at the time of the solemnization of the second marriage, but at some point of time anterior thereto, under what circumstances is death to be presumed? If the absence had continued for seven years, the law, both by its common-law rules and by the statute, presumes death; but, even then, there is no presumption as to the particular time when it took place, especially there is none that life continued up to within a day of the expiration of the seven years. Now, under the combined operation of the polygamy statute and of the common law, if a man's wife abandons him, and a year afterward, having no information whether she is dead or alive, he marries another woman, he, in point of law, does not commit polygamy should it turn out that she is really dead; but, should it turn out that she is alive, he does. Then, suppose he is indicted for polygamy, and, at the trial, there is no evidence whether she is dead or alive, except that she was alive a year before the second marriage, — what is the result? If, at the time of the trial, seven years have elapsed, and the woman has not been heard from, the law presumes that, *now*, she *is* dead, but it has no presumption as to the time of the death. The law, however, presumes the defendant to be innocent; and it would seem, on this state of the case, that, as there is no presumption of the life having continued even a year after the separation, the court should direct an acquittal. If, on the other hand, seven years have not elapsed at the time of the trial, then the presumptions of life and of innocence operate together, the one for the defendant and the other against him. They neutralize each other, and the jury must act on other presumptions and evidence, and decide, as matter of fact, between them all. Perhaps there is not sufficient authority carrying the point in the former supposed instance to the full extent there intimated; but, at least, a verdict of acquittal in such a case would, on the authorities, and certainly in reason, be preferred. This question, with others of the like sort, is dis-

cussed in the author's other work.[1] In the latest English enunciation which he has seen on this subject, the *dicta* do not come quite to the point thus put as to the former supposed instance, but they do as to the latter. The case is as follows: In 1843, a married pair separated. In 1847, the woman, describing herself as spinster, married again. In 1849, she was tried for polygamy, when nothing appeared to have been heard of the first husband after the separation. And the Court for Crown Cases Reserved held it to be wrong to direct the jury, "that, there being no circumstances leading to any reasonable inference that he died, Victor [the first husband] must be presumed to have been living at the date of the second marriage." Lush, J. speaking for the whole court, observed: "In an indictment for bigamy, it is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage. That is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way."[2]

§ 612. **Second Marriage.** — There are no special difficulties relating to the proof of the second marriage. What is said of the proof of the first marriage, together with some points stated in preceding sections,[3] will suffice, except as to what follows.

§ 613. **The Two Husbands or Wives as Witnesses.** — It will occur to the reader, that, according to familiar rules of evi-

[1] 1 Bishop Mar. & Div. § 452–456.

[2] Reg. *v.* Lumley, Law Rep. 1 C. C. 196.

[3] Ante, § 586, 588, 590–593.

dence, if the theory of the prosecution in these cases is true, the first husband or wife, being lawfully married, is not a competent witness either for or against the defendant; but the second is competent, because the marriage is void. Yet, on the other hand, if the defendant denies the first marriage and admits the second, and his theory is right, the first supposed husband or wife is a good witness, while the second is not. Now, the books say "that," in the language of Leach, one of the editors of Hawkins, "the first and true wife cannot be admitted to give evidence against her husband; and this rule has been so strictly taken, that even an affidavit to postpone the trial, made by the first wife, has been rejected; but it is agreed that the second woman is a competent witness, even to prove the marriage, for she is not his wife so much as *de facto*."[1] Thus, to repeat the rule, the second wife is competent;[2] but the first is not, even with the husband's consent.[3] But it is plain that this is putting the case on the theory of the prosecution. The books, when more closely examined, present much of confusion, and little else, on the point.[4] If we apply established principles to the question, it stands thus. It is for the judge to admit or reject a witness, and it must be done before the cause goes to the jury; this being so, if any person is presented as a witness, such person is *prima facie* competent. If, according to the general course of things in a court, the party against whom the witness is called objects, then testimony is introduced to the judge, usually by an examination of the person offered on the *voir dire;* and he decides, according to the testimony as it appears to him, whether or not the fact of the legal impediment is proved, and receives or excludes the witness as the combined law and proven fact may then require. In the actual trial of a polygamy case, however, some things are necessarily admitted, or proved otherwise than on the *voir dire*, by the prosecutor. His witnesses are first introduced; and, among them, cannot be the first husband or wife, because both the pleadings and the

[1] 1 Hawk. P. C. Curw. ed. 687, § 8.

[2] Finney *v.* The State, 3 Head. 544; The State *v.* Patterson, 2 Ire. 346.

[3] Wilson *v.* Hill, 2 Beasley, 143.

[4] See, among other places, 1 Greenl. Ev. § 339; 3 Ib. § 206, and the various books cited by this author; Wakefield's Case, 2 Lewin, 279; Peat's Case, 2 Lewin, 288, and a note by the reporter.

opening to the jury affirm the marriage, and the judge has no occasion to consider the question of fact. So the prosecutor goes on with his testimony, but does not, because with his admissions before the court he cannot, call the first husband or wife. If, after the first marriage is established to the satisfaction of the judge, he then offers the second husband or wife, this person is admitted; but not otherwise, or until then. In other words, until the judge is satisfied with the *prima facie* proof of the first marriage, he cannot admit as a witness a party to the second marriage, the fact of which is averred and acknowledged before him. When the prisoner comes to his defence, if a *prima facie* case has not been made out against him, he has no occasion for witnesses; if a *prima facie* case has been made out, it is generally too late to change the previous rulings. Still, circumstances might be imagined in which the court would, on due proofs, act upon the defendant's theory, and admit the first alleged husband or wife and exclude the second.[1]

CHAPTER XXVI.

ABDUCTION OF WOMEN.

614, 615. Introduction.
616–621. Law of the Offence.
622–624. The Procedure.

§ 614. **General View.** — The subject of this chapter is closely related to Seduction of Women, to be treated of in the next chapter. As distinguished from seduction, it is of but little practical importance in the United States. In England, abduction is more a living offence; while with us it is, at least, desirable that the offence should be understood.

§ 615. **How the Chapter divided.** — We shall consider, I. The Law of the Offence; II. The Procedure.

[1] In Lewin's Reports we have the following: "The question in this case was, whether the reputed first wife of the prisoner was a competent witness to prove that her marriage with the prisoner was illegal, and that she was not his wife. Alderson, B. held that she was not." Peat's Case, 2 Lewin, 111.

I. *The Law of the Offence.*

§ 616. **Stat. 3 Hen. 7 — 39 Eliz.** — An old English statute, 3 Hen. 7, c. 2, after reciting "that women — as well maidens as widows and wives, having substances, some in goods movable and some in lands and tenements, and some being heirs apparent unto their ancestors — 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; to the great displeasure of God," &c., enacts, "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; and that such misdoers, takers, and procurators to the same, and receitors knowing the said offence in form aforesaid, be henceforth reputed and judged as principal felons."[1] Stat. 39 Eliz. c. 9, takes away clergy from the principals and procurers before the fact.[2]

§ 617. **How construed.** — In construing this statute the courts have held, that the word "so," in the body of it, makes the preamble substantially a part of the act.[3] The taking must be for lucre,[4] and the woman must either be an heir apparent, or have property.[5] Likewise force must be used either at the taking, or at the marriage or defilement, but not necessarily at both;[6] yet both force and a marriage or defilement must occur in the county in which the indictment is found;[7] a taking not being sufficient unless followed by one of these.[8] When the offence is complete, a consent given by the woman afterward will not extinguish it.[9] The receivers of the woman are

[1] For this statute, and expositions thereon, see 1 Hawk. P. C. Curw. ed. p. 123 et seq. And see Crim. Law, 5th ed. I. 555.

[2] Baker *v.* Hall, 12 Co. 100.

[3] Burton *v.* Morris, Hob. 182, 183; Case of Stealing Women, 12 Co. 20.

[4] 4 Bl. Com. 208. And see Reg. *v.* Barratt, 9 Car. & P. 387.

[5] Baker *v.* Hall, 12 Co. 100; 1 Hawk. P. C. Curw. ed. p. 124, § 4.

[6] 4 Bl. Com. 208, 209.

[7] 1 Stark. Crim. Plead. 2d ed. 2; 2 East P. C. 453; Fulwood's Case, Cro. Car. 488.

[8] Baker *v.* Hall, 12 Co. 100; Case of Stealing Women, 12 Co. 20.

[9] Reg *v.* Swanson, 7 Mod. 101, 102. And see Crim. Law, 5th ed. I. § 733.

principals; those who receive the takers of her are only accessories after the fact.[1]

§ 618. **Whether Common Law with us.** — The material question for us is, whether this statute is common law in the United States. Upon this question we have no decisions.[2] The Pennsylvania judges, in their report to the legislature of English statutes in force in that State, omitted this one;[3] and Kilty mentions it among the acts not found applicable in Maryland.[4] The matter evidently stands thus: It was as applicable in principle to our colonies as to the mother country; but, owing to the poverty of the early settlers, and to other local causes, the occasions did not arise here for its practical enforcement. This want of occasion is not generally held, by our tribunals, sufficient to exclude any particular provision of English law from among the provisions adopted by us; yet, on such a subject, judges are a little uncertain and variant in their determinations.

§ 619. **How, at Common Law, aside from this Statute.** — Aside from this statute, the acts it prohibits amount to the common-law misdemeanor of kidnapping.[5] An attempt, therefore, to commit this offence, though it does not succeed, is indictable. Thus, an English case lays it down, that attempting to carry away forcibly a woman of great fortune is a great misdemeanor

[1] Baker *v.* Hall, 12 Co. 100; Case of Stealing Women, 12 Co. 20.

[2] Crim. Law, 5th ed. I. § 555.

[3] Report of Judges, 3 Binn. App. 595, 617.

[4] Kilty Report of Statutes, 67. He says: "This offence was generally known in England under the term of stealing an heiress. The statute must be considered in connection with 39 Eliz. c. 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 offence 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 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 & 5 Ph. & M. c. 8 [this statute will be considered under the title Seduction], for what is termed an inferior degree of the same kind of offence."

[5] That is, supposing a transportation to a foreign country not to be an ingredient in the offence of kidnapping. See Crim. Law, 5th ed. II. tit. Kidnapping, § 746 et seq.

at the common law; for "sure," says Lord Holt, "this concerns all the people in England who would dispose of their children well." [1]

§ 620. **How at present in England.** — In England, later statutory provisions seem to have covered this entire subject, leaving little space for the operation of prior written or unwritten laws.[2] There are not, in our country, sufficient analogous provisions, not speaking of seduction, to render it important here to insert the modern statutes and their expositions.

§ 621. **How in the United States.** — We have, however, provisions analogous to some of the modern English ones treated of in England under the title Abduction; but they will be better considered in the next chapter under the title Seduction.

II. *The Procedure.*

§ 622. **Indictment.** — It is not probable that any reader will have occasion to draw or consider an indictment on the above recited statute of Hen. 7, c. 2; yet, for various purposes, it may become important to consider how the form should be, therefore Chitty's observations with his form [3] will be here inserted. He says: "The indictment must set forth that the woman taken away had lands, or goods, or that she was heir apparent, as well as that she was actually married or defiled; because these things are set forth in the preamble to which the enacting clause refers. The place and manner of taking must also be set forth in the proceedings.[4] It must also be alleged, that the taking was for lucre, to bring it within the meaning of the statute.[5] 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.[6] It seems, however, to be both safe

[1] Rex *v.* Pigot, Holt, 758.

[2] Stat. 24 & 25 Vict. c. 100, § 53–55; c. 95, repealing prior statutes. See Greaves Crim. Law Acts, 78; Reg. *v.* Burrell, Leigh & C. 354; Reg. *v.* Timmins, Bell C. C. 276.

[3] 3 Chit. Crim. Law, 818. He says: "See other precedents Cro. C. C. 475; Trem. P. C. 34; Pla. Cor. 174; West. 224; Rast. Ent. 487; Stark. 432. And see the indictment on which Sweeden and his assistants were convicted for carrying away Miss Rawlins, and the Proceedings thereon, 5 Harg. St. Tr. 465 [Reg. *v.* Bayton, 14 Howell St. Tr. 597.]"

[4] Cro. Car. 484.

[5] Hob. 182; 1 Hawk. P. C. c. 41, § 5.

[6] Cro. Car. 489; 1 Hawk. P. C. c. 41, § 6.

and usual to insert it."[1] The form furnished by this author is as follows: —

"That A. B., late of, &c., on, &c., at, &c., in and upon one M. W. spinster, then and yet being under the age of fourteen years, and a maid, and only daughter and heir of P. W. then lately deceased, she the said M. W. then and there having substance in movable goods to the value of one thousand pounds of lawful money of Great Britain, and in lands and tenements to the value of fifteen hundred pounds by the year of like lawful money,[2] did make an assault, and her the said M. then and there did put in great danger of her life, and her the said M. with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, feloniously, and against the will of her the said M., violently did take, force, and convey away, with intention that he the said A. B. for lucre, and the sake of such her substance, feloniously should marry and have the said M. to wife;[3] and that the said A. B. afterwards, to wit, on, &c., by the assent, procurement, and abetment of [the said] A. M., J. J. and C. the wife of F. C. late of, &c., gentleman, and W. C. late of the same parish and county, clerk, with force and arms, at, &c., feloniously, and for lucre of the said substance, of the said M. W. did marry, and had the said M. W. to wife; against the form of the statute, &c., and against the peace, &c. And the jurors, &c., do further present, that the said A. M., J. J., C. the wife of F. C., and W. C. on the said fourteenth day of November, in the year aforesaid, at, &c., in the county of —— aforesaid, with force and arms, knowingly, and feloniously were assisting, aiding, procuring, assenting, abetting, and maintaining the aforesaid A. B. in doing and committing the felony aforesaid, against the form of the statute, &c., and against the peace," &c.

§ 623. **Witness.** — If the woman is forcibly married, and she does not afterward ratify the marriage by a voluntary cohabitation or in any other way, this does not make her in law the wife of the man between whom and her the formal ceremony was had;[4] therefore she may be a witness against him on his trial for the abduction.[5] So, also, on an informa-

[1] 1 Hale P. C. 660.

[2] This allegation is necessary, Cro. Car. 484.

[3] It is safest to insert this allegation, Cro. Car. 489, 1 Hale, 660.

[4] 1 Bishop Mar. & Div. § 210 et seq.

[5] Wakefield's Case, 2 Townsend St. Tr. 112, 2 Lewin, 279, 1 Bishop Mar. & Div. § 196 and note; Fulwood's Case, 1 Hale P. C. 660, 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 and 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 be held to make the marriage good by reason of the subsequent consent implied in the voluntary cohabitation. 1 Bishop Mar. & Div. § 214. Still, it might be a question whether or not she should 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 p. 287, 288 of Lewin.

tion for attempting to debauch a young lady, she was very properly admitted to testify in the defendant's favor.[1]

§ 624. **Conclusion.** — In these cases, as in all others, questions will arise involving general considerations of pleading and evidence, not advisable to be entered into in such a connection as this.[2]

CHAPTER XXVII.

SEDUCTION OF WOMEN.

625, 626. Introduction.
627–643. Law of the Offence.
644–652. The Procedure.

§ 625. **Relations of the Subject — Obscurity — Conspiracy.** — We have already seen, that the subjects of this chapter and the last are closely connected. Indeed, the line dividing the two is not run by all writers in the same place; and, in some particulars, what one would consider as belonging to the one is looked upon by others as pertaining to the other. Then, as a question of the common law, the doctrines of this chapter lie a little in obscurity. A conspiracy to bring about the seduction of a young woman, or even — suppose she is under guardianship, or under the legal constraint of her parents, being a minor — to procure her marriage without the consent of those who are legally entitled to forbid the nuptials, is plainly, both in England and this country, indictable at the common law.[3] But conspiracies, as the reader is aware, rest on grounds peculiar to themselves.

[1] Gray's Case, Skin. 81.

[2] See Reg. *v.* Barratt, 9 Car. & P. 387; The State *v.* Tidwell, 5 Strob. 1.

[3] Crim. Law, 5th ed. II. § 235; Twitchell *v.* Commonwealth, 9 Barr, 211; Anderson *v.* Commonwealth, 5 Rand, 627; Respublica *v.* Hevice, 2 Yates, 114; Miffin *v.* Commonwealth, 5 Watts & S. 461; 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, 5th ed. I. § 501, 502, 767, 768; Grey's Case, 9 Howell St. Tr. 127, Skin. 81.

§ 626. **How the Chapter divided.** — What is to be further said in this chapter will be divided into, I. The Law of the Offence; II. The Procedure.

I. *The Law of the Offence.*

§ 627. **Stat. 4 & 5 Phil. & M.** — In England, in the year 1557, the statute of 4 & 5 Phil. & M. c. 8, was passed. After reciting, § 1, "that maidens and women, children of noblemen, gentlemen, and others, as well such as be heirs apparent to their ancestors, as others, having left unto them, by their father or other ancestor and friends, lands, tenements, and hereditaments, or other great substances in goods and chattels movable, for and to the intent to advance them in marriage somewhat like according to their degrees and as might be most for their surety and comfort, as well for themselves as of all other their friends and kinsfolks, be oftentimes, unawares to their said friends or kinsfolks, by flattery, trifling gifts, and fair promises, of many unthrifty and light personages, and thereto by the entreaty of persons of lewd demeanor, and others that for rewards buy and sell the said maidens and children, secretly allured and won to contract matrimony with the said unthrifty and light personages, and thereupon either with slight or force oftentimes to be taken and conveyed away from their said parents, friends, or kinsfolks, to the high displeasure of Almighty God, disparagement of the said children, and the extreme continual heaviness of all their friends; which ungodly dealing, for lack of wholesome laws to the redress thereof, remaineth a great, familiar, and common mischief in this our commonwealth," — it enacts, § 2, "That it shall not be lawful to any person or persons 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 lifetime 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] And the statute proceeds to add various other provisions, and attach penalties for their violation.

§ 628. **Whether Common Law in our States.** — 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 there it is construed as not being restricted to heiresses and persons of quality.[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]

§ 629. **How by the earlier Common Law.** — Returning to a consideration of the question as it stood in England before the statute came into operation, there are opinions to the effect that the offence was punishable under the earlier common law.[6] Mr. East, however, contends, that it was not fully, and that something more than the bare act of marrying without leave of guardians was required to make the thing done a crime.[7] When we look at this question as one of principle, we see, that under the common law no indictment lies for the employment of mere guile, when the parties stand on equal

[1] See, for this statute, including subsequent sections, and for expositions of it, 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] Kilty Report of Statutes, 167.

[3] Report of Judges, 3 Binn. 595, 621. See also Anderson *v.* Commonwealth, 5 Rand. 627.

[4] The State *v.* Findlay, 2 Bay, 418, 1 Brev. 107; The State *v.* Tidwell, 5 Strob. 1.

[5] Sup. Report Penal Code, 12.

[6] Rex *v.* Moore, 2 Mod. 128; 1 Deac. Crim. Law, 6. Yet see contra, Rex *v.* Marriot, 4 Mod. 144.

[7] 1 East P. C. 458, 459.

ground toward each other.[1] Now, if the woman, though young and a minor, is enticed away, the act of enticement is not, according to this principle, indictable as an offence against her; but, suppose she is under legal guardianship, or under the care of her parents, being therefore not authorized to contract marriage without their permission, and not authorized more than any other female to yield to defilement, a question may be made, whether the act of enticement and defilement, of such a person, is not one of those wrongs as against the guardian or parent, which, being done by way of unfair advantage, are on this ground indictable. The question, however, as one of principle, lies so near the line dividing the indictable from the unindictable, as to require judicial decision for its settlement.

§ 630. **Continued.** — The hints given in the last section will enable the reader to trace the matter out, on the principles laid down in the work on the Criminal Law. Yet it will be found, that, in most of the States, this subject is sufficiently regulated by statutes; and, unless there is a conspiracy involved in the particular case under investigation, there will ordinarily be no need of resorting to the common law.

§ 631. *View of the Modern Statutes and their Interpretation:* —

Taking Girl under Sixteen out of Lawful Custody. — It is perceived that the above-quoted provisions of Stat. 4 & 5 Phil. & M. c. 8, do not render marriage or defilement essential to the constitution of the offence; yet, by subsequent sections, offences of a like nature are created, in which this element is essential. Thus it has been, also, with subsequent legislation, English and American. For example, one of the provisions of the present English statute, following in substance the before quoted section of the statute of 4 & 5 Phil. & M. c. 8, is as follows: "Whosoever shall unlawfully take, or cause to be taken, 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, shall be guilty of misdemeanor; and, being convicted thereof, shall," &c. A statute in Iowa is in like

[1] Crim. Law, 5th ed. I. § 546, 560–564, 581 et seq.

terms, except that the act is to be done for the illicit purpose. The words, at the point of coincidence with this English enactment, are, however, slightly different, as follows: "If any person take or entice away any unmarried female under the age of fifteen years, from her father or mother, guardian, or other person having the legal charge of her person, without their consent," &c.

§ 632. **Continued — Mistaking Girl's Age.** — We have already seen [1] what, in juridical reason and on the judicial authorities, is, upon the English enactment, the consequence of the defendant's having been misinformed of the girl's age, or for some other cause supposing it to be above the statutory period, while in truth it is below. In accord with the view intimated at the place thus referred to as being the sound one, the Iowa court has held it to be 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 offence, 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 offence, not always in the same degree, as if the prisoner had intended the thing unintentionally done.'" [2]

§ 633. **Continued — From whom taken or enticed.** — According to an exposition by the Iowa court, under the foregoing provision, the words "or other persons having the legal

[1] Ante, § 359.

[2] The State *v.* Ruhl, 8 Iowa, 447, 450, 451.

charge of her person" do not mean that such individual shall have all the authority over the child possessed by a parent, or legally appointed guardian; neither do they mean such a one as has a mere temporary charge, like a schoolmistress or governess. If the parents are dead, and no guardian has been appointed, those with whom the girl resides as a member of the family, and who have her wholly under their care and protection, have "the legal charge of her person," within the meaning of the provision under consideration.[1] This doctrine appears to be in accord with the general spirit of the English cases, upon points apparently not directly decided by them.[2]

§ 634. **Continued — Consent of the Girl — Enticement.** — It is plain, that, under these provisions, the consent of the girl is of no avail to the prisoner; though, under the English provision, there seems to have been at one time some doubt on this point.[3] Of course, therefore, the taking need not be by force, either actual or constructive.[4] Yet, on the other hand, if the going away is voluntary, and without enticement by the prisoner, there is no offence, though he received her.[5] Yet enticement is sufficient; and, if at one time a person entices the girl, and she does not go away then, but goes at a subsequent time, and this person receives her, though not approving of the going then, the offence is committed.[6]

§ 635. **Continued — Consent of Parents or Guardians — Fraud.**

[1] The State *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; ante, § 359. Archbold says: "It is an offence within this statute to take away a natural daughter under sixteen from the custody of her putative father. 1 Hawk. c. 11, § 14; Rex *v.* Cornforth, 2 Stra. 1162; Rex *v.* Sweeting, 1 East P. C. 457. 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 offence 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] 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.

[4] Reg. *v.* Mankletow, supra; Reg. *v.* Frazer, 8 Cox C. C. 446.

[5] 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.

[6] Reg. *v.* Robb, 4 Fost. & F. 59; Reg. *v.* Olifier, supra.

— These statutes are plain, that the taking must be against the will of the person having lawful charge of the girl. Of course, then, the consent of this person, intelligently given and not improperly obtained, is a complete defence. But it was laid down to the jury by Gurney, B. in a case which there was no occasion to take for consideration before the other judges, as he proposed to do had there been occasion, that the consent of a parent will not avail the prisoner if obtained by fraud. It is no consent. "And," he observed, "there are several cases which illustrate this doctrine; as, for instance, if a man pretends that he wants your horse to go to Windsor, and promises to bring it back, it will be a stealing if he parts with it, although you gave your full consent to his taking it, provided the jury think, at the time he took it, he did not intend to borrow but to steal it. So, if a burglar pretends that he is a person who has particular business with you, which induces you to open your door, and he gets in, it is as much a breaking as if he himself had opened the door by violence."[1] Archbold observes, 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."[2] To the present writer it seems to be sufficiently plain in principle, that, if at the time when the act is done there is no consent, the case is made out against the defendant, whatever may have happened before. Plainly a consent, given without consideration, is not irrevocable.

§ 636. **Continued — "Possession."** — What is the possession[3] of the parent or other person, out of which the girl must be taken, as an element of this offence, was partly considered in another connection.[4] The English cases are not quite clear on all points of this question; but, on some points, the doctrine is entirely distinct. Thus, if, by previous arrangement with the prisoner, a girl leaves her father's house and then joins him;[5] or, *a fortiori*, if he puts up a ladder to the win-

[1] Reg. *v.* Hopkins, Car. & M. 254.

[2] Archb. Crim. Pl. & Ev. 10th Lond. ed. 478, referring to Calthrop *v.* Axtel, 3 Mod. 169; 1 East P. C. 457.

[3] Ante, § 631.

[4] Ante, § 359.

[5] Reg. *v.* Mankletow, Dears. 159, 6 Cox C. C. 133.

dow, and she comes down on it and goes away with him;[1] this is a taking of the girl out of the father's possession. If a man meets in the street a girl who is out on an errand, or for any temporary purpose, and allures her away with him without inquiring or caring whether she has a home or not, this ought to be deemed as much a taking from the parent or guardian, within this statute, as if he had found her at the house; but whether it is so deemed is not quite clear on the English adjudications.[2]

§ 637. **Continued — How long away.** — It is not necessary that the guilty person should keep, or intend to keep, the girl permanently away from her parent or other guardian. Thus, where she was taken from her father's house for an hour or two, and married, but not defiled, this was held to be sufficient.[3] *A fortiori* it was sufficient where the defendant had her three days, sleeping with her at night.[4]

§ 638. **"Promise of Marriage."** — By the statutes of some of our States, it is made a special offence to seduce a woman, of whatever age, under promise of marriage. Thus, in New York, a legislative provision in 1848 made indictable "any man who shall, under promise of marriage, seduce and have illicit connection with any unmarried female of previous chaste character."[5] And it has been held, that, as an element in the offence, an apparently valid promise of marriage between the seducer and the seduced is necessary; therefore, where the man is married, living with his wife, and the woman knows it, his act of seduction is not within the statute. If she were ignorant of his subsisting marriage, the consequence would be otherwise;[6] because the promise then would be binding on him, to the extent of enabling her to maintain against him her civil suit for its breach.[7] Moreover, he need not be of age; it is sufficient if he has arrived at puberty. If the marriage promise is made at the time when she yields to him,

[1] Reg. *v.* Robins, 1 Car. & K. 456.

[2] Ante, § 359 and note. The cases are there referred to.

[3] Reg. *v.* Baillie, 8 Cox C. C. 238.

[4] Reg. *v.* Timmins, Bell C. C. 276, 8 Cox C. C. 401. And see Reg. *v.* Hopkins, Car. & M. 254.

[5] Stat. 1848, c. 111.

[6] People *v.* Alger, 1 Parker, 333.

[7] Wild *v.* Harris, 7 C. B. 999; Millward *v.* Littlewood, 5 Exch. 775, 1 Eng. L. & Eq. 408.

and not before, and is the inducement for her yielding, the case is still within the statutory provision.[1]

§ 639. **"Previous Chaste Character."** — Under this statute, and under Stat. March 20, 1848, c. 105, the terms of which are, "any person who shall inveigle, entice, or take away any unmarried female of previous chaste character, &c., for the purpose of prostitution," — a "previous chaste character" in the woman is expressly made necessary. It is so also in the statutes of some of the other States. The meaning is, that she shall possess actual personal virtue, in distinction from a good reputation. A single act of illicit connection may, therefore, be shown on behalf of the defendant.[2] But though she had fallen, yet, if at the time of the seduction she is reformed, the case is within the statute.[3] Evidently, therefore, although a single incontinent act may be shown against the woman, it may not be such as, in point of law, to take away her "previous chaste character;" for it may be one of which she instantly repents, and which she does not repeat.

§ 640. **Seduce — "Inveigle," &c.** — Under the New York statute, quoted in the last section, the woman must be inveigled away by the offending man; if she leaves her home of her own volition, and without his interference, the offence cannot afterward be committed.[4] Something on this subject was said in another connection.[5] The kind and extent of seductive arts, which will satisfy the law, do not appear to depend upon an absolute rule, but upon the circumstances of each case; among which are the character, age, intelligence, and education of the woman. In general, if in fact they accomplished the object, they are sufficient in law.[6]

[1] Kenyon *v.* People, 26 N. Y. 203.

[2] The State *v.* Shean, 32 Iowa, 88; Kenyon *v.* People, 26 N. Y. 203.

[3] Carpenter *v.* People, 8 Barb. 603; Crozier *v.* People, 1 Parker, 453; Kenyon *v.* People, 26 N. Y. 203; The State *v.* Carron, 18 Iowa, 372, 375; Andre *v.* The State, 5 Iowa, 389; Boak *v.* The State, 5 Iowa, 430. See Safford *v.* People, 1 Parker, 474.

[4] Carpenter *v.* People, 8 Barb. 603.

[5] Ante, § 634.

[6] The State *v.* Higdon, 32 Iowa, 262; The State *v.* Groome, 10 Iowa, 308. Archbold says: "It was held to be no legal excuse that defendant made use of no other means than the common blandishments of a lover, to induce her to elope with and marry him." Archb. Crim. Pl. & Ev. 10th Lond. ed. 478. This is reasonable; but whether his references sustain the proposition in matter of authority the reader will judge for himself. They are Rex *v.* Twisleton, 1 Lev. 257, 1 Sid. 387; 2 Keb. 32; 1 Hawk. c. 44, § 10.

§ 641. "**Purpose of Prostitution.**" — In one of the above-quoted New York statutes, and in some others, the enticing away, to come within the penalty, must be "for the purpose of *prostitution.*" The word "prostitution" is construed to mean something more than a single illicit act, or a series of such acts with the one person; it being satisfied only by an indiscriminate unlawful connection. There are also intimations in the cases, that the thing contemplated shall be the indiscriminate yielding, by the woman, of her person for lucre, instead of mere gratification; in other words, her becoming a common prostitute.[1] As observed in one of the cases, "a prostitute is a female given to indiscriminate lewdness for gain."[2] It seems to the writer, that, while this interpretation of the word "prostitution," by which its first and leading meaning is given it, is correct as applied to some statutes, yet a statute may be in such terms as to require a different construction. The meaning of particular words, in statutes, is determined, not alone by an arbitrary standard, but much also by their relations to other words, and the subject to which they are applied.[3] And a word in an enactment however penal may have, even against the defendant, its largest popular or secondary meaning, instead of its primary or technical one.[4] Now, there are connections in which the word "prostitution" may be used as signifying, to every understanding, no more than a single incontinent act with one person.

§ 642. "**Seduce and Debauch**" — **Chaste Character.** — The words of the Michigan statute are "seduce and debauch any unmarried woman;" and there are no words, which, in terms, require a previous chaste character. And it has been held by the majority of the court, that, if the defendant has already seduced the complainant under a promise of marriage, then, if afterward she yields to his embraces under a fresh promise, and she would not yield but for this fresh promise, such subsequent misconduct renders him indictable, though the earlier act is barred by the statute of limitations. Said

[1] The State *v.* Ruhl, 8 Iowa, 447; Commonwealth *v.* Cook, 12 Met. 93; Carpenter *v.* People, 8 Barb. 603; The State *v.* Stoyell, 54 Maine, 24.

[2] The State *v.* Stoyell, supra, by Appleton, C. J.

[3] Ante, § 82, 121, 189, 268, 269.

[4] Ante, § 204, 212.

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]

§ 643. **Distinguished from Rape.** — In Wisconsin, a jury having been charged, that, "if the woman ultimately consented to the illicit intercourse, the crime was seduction, although she consented partly through fear and partly because the defendant hurt her;" this was held to be error, because there is a marked distinction between seduction and rape. In the one, the will of the woman yields, and in the other it does not. The case before the jury was rape, and it could not, therefore, be seduction.[2]

II. *The Procedure.*

§ 644. *Form of the Indictment:* —

Taking Girl under Sixteen, &c. — Archbold's form of the indictment on the before recited English statute [3] is as follows: —

"That J. S. late of, &c., on, &c., at, &c., unlawfully did take and cause to be taken one A. N. out of the possession and against the will of R. N. her father, ('*out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her*'), she the said A. N. then and there being an unmarried girl, under the age of sixteen years, to wit, of the age of fifteen years; against the form of the statute in such case made and provided, and against the peace," &c.[4]

[1] People *v.* Millspaugh, 11 Mich. 278, 283. And see The State *v.* Groome, 10 Iowa, 308. As to the Connecticut statute, see The State *v.* Bierce, 27 Conn. 319.

[2] Croghan *v.* The State, 22 Wis. 444. And see Furman *v.* Applegate, 3 Zab. 28.

[3] Ante, § 631.

[4] Archb. Crim. Pl. & Ev. 10th Lond. ed. 477. I copy from an edition published before the late changes in the English law of criminal procedure; because the later editions are not quite reliable for American use. This form, from Archbold, was employed 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.

This author observes, that the allegation "being an unmarried girl" is sufficient.[1]

§ 645. **Wisconsin Statute and Form of Indictment.** — The statute of Wisconsin is, or was, in the following words: "Any unmarried man, who, under promise of marriage, or any married man, who shall seduce and have illicit connection with any unmarried female of previous chaste character, shall be guilty of a misdemeanor, &c.; but no conviction shall be had under the provisions of this section on the testimony of the female seduced, unsupported by other evidence," &c. And, in one case, the indictment, to which no objection appears to have been made, was in the following form: —

"That William West, &c., on, &c., at, &c., the said William West being then and there a married man, did seduce and have illicit connection with one Eliza Pierce, the said Eliza Pierce being then and there an unmarried female of previous chaste character," &c.[2]

§ 646. **Indiana.** — An Indiana statute is: "If any person shall entice or take away any female, of previous chaste character, from wherever she may be, to a house of ill-fame, or elsewhere, for the purpose of prostitution, and every person who shall advise or assist in such abduction, shall," &c. And the following has been given as a sufficient form of the indictment: —

"That A. B. on, &c., unlawfully and feloniously took away one C. D. a female of previously chaste character, from the town of Bloomington, in said county, to the town of Bedford, in the county of Lawrence, in the State of Indiana, for the purpose of having illicit sexual intercourse with the said C. D., contrary," &c.[3]

This offence is called, in Indiana, not seduction, but abduction; it would be so termed in some of the other States and in England. Whether this form of the indictment would be sustained by the Indiana courts, as sufficient, we need not inquire; it certainly would not be by those of most of the other States under a like statutory provision. Passing over other points which might be subjected to criticism, it alleges

[1] Referring to Rex *v.* Moore, 2 Lev. 179; Rex *v.* Boyall, 2 Bur. 832.

[2] West *v.* The State, 1 Wis. 209.

[3] Bicknell Crim. Pr. 308, 310, referring, for the statute, to 2 R. S. 401, § 16; 2 G. & H. 441. I do not find any reference to authorities sustaining this form of the indictment.

that the taking of the woman was "for the purpose of having illicit sexual intercourse," whereas the statutory words are "for the purpose of prostitution;" and we have seen,[1] that these words are generally interpreted as signifying much more than what is here charged.

§ 647. **Continued.** — The statute creating the offence of what is called seduction in Indiana, and would be so called elsewhere, is as follows: "Any person who, under promise of marriage, shall have illicit carnal intercourse with any female of good repute for chastity, under the age of twenty-one years, shall be deemed guilty of seduction, and, upon conviction, shall be imprisoned, &c.; but, in such a case, the evidence of the female must be corroborated to the extent required of the principal witness in case of perjury." And the following has been supposed to be, and perhaps correctly, a sufficient form under this provision: —

"That A. B. on, &c., at, &c., feloniously had illicit sexual intercourse with, and carnal knowledge of, C. D., a female of good repute for chastity, and under the age of twenty-one years, by means of a promise of marriage to her previously made by the said A. B. contrary," &c.[2]

It will be noticed that there is here, at one place, a needless departure from the statute, though perhaps not such as will vitiate the allegation. It cannot be too often urged, as matter of practical advice, that the pleader do not try experiments of this sort.[3] As to the indictment in other respects, where, in this State, the allegation was, in effect, that the defendant had illicit carnal intercourse with one D, 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, it was held to be sufficient.[4] Most pleaders would add, after the allegation that the female was under twenty-one years of age, "to wit, of the age of twenty years," or whatever age she was supposed really to be. This would be held to be unnecessary in some other States besides Indiana,[5] and perhaps everywhere unnecessary.

[1] Ante, § 641.

[2] Bicknell Crim. Pr. 307, referring, for the statute, to 2 R. S. 401, § 15; 2 G. & H. 441; see 26 Ind. 82.

[3] Ante, § 386.

[4] The State *v.* Stogdel, 13 Ind. 565.

[5] And see, ante, § 563.

§ 648. *The Evidence: —*

Previous Chaste Character — Burden of Proof. — As the reader has already observed, the statutes of some of the States require that the female seduced shall have been of "previous chaste character." This, therefore, is one of the issues on which the jury are to pass.[1] According to the doctrine of the Iowa courts, this previous chastity is to be presumed; no evidence is required to establish it in the first instance, and the burden is on the defendant if he would attack it.[2] On the other hand, it is held, in Wisconsin, that, since such a presumption would be inconsistent with the presumption of the defendant's innocence, it cannot of itself prevail, but evidence must be introduced to sustain this allegation.[3] This latter doctrine appears better to accord with legal reason and the analogous precedents than the former. Still there should be a due weight given to a sort of presumption of chastity; since, but for the presumption of the defendant's innocence, it would be alone controlling. And both for this reason and for others, only slight evidence of the previous chastity should be required.

§ 649. **Evidence as to Previous Chastity.** — We have seen,[4] that what is meant by previous chastity is personal virtue in fact, as distinguished from the mere reputation of it. Now, in subsequent chapters, we shall consider, in some measure, by what evidence adultery and fornication are to be proved. Do the doctrines there to be discussed apply to the present issue, and are the parties here to resort to the same measures of proof, with the same limitations, as there? In reason, as previous unchastity is in law one of the elements involved in the issue of not guilty, — is a part of the case itself, — it is difficult to restrain the parties, if they so demand, from going into the elaborate proofs thus suggested, together with the particular proofs applicable to this issue alone. Yet, under some circumstances, in an adultery case, unchaste acts, committed subsequently to those charged in the indictment, may be shown

[1] The State *v.* Carron, 18 Iowa, 372, 376.

[2] The State *v.* Higdon, 32 Iowa, 262; The State *v.* Shean, 32 Iowa, 88; Andre *v.* The State, 5 Iowa, 389; Boak *v.* The State, 5 Iowa, 430.

[3] West *v.* The State, 1 Wis. 209. See, also, Safford *v.* People, 1 Parker C. C. 474.

[4] Ante, § 639.

against a prisoner to give significance to the proofs of those which are alleged; while, on the other hand, the Georgia court has held, that, on the trial of an indictment for seduction, evidence of acts of unchastity on the part of the woman seduced, two months subsequent to the date of the offence charged in the indictment, is not admissible in behalf of the prisoner.[1]

§ 650. **Continued.** — In an Iowa case, a witness having testified, that, on two occasions prior to the seduction charged, he had committed the unlawful act with the woman, "the State, as rebutting evidence, introduced 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." And the majority of the court held, that this rebutting testimony had been rightly received. Said Beck, J.: "The observation of all experience establishes, that a woman of good reputation for virtue with those who well know her, of modest deportment when in the society of men and women, will not likely be guilty of the conduct charged against the prosecutrix. When such accusations are brought against women of such character, they are regarded in a degree as improbable. This rule is of constant application in every-day life, and preserves the peace and name of the virtuous against the tongue of slander and hate. Without its protection, the life of many good women would be embittered. It is, in truth, the only incentive to and reward of a life of innocence and purity, so far as this world alone is concerned. A rule of such constant application in every-day life cannot be ignored in a court of justice. The fact 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."[2]

§ 651. **Married Man.** — If, in Wisconsin, under the statute

[1] Mann *v.* The State, 34 Ga. 1, 5.

[2] The State *v.* Shean, 32 Iowa, 88, 91, 92.

before quoted,[1] the indictment alleges that the defendant was a married man, this allegation must be proved.[2]

§ 652. **Court or Jury — Previous Chastity — "Seduce" — "Prostitution."** — The question of the previous chastity of the woman is for the jury.[3] The meaning of such words as "seduce,"[4] "prostitution,"[5] and the like, is to be determined by the court, as a question of law; while the evidence is for the jury.

CHAPTER XXVIII.

ADULTERY.

653. Introduction.
654–668. Law of this Offence.
669–690. The Procedure.

§ 653. **How the Chapter divided.** — We shall consider, I. The Law of this Offence; II. The Procedure.

I. *The Law of this Offence.*

§ 654. **Simple Adultery — Nuisance by Open Repetitions.** — There is a difference in the law between a single act of adultery, and an open and notorious adulterous cohabitation. The latter, which will be discussed in another chapter, may, under some circumstances, be, and perhaps it always is, a nuisance at the common law. But, in the absence of a statute on the subject, the former is not indictable.[6]

§ 655. **Under Statutes — Differences of Views.** — In a considerable number of our States, adultery, even a single act, is made indictable by statute. The general form of the provision is, that one who commits "adultery" shall be punished in a way pointed out; leaving it for the courts to say what is adultery, and what is not. If adultery were a common-law

[1] Ante, § 645.
[2] West *v.* The State, 1 Wis. 209.
[3] The State *v.* Carron, 18 Iowa, 372.
[4] The State *v.* Bierce, 27 Conn. 319.
[5] Carpenter *v.* People, 8 Barb. 603.
[6] Crim. Law, 5th ed. § 38, 39, 501; ante, § 625.

offence, accurately defined, like, for example, "robbery," or "larceny," such a statute would create a statutory crime, identical with the common-law offence, and there would be no difficulty in its interpretation.[1] As it is, various differences of judicial opinion have arisen. Thus, according to some opinions, the criminal offence is committed whenever there is an intercourse from which a spurious issue may proceed; and, in such a case, both parties are guilty of it, though one only is married.[2] Therefore 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."[3] This doctrine, it is perceived, makes the essence of the offence consist in 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, if there should be any, is not imposed upon the marriage.[4] The reader cannot but perceive that this theory ignores other and weighty considerations; such as the moral contamination, the blight on the happiness of the other party to the marriage, the corruption of the fountain of public virtue, and many more considerations of the like sort. According to this view, too, after a married woman has arrived at a certain age, her adultery ceases to be a crime; yet nothing of this sort has ever been judicially held.

§ 656. **Differing Views, continued — Definition — (Scotch Law, in the Note).** — There is in the books some language seeming to favor still another proposition, namely, that where either of the parties is married, the criminal act is adultery in both;[5] but probably no adjudication has affirmed that a single woman commits the offence by a carnal intercourse with a married man.[6] The Virginia court held, that, when the woman is

[1] Ante, § 361.

[2] The State *v.* Wallace, 9 N. H. 515; The State *v.* Pearce, 2 Blackf. 318; The State *v.* Armstrong, 4 Minn. 335. And see the reasoning in Galbraith's charge (Pennsylvania), 4 Am. Law Register, 209.

[3] The State *v.* Hinton, 6 Ala. 864; Hall *v.* Hall, 2 Strob. Eq. 174, 187; Tebb's Essay, 6, 7; 35 Law Mag. 68; Shelford Mar. & Div. 386; Rees Cyc. tit. Fornication.

[4] Galbraith's Charge, 4 Am. Law Register, 209; The State *v.* Lash, 1 Harrison, 380. And see The State *v.* Armstrong, 4 Minn. 335.

[5] The State *v.* Hinton, 6 Ala. 864; Hull *v.* Hull, 2 Strob. Eq. 174, 187.

[6] The case of The State *v.* Hinton, supra, appears to be one of *living*

married, the act by an unmarried man is only fornication in him.[1] And this conducts us to what is believed to be the more common view in point of authority, and the better view in legal principle, that, in all cases where one of the parties to an act of criminal intercourse is unmarried, it is fornication in such one, and adultery in the married one.[2] And hence

together in adultery; between which and simple adultery there may be a distinction. The unmarried woman, however, would be guilty of the offence under the statute of Iowa. Post, § 657. Whether she would be a principal of the second degree, under a familiar common-law rule, see post, § 662.

[1] Commonwealth *v.* Lafferty, 6 Grat. 672. In a recent 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 note) have not established a different doctrine. 4 Am. Law Register, 209. See post, § 657.

[2] Commonwealth *v.* Call, 21 Pick. 509; Commonwealth *v.* Elwell, 2 Met. 190; Respublica *v.* Roberts, 2 Dall. 124, 1 Yeates, 6; The State *v.* Hutchinson, 36 Maine, 261; Cook *v.* The State, 11 Ga. 53, 56; Commonwealth *v.* Burton, Recorder's Decisions, 83, 85; 2 Greenl. Ev. § 48; 6 Dane Abr. 677; 1 Bishop Mar. & Div. § 703; Bouvier Law Dict. tit. Adultery; Train & Heard Preced. 22. And see Godol. Abr. 469, 476; Ayl. Parer. 43; The State *v.* Way, 6 Vt. 311. 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 cases relating to this offence. 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 offence 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 committed 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, 1, 17, 1.

we derive what is believed to be the better definition of the offence, that adultery is the voluntary sexual intercourse of a married person, with a person other than the husband or wife.[1]

§ 657. **Statutory Definings.** — Partly to promote certainty in consequence of these differing views, and partly to establish a rule different from what the courts would otherwise hold, the statutes of some of the States in which adultery is a crime have made special provisions, more or less full, regarding these conflicting doctrines. Thus, in Massachusetts, "when the crime is committed between a married woman and a man who is unmarried, the man shall be deemed guilty of adultery."[2] And recently, in Pennsylvania, to settle a doubt which had arisen, the statute prohibiting and punishing adultery was revised to read as follows: "If any married man shall have carnal connection with any woman not his lawful wife, or any married woman have carnal connection with any man not her lawful husband, he or she so offending shall be deemed guilty of adultery; and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court.[3] In Iowa, "when the crime is committed between parties only one of whom is married, both are equally guilty of adultery, and shall be prosecuted accordingly."[4]

§ 658. **How in Principle.** — Returning now to the law as it stands on the single statutory word "adultery," let us make some further inquiry into the principles by which the question should be decided. When a word like this is found in a statute, we determine its meaning by referring, either, 1st, to the adjudged law on the subject; or, 2dly, to common usage; or, 3dly, to the legal reason of the thing; and we entertain doubt

[1] 1 Bishop Mar. & Div. § 703; Helfrich *v.* Commonwealth, 9 Casey, 68.

[2] R. S. c. 130, § 1; Gen. Stats. c. 165, § 3; Commonwealth *v.* Reardon, 6 Cush. 78; Commonwealth *v.* Elwell, 2 Met. 190.

[3] Act of March 31, 1860, § 38, Prud. Dig., 9th ed. 223. About the time when the statute was revised, the Pennsylvania court settled the law in accordance with its terms. Helfrich *v.* Commonwealth, 9 Casey, 68. In Georgia, to say to a white man, "Negroes have been with your wife, I can prove it," thereby imputing sexual connection, is not actionable *per se;* as, under the code, the adultery of the woman is not punishable. McDonald, J., doubting. Castleberry *v.* Kelley, 26 Ga. 606.

[4] The State *v.* Wilson, 22 Iowa, 364.

only when there is a contrariety in the responses from these several sources, or when, there being no contrariety, the response from no one of them is clear and distinct. We do not look to the etymological construction of the word; because hearers and speakers of all language, alike, understand the words and phrases employed to be used in their actual combinations and present meanings, not in other combinations or in ancient meanings, — as the painter understands himself, and is understood by others, to make his canvas impart to the eye of the beholder, the impression which comes from the reflection of light as it actually falls on the combinations of colors there found, not on the original elements of his colors.

§ 659. **Continued.** — Consulting, then, these three several sources, we have the following results: —

1. The Adjudged Law. — Adultery, though not punishable by the common law of England in the common-law courts, is punishable by its unwritten law in the ecclesiastical courts. And one of the oldest and best of the writers on this subject, Godolphin, says: "Adultery . . . is the inconstancy of married persons, or of persons whereof the one at least is under the conjugal vow."[1] Further on he adds: "So, then, *adulterium*, being *quasi accessio ad alterius thorum*, is the violation of another's bed; whence it is required that either both or one of the parties be under the matrimonial vow, for that conjugal circumstance, either in the male or female, is the *causa sine qua non* that the luxurious act falls under the notion of adultery, in distinction from acts of the same kind under other circumstances. For the law holds, that it may be committed in a threefold manner, either *ex parte viri*, *vel feminæ*, *vel utriusque*; always supposing that one or both are matrimonialized, and both living."[2] To the same effect is the civil branch of that body of the English common law known as the ecclesiastical law; for, in it, adultery is committed likewise in three ways; namely, by a married man having sexual intercourse with an unmarried woman, by a married woman having the same with an unmarried man, and by either having the like intercourse with a married person of the opposite sex, other

[1] Godol. Abr. of the Ecclesiastical Laws, 469, tit. Adultery.

[2] Godol. Abr. 475.

than such person's husband or wife. The civil suit for criminal conversation could not, indeed, be practically maintained in the common-law tribunals, for an unlawful intercourse with the husband; because the wife could sue in those tribunals only when the husband joined her, and he would not join her in suing a woman with whom he had committed adultery, or, if he did, his participation in the act complained of, he being a principal plaintiff, would bar him on another ground. Yet even this suit was not termed a suit for adultery, as was the divorce suit; but a suit for criminal conversation. So that, looking to the adjudged law, we have a clear response, according with our definition.

§ 660. 2. **Common Usage of the Language.** — In common acceptation, adultery is a word of somewhat broad meaning: sometimes it is even extended to designate the criminal act when neither of the parties is married. But it is more frequently and certainly more properly restricted to mean the same as stated in the last section; or, at least, to be applicable only when one of the parties is married, in which case, both are often spoken of as committing the offence. No man, in popular speech, ever called it fornication, as distinguished from adultery, for a married person, man or woman, to commit the unlawful act with an unmarried person.

§ 661. 3. **The Legal Reason of the Thing.** — From this source we receive the same response as from the others. It cannot be primarily deemed adultery in an unmarried person to commit this act with a married one, because the law must be understood to extend its obligations particularly over those who have assumed the marital status. But no reason, existing in the law, can distinguish between the act as committed by the husband or by the wife, or between the act with a married or an unmarried *particeps criminis*. Suppose, to test this statement, we inquire, whether the offence is not to be viewed by the law as one tending to the begetting of illegitimate children. It is not; because fornication tends as strongly as adultery to this result, while the legal distinction between it and adultery is plain and marked. Then, is it not to prevent a married man from having imposed upon him an illegitimate child as legitimate? Not at all; for, if it were, the crime would not arise

when the wife was past the age of childbearing, or was otherwise barren, or was already in pregnancy by her husband; but no one ever supposed that such a circumstance could furnish a defence to an indictment against her for adultery.

§ 662. **Aiding at the Fact.** — There is, however, a question of real difficulty upon this subject. It is, whether, by force of the common-law rule and the rule of reason whereby one present and lending the concurrence of his will to a criminal thing done by another becomes guilty as doer, the *particeps criminis* with an adulterer does not incur the statutory offence of adultery. We saw, in a previous chapter,[1] that, where an English statute made it treason "if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir," the courts held the consenting woman to be guilty as well as the man, though the terms of the enactment included only the man. But the reader observes, that this offence was by the words creating it made the heaviest of all offences; and the law does recognize a distinction between aider and doer, where the shade of guilt is very light. We may therefore suppose, that, if the statute of a State makes fornication and adultery both punishable, the somewhat less guilty and unmarried *particeps criminis* in an act of adultery will be deemed to be within the penalty against fornication merely. Where also the offence of adultery itself is made a light one by statute, and fornication is not punishable at all, the case may lie within reasons brought to view in the work on the Criminal Law,[2] and the unmarried *particeps criminis* altogether escape. But where the offence of adultery is heavily punished, especially where it is felony, and fornication is not punished, no rule of the law, which the author has ever seen developed in any book, can prevent the result from falling, that the guilty participator must be punished together with the doer. If the other result is to be established, it must be as an anomalous one, or as one resting on a reason to be hereafter unfolded; or, perhaps, in some States, on the peculiar phraseology of the statute.[3]

§ 663. **Voluntary — Mistake of Person — Mistake of Status.** —

[1] Ante, § 594.

[2] Crim. Law, 5th ed. I. § 657-659.

[3] And see ante, § 145, 594; The State *v.* Brady, 9 Humph. 74.

According to our definition, the carnal act, to constitute adultery, must be voluntary. If, therefore, it is so compelled by force, or committed through such mistake of the person, as brings the case within principles relating to these points discussed some chapters back,[1] there is no offence.[2] How it would be, in those localities where the act in the man is adultery when he is single and the woman is married, if he honestly believed her to be unmarried also, is a question which has not probably received judicial determination.[3] But how this is in principle appears from some previous discussions;[4] and we shall presently consider the subject further. Where the parties accused have been married in form to each other, if the marriage is void in law, and known by them to be so,[5] it will not protect them from a charge of adultery, fornication, or incest.[6]

§ 664. **Continued — Mistake of Facts — Carelessness — Assault on Foreign Minister.** — In the examination of the points presented in the last section, it is necessary to widen a little the range of our discussion. We saw, in another connection, that, within limits not easily defined, carelessness is criminal.[7] A man may therefore be responsible, mistaking the facts, because he did not use proper caution, or make the necessary inquiry.[8] We have also seen, that, when a person intends to do one wrong, and accidentally does another which he did not intend to do, he is, in certain classes of cases, not all, answerable criminally for the wrong done; the intent to do the one being transferred in law to the other. Likewise we have seen, that in these cases the wrong intended need not always be indictable, if the wrong done is so.[9] On these several principles there may be a criminal liability for acts performed under a

[1] Ante, § 351 et seq.

[2] 1 Bishop Mar. & Div. § 710. See ante, § 357.

[3] See Commonwealth *v.* Elwell, 2 Met. 190; Delany *v.* People, 10 Mich. 241, 244.

[4] Ante, § 359, 596, 632.

[5] See Crim. Law, 5th ed. I. § 303; ante, § 357.

[6] The State *v.* Fore, 1 Ire. 378. See The State *v.* Pearce, 2 Blackf. 318.

[7] Crim. Law, 5th ed. I. § 313 et seq.

[8] Rex *v.* Lediard, Say. 242; Harwood's Case, 1 Mod. 79; Barnes *v.* The State, 19 Conn. 398; Sturges *v.* Maitland, Anthon, 153; Commonwealth *v.* Mash, 7 Met. 472, as to which query, and see 1 Alison Crim. Law, 535, 536, 541, and McDonald's Case, 1 Broun, 238. Crim Law, 5th ed. I. § 303, 304.

[9] Vol. I. § 323 et seq.; ante, § 395, 632.

mistake of facts.[1] Thus, where one assaults a foreign minister in ignorance of his official character, it has been held that the graver offence is committed.[2] The offender meant to violate the law, but in a less degree. Yet there may be doubt, whether this doctrine concerning an assault on a foreign minister would be correct if extended to all circumstances. Suppose a man does intend to do an act violative of the law, no good reason appears why he should be universally held criminal for the result, as respects facts he was ignorant of, more than if he had not intended an unlawful act; because this would be to apply one rule to the innocent, and another rule to the guilty. In accordance with this suggestion seems to be the decided law, as concerns some cases.[3] But there is such a diversity of things of this general sort, that one rule could hardly in justice be applied to all.

§ 665. **Continued.** — If, therefore, a married man should have carnal intercourse with a woman whom he supposed to be his wife, while she was not, mistaking the person, he would commit no offence; because neither in law nor in morals did he intend any.[4] Yet, if the man were unmarried, and on apparently good authority believed the woman to be unmarried also, while in truth she had a husband, would the act in him be adultery, or only fornication? This precise question has probably not been decided in this country.[5] Baron Hume, a writer of great authority on the Scotch law, speaking of incest, says: "It is essential to the guilt of this, as of all other crimes, that the parties, at the time of offending, have been in the knowledge of that circumstance wherein the wrong lies; so that either of them, who was then ignorant of the relation (if such a thing should happen), shall be free of all punishment."[6]

[1] Crim. Law, 5th ed. I. 327, note, 330; 1 East P. C. 102; Barnes *v.* The State, 19 Conn. 398.

[2] United States *v.* Liddle, 2 Wash. C. C. 205; United States *v.* Ortega, 4 Wash. C. C. 531; United States *v.* Benner, Bald. 234, 240. But see United States *v.* Hand, 2 Wash. C. C. 435. An indictment for assaulting and obstructing an officer should in substance allege, that the defendant knew he was an officer. Commonwealth *v.* Kirby, 2 Cush. 577.

[3] Crim. Law, 5th ed. II. § 51. But see the doctrines discussed Ib. I. § 323 et seq.

[4] 1 Bishop Mar. & Div. § 710; ante, § 663.

[5] In this connection the reader may consult what is said ante, § 357, and the accompanying sections.

[6] 1 Hume Crim. Law, 2d ed. 448. As to adultery, see ib. p. 453.

Whether we should follow the Scotch law would depend on our views of the points presented in the last section.

§ 666. **The Marriage — Divorce — Guilty Party marrying contrary to Statute — Polygamy — Absent and not heard from.** — To constitute the offence of adultery, there must be subsisting, as we have seen,[1] a marriage. If, therefore, there has been a divorce of married parties, neither of them can, after the divorce, commit the crime of adultery. Even where the statute law of a State forbids a second marriage of the guilty party against whom the innocent one obtained the divorce, the rule remains the same; such guilty one does not commit polygamy by marrying again, but only an offence against the prohibiting statute; neither does he commit adultery by cohabiting under such second marriage, though the marriage is void.[2] So, since there can be no adultery where there is no marriage, if one of the married parties has been absent and unheard of so long as to create the legal presumption of death, and the other, believing such party to be dead, contracts a second marriage, the cohabitation under this second marriage is not punishable as adultery.[3]

§ 667. **Attempts — Conspiracies, &c.** — The subjects of solicitations and other attempts, and conspiracies, to commit adultery, or to procure the commission of it by others, were sufficiently discussed in the work on the Criminal Law.[4]

[1] Ante, § 654, 655.

[2] 2 Bishop Mar. & Div. § 700. See this section, and accompanying sections, and the sections there referred to, for many views on this general subject. In The State *v.* Weatherby, 43 Maine, 258, 263, 264, where it was held that a man whose wife has obtained a divorce from him for his fault, and who marries again contrary to a prohibiting statute, cannot be convicted of adultery for cohabiting under this second marriage, Rice, J. observed: "Adultery, in this State, can only be committed by parties one of whom, at least, is married, and by parties who are not married to each other. To affirm that a person is married, and yet has no legal husband or wife, is manifestly a solecism In the very nature of things, the marriage contract under such circumstances cannot exist. There cannot be a husband without a wife, nor a wife without a husband. . . . There is no law of this State which declares, that such acts as have been proved against the defendant constitute the crime of adultery. Nor would those acts constitute that crime at the common law."

[3] Commonwealth *v.* Thompson, 6 Allen, 591. As to which case, see further Commonwealth *v.* Thompson, 11 Allen, 23. And see ante, § 357.

[4] Crim. Law, 5th ed. I. 501, 767, 768; II. § 184, 235; Reg. *v.* Pierson, 1 Salk. 382; The State *v.* Avery, 7 Conn. 266; Shannon *v.* Commonwealth, 2 Harris, Pa. 226.

§ 668. **Degree of the Offence.** — Adultery, in Connecticut, is felony;[1] in Pennsylvania[2] and Vermont,[3] it is misdemeanor. The principles on which this distinction, arising under the statutes of the respective States, is, with its consequences, to be determined, are stated in the work on the Criminal Law.[4]

II. *The Procedure.*

§ 669. *The Indictment:* —

General View. — We have seen,[5] that, according to the general form of the statutory laws on this subject, this offence is created by force of the one word "adultery." It results, therefore, from principles already explained,[6] that the structure of the indictment, with most other things relating to the procedure, depends mainly upon general and common-law principles.

§ 670. **Separate Indictments — Joint.** — The parties, in a case of adultery, may be indicted separately,[7] or, supposing the act to be in law adultery in both, together,[8] at the election of the power which prosecutes.

§ 671. **Form of Joint Indictment.** — If the indictment is joint, it must show, in some way, that the defendants committed the offence with each other; because, if it is open to the inference that the acts were distinct and with third persons, it will be bad for duplicity.[9] Now, in Massachusetts, as we have seen,[10] if a married woman, and a man whether married or unmarried, but not the woman's husband, commit the forbidden act together, both are guilty of adultery. Then, in this condition of the law, a joint indictment against the two may run as follows: —

That A, of, &c. [the man] and B, of, &c. [the woman] on, &c. at, &c., not being then and there married to each other, but the said B then and there having a hus-

[1] The State *v.* Avery, 7 Conn. 266; Crim. Law, 5th ed. I. § 501 and note, 768.

[2] Crim. Law, 5th ed. I. § 768.

[3] The State *v.* Cooper, 16 Vt. 551.

[4] Crim. Law, 5th ed. I. § 614–625.

[5] Ante, § 655.

[6] Ante, § 363, 366, 381, 413.

[7] The State *v.* Dingee, 17 Iowa, 232; The State *v.* Wilson, 22 Iowa, 364.

[8] The State *v.* Bartlett, 53 Maine, 446; Commonwealth *v.* Elwell, 2 Met. 190; Frost *v.* Commonwealth, 9 B. Monr. 362.

[9] Maull *v.* The State, 37 Ala. 160.

[10] Ante, § 657.

band living other than the said A, to wit, one C, did then and there have carnal knowledge together, each of the body of the other, and thereby committed adultery, against the peace, &c. and contrary, &c.[1]

§ 672. **Form of Separate Indictment.** — If the man is indicted separately from the woman, the following form, which was held to be good on a motion in arrest of judgment, will suit the views of some practitioners: —

"That, &c., did commit the crime of adultery with one Catharine Ann Smith, then the lawful wife of Peter J. Smith, by then and there having carnal knowledge of the body of the said Catharine Ann Smith."[2]

§ 673. **Allegation of Marriage — Not Husband and Wife.** — We have seen,[3] that, in indictments for polygamy, there is a difference of opinion as to what must be set out in alleging the first marriage. But does the same rule, whatever it is, which properly governs the indictment for polygamy, necessarily govern the indictment for adultery? If we assume, that, in a polygamy case, the first marriage must be set out with time and place, and the maiden name of the woman, it does not, to the writer, seem to follow that the same thing would be required in a case of adultery. Not to advert to the fact that polygamy is a heavier offence in the law than adultery, it is in respect of the first marriage a thing of a different nature. In polygamy, the offence itself is a marriage in form, and to balance this an equal formality of marriage ought on the other hand to be shown. But the offence of adultery rests rather on a subsisting status of marriage, than on a marriage solemnization, it being a breach of the duty of one on whom the law has cast this status. At all events, no such formal setting out of the marriage is necessary in an adultery case. And though, in the first of the above forms, the writer introduced, under a *videlicet*, the name of the woman's husband, even this is believed not to be, on the authorities, necessary. Thus, in one case, it was averred in the indictment that the *particeps criminis* was a married woman; but it was not added, either in words or effect, that the defendant was not her husband; and this was held to be inadequate. Shaw,

[1] And see Commonwealth *v.* Elwell, 2 Met. 190; Commonwealth *v.* Thompson, 99 Mass. 444.

[2] Commonwealth *v.* Reardon, 6 Cush. 78.

[3] Ante, § 601, 602.

C. J. said: "An averment that one had committed the crime of adultery, without alleging how and in what manner, would be clearly insufficient. The purpose of an indictment is to allege and set forth those facts which constitute that crime; and, for that purpose, it must appear that the woman, with whom the illicit connection is alleged to have taken place, was not the wife of the accused. This is commonly done by alleging, that, at the time, she 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."[1] There may be some doubt in legal reason; but, on the whole, there seems to be no principle known to criminal pleading on which it becomes necessary to mention the name of the third person in such a case as this; there are forms in the books in which the name is not mentioned;[2] and, assuming the indictment to be good without such name, it is prudent not to give it in a way requiring proof, since thus the danger of a variance is avoided.

§ 674. "**Adultery**" — **Carnal Knowledge.** — It has been held, in Pennsylvania, not to be necessary to allege that the adultery was committed by having carnal knowledge, &c.; but an indictment is sufficient which charges that the defendant "did commit adultery with a certain" person whom it names.[3] Said Lowrie, C. J.: "In describing the offence in the indictment, no greater particularity has heretofore been required than is found here, and this ought to be enough to sustain this indictment. We do not think that more ought to be

[1] Moore *v.* Commonwealth, 6 Met. 243.

[2] Train & Heard Preced. 23, 24; Whart. Preced. 2d ed. pl. 995 et seq. See, also, The State *v.* Hutchinson, 36 Maine, 261; The State *v.* Hinton, 6 Ala. 864; The State *v.* Clinch, 8 Iowa, 401. The following was, on motion in arrest of judgment, held to be good: That the defendant, Tompson, "did, &c. with a certain woman whose name to said jurors is unknown, &c.; he the said Tompson being then and there a married man, and having then and there a lawful wife alive other than the said woman whose name to said jurors is unknown as aforesaid." Commonwealth *v.* Tompson, 2 Cush. 551.

[3] The form of indictment, which in this case was adjudged good, is as follows: —

"That Erasmus H. Helfrich, late of the county of Lehigh, yeoman, on the seventeenth day of July, in the year of our Lord one thousand eight hundred and fifty-eight, in the county aforesaid, and within the jurisdiction of this court, then and there being a married man and having a wife in full life, to wit, Mary Ann Helfrich, did commit adultery with a certain Matilda Moyer, then late of the same county; contrary to the form of the act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania."

allowed [alleged], unless it might be in stating the place. 'Commit adultery' does not merely imply, but expresses, carnal knowledge; for that is its very meaning. Having carnal knowledge is but a euphemism of it."[1] And this Pennsylvania doctrine appears to prevail also in Alabama, under a somewhat different form of statutory provision.[2] This method of stating the act, namely, by the words "did commit adultery," is not, even in Massachusetts, held wrong, otherwise than is implied by an invariable course of practice; and, on principle, it is no more loose than some other things which are everywhere allowed. Still it is a needless blending of law and fact in a single form of words.[3] We have seen,[4] that, in seduction cases, if the words of the statute are, for example, "seduce and have illicit connection with," the same words in the indictment are adequate without more. But the words employed in those statutes are more purely expressive of fact, and less compounded with ideas of the law, in their meaning, than the word "adultery."

§ 675. **Allegation of Knowledge.** — Whatever may be the true view of the law as to a mistake in the person, or condition of the person, with whom the act is committed,[5] it is not necessary to allege, or prove in the first instance, that the defendant knew the status of such person. Matter like this, if available, is only so when shown by the defendant in his defence.[6]

§ 676. **Then and There.** — Where the indictment was, 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;" this was held to be insufficient; because, "to the fact that she was a married woman and the wife of another, no time is averred."[7] There are various analogies which, not intending to call in question the correctness of this decision, lead the writer to believe that some courts, especially under the guidance of statutes prevail-

[1] Helfrich *v.* Commonwealth, 9 Casey, 68, 70, 71.

[2] The State *v.* Hinton, 6 Ala. 864; Lawson *v.* The State, 20 Ala. 65; Maull *v.* The State, 37 Ala. 160.

[3] Crim. Proced. 2d ed. I. § 329-334, 514.

[4] Ante, § 645–647.

[5] Ante, § 663–665.

[6] Commonwealth *v.* Elwell, 2 Met. 190; ante, § 357, 358.

[7] The State *v.* Thurstin, 35 Maine, 205.

ing in some of our States, would hold this form of the allegation to be adequate.

§ 677. *The Evidence:* —

General Views — Compared with Divorce Cases. — The two facts to be proved in these cases are the marriage and the adultery. In the author's work on the law of Marriage and Divorce, the evidence by which the fact of marriage,[1] and the fact of adultery,[2] are to be established, was considered in full. As to the fact of marriage, which must be proved as a part of the evidence of adultery, the discussion there is complete in its application to the present issue.[3] Besides, in the chapter on polygamy, in the present volume, various points were brought forward, applicable as well to this offence as to that.[4] In another connection we saw,[5] that, as a general proposition, the evidence in civil and criminal cases is the same; the result whereof would seem to be, that the discussion concerning the proof of adultery in divorce causes applies equally to the issue presented by an indictment for the criminal offence. This, however, which we may think ought in just principle to be so, is practically not quite so in fact.

§ 678. **Comparison with Divorce Cases, continued.** — The English ecclesiastical judges, through whom our divorce law has been principally transmitted to us, were perhaps men of greater breadth of judicial understanding than the average of those who preside at our criminal trials. Perhaps also there is a tendency in those tribunals in which the evidence is passed upon by the judge, to permit a wider scope to the witnesses than is given them where the evidence is delivered to a jury. And, perhaps, in spite of theory, all judges will hold the reins of the evidence more tight in criminal than in civil matters, and in matters *quasi* civil. At all events, if the real purpose of admitting and excluding testimony is to help the jury to arrive at the truth, there is growing up in our country, in criminal cases for adultery, a series of wide departures from the better rules which exist in the ecclesiastical divorce law.

[1] 1 Bishop Mar. & Div. § 408–545.

[2] 2 Bishop Mar. & Div. § 612–647.

[3] 1 Bishop Mar. & Div. § 441, 442, 485, 490–502. And see Commonwealth *v.* Belgard, 5 Gray, 95; The State *v.* Libby, 44 Maine, 469, 479.

[4] Ante, § 607–611.

[5] Crim. Proced. 2d ed. I. § 1047.

§ 679. **Continued — Other like Acts — Intent and Opportunity.** — For example, it is an established principle in the criminal law, that, when a defendant is on trial for one crime, the jury shall not be prejudiced by having another proved against him, unless the proof of the latter has some direct tendency to aid in the proof of the former. But if it has this direct tendency, it is admissible.[1] Now, according to the doctrine prevailing in divorce causes, the fact that a party committed adultery, or took improper liberties, with the alleged *particeps criminis* on one occasion, does directly tend to prove adultery on another occasion, when the opportunity is shown to have existed. And in some circumstances, proof of an *adulterous intent*, as appearing in improper or unlawful familiarities with still other persons, is relevant, and therefore admissible. The case is like the familiar one in which, in the criminal law, a man's intent in passing a piece of counterfeit money is made to appear by proof of his having passed or offered to pass other counterfeit money at other times.[2] If a man is shown to have the intent to commit adultery, and then he is shown to have the opportunity, the presumption is more or less strong that he commits it; while evidence of the opportunity alone, without the intent, would go but a little way in this direction.[3] So it is held in divorce law; and so, on principle, it should be on an indictment for adultery.

§ 680. **Adulterous Intent — Other like Acts, continued.** — And in accordance with this doctrine it has indeed been decided, that, when an act of adultery is attempted to be proved as committed at a particular time, acts of improper familiarity with the same *particeps criminis* at an anterior time are admissible.[4] But 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,

[1] Crim. Proced. 2d ed. I. § 1064–1067.

[2] Ib. I. § 1066.

[3] And see 2 Bishop Mar. & Div. § 619.

[4] 2 Greenl. Ev. § 47; Commonwealth *v.* Durfee, 100 Mass. 146; Commonwealth *v.* Pierce, 11 Gray, 447; The State *v.* Marvin, 35 N. H. 22; Commonwealth *v.* Lahey, 14 Gray, 91; McLeod *v.* The State, 35 Ala. 395; People *v.* Jenness, 5 Mich. 305, 320; Commonwealth *v.* Morris, 1 Cush. 391; Commonwealth *v.* Merriam, 14 Pick. 518.

the evidence of them — that is, of the previous adultery — is not admissible:[1] 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!

§ 681. **Continued.** — If the familiarities took place subsequently to the time when the adultery is attempted to be proved, they do not perhaps tend so strongly to the establishment of the crime as they do when they took place before. And it is at least an open question in matter of authority,[2] possibly it may be even so also in principle, whether they should be admitted in evidence, since the adulterous mind may have come to the accused party subsequently to the time to which the accusation relates.[3] And in Massachusetts, where the proof showed actual adultery committed at a subsequent time and in another county, it was held not to be admissible; because, in the language of Merrick, J. speaking for the majority of the court, "it tended to prove the commission of an offence, similar to that charged in the indictment, but still wholly distinct from it, both in time and place; and was, therefore, in no way pertinent to the matter in issue."[4]

§ 682. **Continued.** — Since the last two sections were published, in the first edition of the author's work on Criminal Procedure, the Massachusetts court, in a divorce case, overruled the doctrines to which objection is there made; and the language of the court leaves it clear, that the new and better doctrine would be followed likewise in a criminal cause. In

[1] Commonwealth *v.* Thrasher, 11 Gray, 450. A statute in Indiana provides, that, if a wife shall have left her husband, and shall be living, at the time of his death, in adultery, she shall take no part of his estate. And under this statute the fact that the crime was once committed, under circumstances showing a deep degree of abandonment, may, it has been held, be submitted to the jury with the other circumstances of the case, to enable them to determine as to her course of life at the time of her husband's death. Gaylor *v.* McHenry, 15 Ind. 383.

[2] Commonwealth *v.* Pierce, 11 Gray, 447. In Indiana, on an indictment containing a single charge of incest, which was proved in time and place as laid, it was held that the *particeps criminis*, who had testified to this, could not then proceed to strengthen the case by testifying also to incest committed between the same parties at subsequent times. Lovell *v.* The State, 12 Ind. 18.

[3] 2 Bishop Mar. & Div. § 625.

[4] Commonwealth *v.* Horton, 2 Gray, 354, 355.

the case thus referred to, it was held, that actual adultery, committed by the accused parties out of the Commonwealth subsequently to the bringing of the suit, might be shown in aid of other testimony tending to establish the anterior adultery, charged in the libel, within the Commonwealth. The learned judge, who spoke for the whole court, after referring to the leading cases in support of the doctrines objected to in the last two sections,[1] observed: "In the opinion of the court, there is in each case a plain misapplication of the rules of evidence to the facts presented. The evidence by which the act of adultery is proved is seldom direct. The natural secrecy of the act makes it ordinarily impossible to prove it, except by circumstantial evidence. The circumstances must be such, indeed, as 'to lead the guarded discretion of a reasonable and just man to the conclusion of guilt.' But when adulterous disposition is shown to exist between the parties at the time of the alleged act, then mere opportunity, with comparatively slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place. 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

[1] Commonwealth *v.* Horton, 2 Gray, 354; and Commonwealth *v.* Thrasher, 11 Gray, 450.

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]

§ 683. **Continued.** — It is encouraging to note, that, at last, a common-law court has been induced to recognize those better doctrines which have long been seen and followed by those able English judges whose special duties have rendered them familiar with this subject, in divorce causes. Let us see whether our common-law courts cannot be further impressed with the like wisdom from the same source. In divorce causes, it may be observed, those judges who are particularly acquainted with the subject deem it to be of the highest importance to show, against the party accused, such facts and circumstances as point to the offence, and render its commission probable; and, where these were wanting, they have even refused to grant the divorce though the very fact was testified to by persons who professed to be eye-witnesses.[2] Now, this is a doctrine sound in human nature, and worthy to be followed by every court and jury sitting in a cause of this kind, whether civil or criminal. It was, therefore, further observed in the author's work on the law of Marriage and Divorce, that "every act of adultery implies three things: first, the opportunity; secondly, the disposition in the mind of the adulterer; thirdly, the same in

[1] Thayer *v.* Thayer, 101 Mass. 111, 113, 114, opinion by Colt, J. And see Carotti *v.* The State, 42 Missis. 334.

[2] 2 Bishop Mar. & Div. § 617, 618.

the mind of the *particeps criminis*. And the proposition is substantially true, that, wherever these three are found to concur, the criminal fact is committed. This proposition, however, should in reason be qualified thus: if these three things do concur, still the parties may not know the state of each other's minds on the subject, or they may be restrained by fear, or they may be under some temporary incapacity, or temporary absence of desire. And plainly wherever they do not concur, the offence is not committed. The proof of their concurrence may lie in detached testimony, no one witness being able to establish more than a single one or two of the links in the chain, or it may come in any other form."[1] It is not proposed to draw out here all the consequences of these propositions, but a single one may be noted.

§ 684. **Continued.** — Thus, while evidence of antecedent or even subsequent adulterous conduct between the defendant and the particular *particeps criminis* accused is pertinent, it is also relevant, though somewhat less convincing, to show the like conduct of the defendant toward still another person; at least, if it has gone so far as to constitute an actual attempt, whether successful or not, to commit the offence.[2] This doctrine is as applicable in a criminal case as in a divorce cause. Such evidence shows that the defendant had no principle restraining him from the act, but had the adulterous intent, which awaited only an opportunity. But it is not best to follow these doctrines further here; they will be found, in detail, in the author's work on Marriage and Divorce. It is, in these criminal cases, let us add, held, in accordance with the doctrines prevailing in divorce law, that, if familiarities indicating adultery are proved against a male defendant, evidence is then admissible that the alleged female *particeps criminis* bears the general reputation of being an unchaste woman.[3]

§ 685. **Time and Place.** — In divorce law, it is not necessary to prove at what particular time and place the adulterous act occurred; though the judge or jury must be satisfied that it did occur at some time and some place.[4] Of course, in crimi-

[1] 2 Bishop Mar. & Div. § 619.
[2] 2 Ib. § 625.
[3] Blackman *v.* The State, 36 Ala. 295.
[4] 2 Bishop Mar. & Div. § 613.

nal cases, the place must be shown to have been within the county in which the indictment was found.[1] But whether in other respects the same rule applies in criminal as in divorce cases it is perhaps not so easy to state on authority. In one case, "the defendants requested the court 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." This instruction the court declined to give; but told the jury, "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.[2] It is probably never required, in the criminal law, that the jury should be satisfied of the precise day when an alleged crime was committed, any more than of the precise hour, or the precise minute. And if the precise minute must be shown, then there could be no proof of any crime which the witness did not actually see perpetrated.

§ 686. **Confessions.** — For reasons peculiar to the law of divorce, this remedy cannot be granted to the plaintiff on the strength of the mere unaided confessions of the defendant. But on the trial of an indictment, these reasons do not prevail; and, as a general proposition, subject undoubtedly to exceptions, the defendant may be convicted of the crime of adultery on his own confessions,[3] and particularly so when they are corroborated by circumstances.[4] Still, if the man and woman are jointly indicted, in a single count, for one act of adultery, both cannot be convicted on the confession of one to an act committed at a particular time, and the confession of

[1] Crim. Proced. 2d ed. I. § 384, 385.

[2] Commonwealth *v.* Cobb, 14 Gray, 57.

[3] The State *v.* Libby, 44 Maine, 469; Lawson *v.* The State, 20 Ala. 65; Frost *v.* Commonwealth, 9 B. Monr. 362.

[4] Commonwealth *v.* Tarr, 4 Allen, 315. And see Bergen *v.* People, 17 Ill. 426.

the other to an act committed at a different time.[1] 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.[2]

§ 687. **Continued — Marriage.** — These criminal cases for adultery belong to the class in which what is sometimes called a fact of marriage, in distinction from cohabitation and repute, must be proved.[3] Under the statutes of some of our States, and by the rulings of the courts without the aid of a statute in others, evidence of confessions may be received to establish even this fact of marriage.[4] But where such a confession is admissible, it must be that of the particular defendant. Therefore, if a man and woman are indicted together for adultery, she being alleged to be the wife of another man, her confession of the marriage is good against her; but, supposing it to have been made in the absence of the defendant, it is not admissible against him.[5] Other points relating to the proof of the marriage were brought to view under the title Polygamy,[6] and the whole subject is fully discussed in the author's work on the law of Marriage and Divorce.

§ 688. **Wife — Husband.** — A wife, in these cases as in most others,[7] is incompetent to testify as a witness against her husband.[8] It has, therefore, even been held, that she cannot so much as prefer a complaint on oath before a magistrate for his arrest for this offence.[9] In Iowa, however, by a statute, complaint must be made by the wife, and the husband cannot be prosecuted otherwise.[10] Still, under this statute, if the prosecution is commenced by the wife, it may then be carried on without her presence or consent.[11] She need not go before the grand jury.[12] If several persons are indicted for a con-

[1] Commonwealth *v.* Cobb, 14 Gray, 57.

[2] Lawson *v.* The State, 20 Ala. 65; Frost *v.* Commonwealth, supra.

[3] 1 Bishop Mar. & Div. § 442, 482 et seq.

[4] 1 Ib. § 497–502, 544, 545; ante, § 609.

[5] Commonwealth *v.* Thompson, 99 Mass. 444.

[6] Ante, § 607–613.

[7] Crim. Proced. 2d ed. I. § 1019; II. § 69, 649.

[8] The State *v.* Armstrong, 4 Minn. 335.

[9] The State *v.* Berlin, 42 Misso. 572; Commonwealth *v.* Jailer, 1 Grant, Pa. 218. See Crim. Proced. 2d ed. I. § 230–232.

[10] Crim. Proced. 2d ed. I. § 232; The State *v.* Wilson, 22 Iowa, 364.

[11] The State *v.* Baldy, 17 Iowa, 39.

[12] The State *v.* Dingee, 17 Iowa, 232.

spiracy to charge the wife of one of them with adultery, this wife cannot be a witness in the case.[1]

§ 689. **Jury to judge of Facts.** — In these cases, as in others, though the court receives or rejects the evidence offered, the jury are to pass upon the result of it when admitted. Thus, when, on a trial for fornication, the judge charged the jury, that, if they believed the parties were found on a bed together, that the room-door was closed, that there was no one else present, that the woman was a prostitute, and that the defendant was in the habit of visiting her, they were bound to find him guilty of the crime, this was held to be wrong; for, though the evidence was thus conclusive as a question of fact, yet, as a question of law, it was for the jury, not the court, to draw the inference.[2]

§ 690. **Marriage not proved.** — Where, by law, fornication is ind ctable, the defendant may be convicted of it, on an indictment for adultery, if the marriage is not proved.[3] In order to justify the conviction for fornication, however, the indictment, omitting the allegation of marriage, must contain sufficient of averment to charge fornication.[4]

CHAPTER XXIX.

FORNICATION.

§ 691. **General View.** — A single act of fornication, like a single act of adultery,[5] is not indictable at the common law.[6] In some of our States it is made indictable by statutes;[7] and, where it is, there may be, as already observed,[8] a conviction of this offence on an indictment for adultery,[9] as well as on

[1] The State *v.* Burlingham, 15 Maine, 104.

[2] Ellis *v.* The State, 20 Ga. 438.

[3] The State *v.* Cowell, 4 Ire. 231; Crim. Law, 5th ed. I. § 795; post, § 691.

[4] Post, § 692; Commonwealth *v.* Murphy, 2 Allen, 163.

[5] Ante, § 654.

[6] The State *v.* Rahl, 33 Texas, 76.

[7] See The State *v.* Way, 6 Vt. 311; The State *v.* Cox, 2 Taylor, 165; Commonwealth *v.* Jones, 2 Grat. 555.

[8] Ante, § 690.

[9] Respublica *v.* Roberts, 2 Dall. 124, 1 Yeates, 6; The State *v.* Cowell, 4 Ire.

the indictment for fornication only. It differs from adultery in being constituted without the element of a marriage.

§ 692. **Form of Indictment.** — It is plain that, as a general rule, the parties to this offence, the same as to adultery,[1] may be indicted either separately or together at the election of the pleader.[2] And, unless there is some peculiarity in the statute, the indictment for fornication differs from that for adultery simply in omitting to charge a marriage. Yet an indictment for fornication, it has been held, though it need not aver a marriage, as is required in the indictment for adultery,[3] must allege that the parties were not married to each other; because, without this allegation, no offence appears.[4] Upon this view of the law, the following form is drawn: —

"That C. D., late of, &c. on, &c. at, &c., did commit the crime of fornication with one J. N., by then and there having carnal knowledge of the body of the said J. N., the said C. D. being then and there a single and unmarried man, and the said J. N. being then and there a single and unmarried woman, and the said C. D. and J. N. not being then and there lawfully married to each other, against," &c.[5]

§ 693. **Continued.** — Such is the doctrine in Massachusetts; but, in considering it, we should bear in mind the words of the statute, which are, "if a man commits fornication with a single woman, each of them shall be punished," &c.[6] Now, in this instance, the indictment, in order so to conform to the statute as to show an affirmative offence,[7] must contain, in some form, the sort of negative averment that the parties were not married to each other; or, exactly, that the female was, in the language of the statute, "a single woman." And the manner of the averment, in the foregoing form, is well enough. But, where the statute does not contain this clause, or any other of the like import, and the indictment employs the statutory term "fornication," together with the other appropriate allegations, it is believed that, on general principles,

231; The State *v.* Hinton, 6 Ala. 864; Crim. Law, 5th ed. I. § 795. Otherwise now in Alabama. Smitherman *v.* The State, 27 Ala. 23.

[1] Ante, § 670.

[2] The State *v.* Cox, 2 Taylor, 165.

[3] Ante, § 671–673.

[4] Commonwealth *v.* Murphy, 2 Allen, 163.

[5] Train & Heard Preced. 233.

[6] Mass. Gen. Stats. c. 165, § 8. The language of the Revised Statutes was the same. R. S. c. 130, § 5.

[7] Crim. Proced. 2d ed. I. § 614, 637; ante, § 378 et seq.

and according to the practice of most courts, there is no need to aver that the parties were not married to each other. The rule of certainty required in dilatory pleas — namely, "to a certain intent in every particular" — would doubtless demand this averment; but, in indictments, no greater certainty is necessary than will show a *prima facie* case,[1] and the prosecutor, it is believed, is not required to prove, therefore in the absence of particular statutory words he should not be called upon to allege, that the parties are not married. A marriage would seem to be in its nature matter of defence, while it is matter lying peculiarly within the knowledge of the defendant.[2] The author is not able to refer to any case in which this question has been discussed; but a book of Indiana practice, written by a competent lawyer and judge, omits the allegation in an indictment for open and notorious fornication;[3] and a book of forms prepared by a Pennsylvania lawyer, who ought to know what is required by the courts of his own State, has the following for fornication and bastardy: —

"That A. B., late, &c. on, &c. at, &c. and within the jurisdiction of this court, did commit fornication with a certain C. D., and a male bastard child on the body of her the said C. D. then and there did beget, contrary, &c., and against," &c.[4]

§ 694. **Conclusion.** — This offence, at other points, is so analogous to adultery, that no further separate discussion of it is required. In the last chapter, therefore, and in the chapter next following, various things helpful to those who are considering this offence are brought to view.

[1] Crim. Proced. 2d ed. I. § 324–328.

[2] See, as illustrating this proposition, ante, § 358, 485–488.

[3] Bicknell Crim. Pr. 448. It is held, in this State, that an indictment for living in open and notorious fornication need not negative a marriage; The State *v.* Gooch, 7 Blackf. 468; and it is believed that, in principle, there is no difference between that case and this. Post, § 700.

[4] Whart. Preced. 2d ed. No. 1003.

CHAPTER XXX.

LIVING IN ADULTERY OR FORNICATION.

695, 696. Introduction.
697, 698. Law of the Offence.
699–709. The Procedure.

§ 695. **General View.** — If the subject of the last chapter was closely connected with the one next before it and with this one, so this is closely connected with the last two and with the one next following. We have, in our States, statutes in various forms making punishable, not a single act of private adultery or fornication, but a series of acts, more or less continuous, and more or less open, and more or less offensive to the public sense of decency, according to the special terms of the particular statute. And, though it was deemed best to divide the discussion of these things into two chapters, there is no exact and certain line distinguishing what is for this chapter from what is to be considered in the next.

§ 696. **Order of the Chapter.** — We shall consider, I. The Law of the Offence; II. The Procedure.

I. *The Law of the Offence.*

§ 697. **Living in Adultery, &c.** — The statutes of the different States vary considerably in their terms; therefore the practitioner must look specially into the particular words of the enactment in his own State. A "living in adultery" is not constituted by a single act of unlawful commerce;[1] and it is the same with the words "living together" in adultery or fornication. Even if the one act is had in pursuance of a previous agreement between the parties, this does not make it a "living together in adultery or fornication" by them.[2] Something more, therefore, than mere occasional private intercourse is required; there must be a notoriety to the conduct of the parties, or they must live or lodge, at times at least,

[1] McLeland *v.* The State, 25 Ga. 477. [2] Smith *v.* The State, 39 Ala. 554.

under the same roof, or something must be done of the sort.[1] But it has been held, that 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 offence, though he does not otherwise abandon his own home;[2] also, that there is no legal impossibility of the complete crime being committed in a single day.[3] It was, therefore, deemed, in one case, not to be necessary, "that," in the words of Phelan, J. "the guilty parties should live together in the same house or continually, as man and wife. Any habitual illicit intercourse between them, though living apart, will constitute the offence. How long such habitual illicit intercourse must be continued is not settled." Each case, it was considered, must depend on its own special facts.[4]

§ 698. **Open and Notorious Living, &c.** — By a statute in Indiana, "every person who shall live in open and notorious adultery or fornication shall be fined," &c.; and it was held, that, to constitute such open and notorious acts, there must be a living together, as it was called, in distinction from occasional instances of incontinence.[5]

II. *The Procedure.*

§ 699. *The Indictment:* —

General View — Follow Statute. — There are no special difficulties as to the form of the indictment under these statutes. But, as the statutes differ in their terms, the pleader should be particularly careful to note the exact language of the provision on which he is proceeding, and follow it, at least, sufficiently to prevent a variance. Thus, in Arkansas, the statute being, "if any man and woman shall live together, as husband and wife, without being married," &c.; an indictment, alleging that the defendant unlawfully and wickedly did bed and live with a person named, was held to be defective in not charging a living together as husband and wife without being married.[6]

[1] Wright *v.* The State, 8 Blackf. 385; Searls *v.* People, 13 Ill. 597; Collins *v.* The State, 14 Ala. 608.

[2] Collins *v.* The State, 14 Ala. 608.

[3] The State *v.* Glaze, 9 Ala. 283.

[4] Smith *v.* The State, supra.

[5] The State *v.* Gartrell, 14 Ind. 280.

[6] Crouse *v.* The State, 16 Ark. 566.

§ 700. **Indiana — (Ohio, in the Note).** — The statute of this State has already been given.[1] It provides both for fornication and for adultery. "It is held," says Bicknell,[2] "that an indictment against an unmarried man, for living in open and notorious fornication with a woman, need not aver that she is unmarried; although, if the proof should show her to have been married at the time, the prosecution would fail, on the ground that the crime would be adultery and not fornication."[3] And he furnishes the following form of the indictment on the clause which makes the act fornication: —

"That A. B., on, &c., at, &c., and from that day until the ——— day of ———, in said county, unlawfully lived in open and notorious fornication together with one C. D., a woman, contrary," &c.[4]

On the adultery clause his form of the indictment is as follows: —

"That A. B. on, &c., at, &c., and from that day continuously until the ——— day of ———, in the year ———, at said county, unlawfully lived in open and notorious adultery together with one C. D., a woman who was then and there, and during all the said time, the wife of one E. D., who was then and there living, contrary," &c.

§ 701. **Disjunctive Allegation — "Or" — "And" — Duplicity.** — On a statute like this,[5] employing the words "adultery *or* fornication" (the Alabama provision is so also, and so are those of some of the other States), it is not permissible to allege that the parties lived together in "adultery *or* fornication."[6] Neither, it is believed, would it do to say "adultery *and* fornication;" for then the count would be incongruous,[7] likewise it would be double. Therefore, on this form of the provision, the Indiana

[1] Ante, § 698.

[2] Bicknell Crim. Pr. 446, 447.

[3] The State *v.* Gooch, 7 Blackf. 468; post, § 701. And see, ante, § 693.

[4] On the question whether the allegation should negative a marriage, the reader will compare this form with the form and discussion, ante, § 692, 693. In Ohio, the statute is different; and, according to the doctrine laid down in the discussion thus referred to, the indictment should negative the marriage. It is: "If any unmarried persons shall live and cohabit together, in a state of fornication, such persons, so offending, shall each, on conviction thereof, be," &c. And the following is the form given in Warren's Criminal Law (3d ed. p. 607, 617, 618): —

"That A. B. and C. D., on, &c., and from that time until the, &c., at, &c. (the said A. B. being then and there an unmarried man, and the said C. D. being then and there an unmarried woman), unlawfully did live and cohabit together in a state of fornication," &c.

[5] See Crim. Proced. 2d ed. I. § 434–446, 484, 588–592; II. § 438–440, 646.

[6] Maull *v.* The State, 37 Ala. 160.

[7] Ante, § 526.

pleader has wisely chosen to draw separate indictments on the two clauses of the one provision. Doubtless, however, the two forms of the charge could be included in one indictment, in distinct counts. Indeed, the broad doctrine is maintained, about which, however, there may be some doubt in matter of principle, that adultery and fornication under a statute in this form are so distinct as to render it impossible there should be a conviction for the one on an indictment for the other.[1] To the writer it would seem better to hold, that, if the indictment charges a marriage, and this is not proved, there may be a conviction for living in fornication;[2] and, on the other hand, if it is silent as to the marriage, this is a waiver of any claim by the prosecuting power to take advantage of such a fact, and the defendants cannot be permitted to escape by showing a marriage.[3] The latter point, however, is less clear in principle and in authority than the former.

§ 702. **"Together."** — The word "together" must in some way be covered by the allegation. Thus, where the charge was, that the defendants "did live in a state of adultery," &c., it was held to be insufficient; because, as observed by 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."[4]

§ 703. **Continuando.** — Again, while this offence is properly laid with a *continuando* if the pleader chooses, and is indeed one in which this form of the allegation is particularly appropriate,[5] the Alabama court has held, no doubt correctly, that it need not be. "Our statute," said the learned judge, "uses the terms 'who shall live together in adultery,' but we see no

[1] Thus, in Alabama, "the statute," it was observed, "has disjoined the offences of adultery and fornication, by declaring, that, 'if any man and woman live together in adultery *or* fornication,' &c." And the court held, that, under this statute, on an indictment for adultery, containing but a single count, no conviction can be had if the evidence shows both the parties to have been unmarried. "In such case, there is a fatal variance between the offence charged ['adultery'], and that proved ['fornication']." Smitherman *v.* The State, 27 Ala. 23. And see ante, § 700.

[2] Ante, § 691.

[3] Ante, § 485 et seq.

[4] Maull *v.* The State, 37 Ala. 160, 161. And see post, § 720, 721.

[5] Crim. Proced. 2d ed. I. § 392–395; II. § 103, 866.

reason to suppose they [the parties] could avoid a conviction for this specific offence, if the connection had only existed for one day. The living together in this condition is a question of fact for the jury."[1]

§ 704. **North Carolina Statute and Form.** — A provision in North Carolina is in the following words: "If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed, and cohabit together, they shall be deemed guilty of a misdemeanor." And the following indictment was held, on motion in arrest of judgment, to be good: —

"That George M. Lyerly (a male), late of said county of Rowan, and Jane May (a female), late of said county of Rowan, on the first day of January, in the year of our Lord eighteen hundred and fifty-nine, and on divers other days and times, both before and after that day, with force and arms, in the said county, unlawfully did bed and cohabit together without being lawfully married; and then, and on said other days and times, and there, did commit fornication and adultery; against the form of the statute in such case made and provided, and against the peace and dignity of the State."[2]

§ 705. **Views of this Form — Sex — "Live together," &c. — Alabama Form.** — This form contains more than is strictly necessary. Thus, there is no occasion to mention the sex of the parties; although, of course, if they were not of opposite sex they could not commit the crime. So it was held in Alabama, where the allegation, "that Daniel McLeod and Delany Waters, *alias* Lany Waters, did live together in a state of adultery and fornication," was adjudged to be sufficient.[3] Yet where, as in North Carolina, the statute uses the expression "man and woman," the pleader who wishes to be nicely exact will introduce the same words or their equivalent into the indictment, though he may not deem them to be strictly necessary.

§ 706. **"Live together," continued.** — According to the Alabama doctrine, therefore, it is sufficient for the indictment simply to charge, that the defendants, who appear to be a man and a woman, "did live together in fornication." Taking into the

[1] The State *v.* Glaze, 9 Ala. 283, opinion by Goldthwaite, J. And see ante, § 697.

[2] The State *v.* Lyerly, 7 Jones, N. C. 158. See, for a form under the Alabama statute, Lawson *v.* The State, 20 Ala. 65.

[3] McLeod *v.* The State, 35 Ala. 395.

account the difference between the Alabama and Indiana statutes, this view accords with the Indiana forms before given,[1] and is doubtless correct. Said Goldthwaite, J. in a case of this sort: "If a single act of fornication was indictable, it might perhaps be necessary to allege the constituents which make up the offence; although, even then, upon the reasoning of the case of The State *v.* Hinton,[2] it would be sufficient to charge the offence in the terms of this indictment. But entertaining some doubts as to the correctness of the reasoning in the case cited, we prefer to rest our decision on different grounds. The offence 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 offence 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." [3]

§ 707. **Another Form of Statute and Indictment.** — There is a North Carolina statute in which the crime is defined to be "a man taking a woman, or a woman a man, into his or her house, and having one or more children, without parting, or an entire separation; or, where they bed or cohabit together, they not being lawfully married." And an indictment alleging, that the defendant, Joel Fore, "did take into his house one Susan Chesnut, and they did then and there have one or more children, without parting, or entire separation, they, the said Joel Fore and Susan Chesnut, never having been lawfully married," was held to be, though "very carelessly drawn, . . . sufficient." [4] Again, an indictment charging that the defendants, "being persons of lewd and vicious habits, on, &c., and for a long time, to wit, for, &c., unlawfully did bed and cohabit together as man and wife, without being joined together in the holy bands of matrimony, contrary to the form of the statute," &c., was held to be good.[5]

§ 708. **Joint or Several Prosecutions.** — Though it seems to be

[1] Ante, § 700.

[2] The State *v.* Hinton, 6 Ala. 864.

[3] Lawson *v.* The State, 20 Ala. 65, 74. As to this doctrine of necessity in the form of the allegation, see Crim. Proced. 2d ed. I. § 493 et seq.

[4] The State *v.* Fore, 1 Ire. 378.

[5] The State *v.* Jolly, 3 Dev. & Bat. 110. To the like effect, see The State *v.* Gartrell, 14 Ind. 280.

the more proper form to make the indictment for this offence joint, against the two participants, yet this is not necessary. It is good against one of them alone.[1] And if the two are joined in the indictment, but one only of them is taken, it may proceed against the one; and, if there is a general verdict of guilty, this will not furnish ground for a motion in arrest of judgment.[2]

§ 709. *The Evidence:* —

General View. — The evidence in these cases is like that in simple adultery; modified in some particulars which will occur to every reader. There is no need, therefore, to enter upon a separate discussion of it here.

CHAPTER XXXI.

OPEN AND NOTORIOUS LEWDNESS.

710. Introduction.
711–718. Law of the Offence.
719–725. The Procedure.

§ 710. **Order of the Discussion.** — We shall consider, I. The Law of the Offence; II. The Procedure.

I. *The Law of the Offence.*

§ 711. **How at Common Law.** — The common law protects, to a certain extent, the morals of the community; and though, as we have seen,[3] it does not punish a single private act of adultery or fornication, it does visit with its penalties repetitions of the act, if of a public and openly scandalous nature.[4] Consequently, as observed elsewhere, "the keeping of bawdy-houses, the publishing of obscene prints and writings, the public utterance of obscene words, the indecent and public

[1] Wasden *v.* The State, 18 Ga. 264.
[2] The State *v.* Lyerly, 7 Jones, N. C. 158.
[3] Ante, § 654, 691.
[4] Crim. Law, 5th ed. I. § 501. And see Crouse *v.* The State, 16 Ark. 566; Delany *v.* People, 10 Mich. 241.

exposure of one's person or the person of another, and generally all acts of gross and open lewdness, are indictable at the common law."[1] For a like reason, while slavery existed among us, if a master caused or permitted his slave to pass about in public view, indecently naked, he was punishable at the common law for the offence against morality and decency; and an express command by him to the slave need not be shown to establish in proof the crime.[2] But most of these forms of public indecency, being considered in other connections, do not belong to this chapter.

§ 712. **Lewdly and lasciviously associate, &c.** — In some of the States, adultery, fornication, lewdness, or whoredom, when open and notorious, is by statute indictable, though the single act is not so, or punishable more severely than the single act; and then the party, to render himself liable, must proceed further or less far, according to the words of the statute. Where the words were, "shall lewdly and lasciviously associate and cohabit together," the cohabitation meant was held to be, not simple incontinence in a single instance, or in two instances,[3] but a dwelling or living together by the parties; the design of the enactment being, in the language of the court, "to prevent evil and indecent examples, tending to corrupt the public morals."[4] Therefore, under a statute like this, something more must be shown against a defendant than mere private incontinence, continued to however great a degree.[5]

§ 713. **Lascivious Carriage.** — But the Connecticut court has held, that, under a statute against "lascivious carriage," wanton and lascivious acts of one person only, practised toward and against the will of another of the opposite sex, may constitute the offence, though no third person is present. Said the judge: "It is evident from the preamble to the act, and the plain import of the expressions, that they meant to include and suppress all those wanton acts, between persons

[1] Crim. Law, 5th ed. I. § 500. And see ante, § 546, 550.

[2] Britain *v.* The State, 3 Humph. 203.

[3] The State *v.* Marvin, 12 Iowa, 499.

[4] Commonwealth *v.* Calef, 10 Mass. 153; The State *v.* Moore, 1 Swan, Tenn. 136.

[5] Commonwealth *v.* Catlin, 1 Mass. 8; The State *v.* Marvin, 12 Iowa, 499. See, however, The State *v.* Cagle, 2 Humph. 414.

of different sexes, flowing from the exercise of lustful passions, which are grossly indecent and unchaste, and which are not otherwise punishable as crimes against chastity and public decency." [1]

§ 714. **Lascivious Behavior, &c.** — And the Vermont court has decided, that, where a man indecently exposes his person to a woman, and solicits her to have sexual intercourse with him, and persists in this solicitation against her opposition and remonstrance, his conduct amounts to "open and gross lewdness and lascivious behavior," within the statute of this State.[2]

§ 715. **Whoredom.** — In Indiana it has been laid down, that any single act of adultery between a married female and a male not her husband, is "whoredom." [3] The reader will compare this interpretation with what is said of the word "prostitution" in a previous chapter.[4] Though doubtless these two words are not identical in meaning, we may still imagine situations and connections in which they ought to be deemed more nearly so than the naked expositions given there and here would indicate.

§ 716. **Lewdness.** — This word, it appears from an examination of the foregoing sections, differs in meaning both from whoredom and from prostitution. In a Massachusetts case, the court, without defining it, observed: "The argument for the defendant, that the word 'lewdness' in the statute applies only to the common-law offence 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." [5]

§ 717. **Public Indecency.** — An Indiana statute having made punishable "public indecency," the court held that these words were too indefinite in meaning to be the foundation of a criminal proceeding.[6] Thereupon the legislature expressed its own sense of their meaning, by substituting for the pro-

[1] Fowler *v.* The State, 5 Day, 81, 84, opinion by Baldwin, J.

[2] The State *v.* Millard, 18 Vt. 574.

[3] Rodebaugh *v.* Hollingsworth, 6 Ind. 339.

[4] Ante, § 641.

[5] Commonwealth *v.* Lambert, 12 Allen, 177. Compare this with Commonwealth *v.* Catlin, 1 Mass. 8. See, also, The State *v.* Rye, 9 Yerg. 386.

[6] Jennings *v.* The State, 16 Ind. 335; The State *v.* Huey, 16 Ind. 338.

vision one 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." [1]

§ 718. **Cohabitation under Invalid Marriage.** — It may be a question whether, or how far, a cohabitation under a polygamous or otherwise invalid marriage is obnoxious to provisions of statutory law like those discussed in this chapter. From one case it would seem, that, in these circumstances, the inhibitions now under consideration are not violated.[2]

II. *The Procedure.*

§ 719. *Indictment:* —

General View.— It will be helpful, in this connection, to consult the discussions of the last chapter; for the analogies between the procedure there discussed and here are very close. But as the statutes creating this offence differ in their terms, what is most important, in framing the indictment, is to follow the particular statutory words.

§ 720. **Massachusetts Statute and Form.** — The Massachusetts statute is as follows: "If any man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness and lascivious behavior," &c.[3] Now, it is to be observed, that here are two clauses; and, according to principles before laid down,[4] if the indictment is on the former clause, the marriage of the parties must be negatived, while if it is on the latter it need not be. In Train and Heard's Precedents we have the following form, drawn on the former clause; but, for a reason of another sort, as we shall see in the next section, it is insufficient according, at least, to the opinions of some courts: —

[1] Bicknell Crim. Pr. 448, 449.

[2] Commonwealth *v.* Hunt, 4 Cush. 49. And see ante, § 666.

[3] Gen. Stats. c. 165, § 6. In the Revised Statutes, the provision was in the same terms. R. S. c. 130, § 4.

[4] Ante, § 692, 693. In Iowa, an indictment under the Code should charge that the parties were not married to each other. The State *v.* Clinch, 8 Iowa, 401.

"That C. D., late of, &c., on, &c., at, &c., and from that day continually to, &c., at, &c., did lewdly and lasciviously associate and cohabit with one J. N.; the said C. D. being then and there an unmarried man, and the said J. N. being then and there an unmarried woman, and the said C. D. and the said J. N. not being then and there married to each other; against the peace, &c., and contrary," &c.[1]

It is plain that this negative averment, though legally well enough, is more extended in its terms than it need be.[2] Therefore, and because this form will be deemed by some, and perhaps by all, to be insufficient in another respect, the following substitute is proposed: —

That A, &c., and B, &c., at, &c., on, &c. and from that day continually until the, &c., not being there at the said several days and times married to each other, did lewdly and lasciviously associate and cohabit together, against the peace, &c., and contrary, &c.

§ 721. **"Together" — "With each other."** — Some of the statutes use the words "together;" others, "with each other;" in describing the cohabitation. We saw, in the last chapter, that the allegations in the indictment for the offence there treated of must cover these words;[3] and there appears to be no difference in this respect, between the offence there and here. If this doctrine is sound, then the Massachusetts precedent given in the last section is not adequate. Therefore, in Missouri, a statute having provided, that "every man and woman, one or both of whom are married and not to each other, who shall lewdly and lasciviously abide and cohabit with each other," shall, &c., an indictment setting out that the defendant, a married man, lewdly and lasciviously abode and cohabited with one B, not saying that the two cohabited "with each other," was held to be insufficient.[4] And in Michigan, where the term is "together," the statute being, "if any man and woman, not being married to each other, shall lewdly and lasciviously associate and cohabit together," &c., not only is this doctrine held, but the language of the court goes to the further point, that separate informations cannot be maintained, the parties must be charged jointly, though they need not be jointly tried; "unless," added the learned judge, "one of the parties be unknown, or since dead."

[1] Train & Heard Preced. 352.
[2] Ante, § 382.
[3] Ante, § 702.
[4] The State *v.* Byron, 20 Misso. 210.

Consequently, where the allegation was, that the one defendant "did lewdly and lasciviously associate and cohabit with B, &c., they not being then and there married to each other," it was adjudged ill as not charging a joint offence against B also.[1]

§ 722. **Divers Days — Continuando — "Then and There."** — This is one of those offences which are generally laid as continuing from day to day. The forms of doing this are various, and they have been by the author discussed elsewhere.[2] The Massachusetts form above given suggests the inquiry whether, after the allegation of different days has been made, it is sufficient in a subsequent averment to set out the time and place simply by the use of "then and there." On this point, the author has sought in vain for authorities as distinct as he would like. In Massachusetts, a defendant was indicted for that he, "on, &c., and at said Greenfield from said last mentioned day to the day of finding this indictment, without *then and there* having any license, appointment, or authority therefor first duly had and obtained according to law, was *then and there* a common seller of spirituous and intoxicating liquors;" and the court sustained the indictment against an objection to the manner in which the latter day was set out. But the point now under discussion was not agitated.[3] Lord Hale, on the authority of the Year Books, lays it down as insufficient to charge that the defendants, on the first day of May, and also on the second day of May, made

[1] Delany *v.* People, 10 Mich. 241. In this case, the court considered that it was not legally possible for one of the parties to commit the offence unless the other was guilty also. Said Christiancy, J.: "The analogy, therefore, so far as this question is involved, is complete between this offence and those of conspiracy and riot, which cannot be committed by a single person. The charge, therefore, must be joint; and both must be joined as defendants in the same information or indictment, unless one of the parties be unknown, or since dead," p. 245. Now, it seems to me, that, as the learned judge observed, the analogy is complete between this offence and the offences of conspiracy and riot. But I understand that, if the prosecuting power pleases, parties guilty of those offences may be indicted, as well as tried, separately; though, in practice, such a course is unusual. The form of the allegation, however, should, even in such a case, charge, in some appropriate form of words, that the criminal act was committed jointly. Crim. Proced. 2d ed. II. § 225, 998. Now, the forms held ill in Missouri and Michigan do not quite come to the point of charging a joint act; and, at the same time, they do not fully cover the words of the statute. And see Ashworth *v.* The State, 9 Texas, 490.

[2] Crim. Proced. 2d ed. I. § 392–397.

[3] Commonwealth *v.* Wood, 4 Gray, 11.

an assault on one, and then and there feloniously took, &c.; because, two days having been mentioned before, it is not evident to which of them the felonious taking relates.[1] And this doctrine has been repeated in all the books since;[2] and, so far as the author is aware, practised upon. But the case put by Lord Hale was not one of an offence in its nature continuing. As applied in ordinary criminal cases, there can be no question of the soundness of the doctrine. But, if the offence is continuing in its nature, and the opening allegation puts it in this form, the writer of these sections does not perceive why "then" may not refer as well to the whole series of days as to a single twenty-four hours. It is established doctrine that "then" will mean less than twenty-four hours when its antecedent does;[3] consequently, when its antecedent is larger, it should be construed as being larger also. Still, those forms to which we usually resort as evidence of the law are not drawn on this idea of the effect of the word "then."[4] It is not necessary to charge the offence now under discussion as continuing, though the pleader may do so if he chooses.[5]

§ 723. "**Lewd, &c., Person.**" — A statute in Massachusetts provides for the conviction, before a magistrate, of "lewd, wanton, and lascivious persons in speech or behavior;"[6] and the following allegations in a complaint were held to be sufficient: —

"That A, at, &c., on, &c., and on divers other days and times, at, &c., between that day and the day of making this complaint, was and still is a lewd, wanton, and lascivious person in speech and behavior," &c.

The charge was held to be neither uncertain nor double; it entered sufficiently into the particulars; and it need not, as it did not, conclude to the common nuisance. On the last point, Merrick, J. observed: "In prosecuting offences which are in strictness nuisances, this form in pleading is considered essential;[7] but, in relation to the several offences enumerated

[1] 2 Hale P. C. 178; 1 Chit. Crim. Law, 218.

[2] And see Crim. Proced. 2d ed. I. § 414.

[3] Ib. I. § 412.

[4] Ib. II. § 98, 103, 105, 273, 488, 812, 875, 1042.

[5] Hinson *v.* The State, 7 Misso. 244.

[6] Mass. Gen. Stats. c. 165, § 28.

[7] As to which, see Crim. Proced. 2d ed. II. § 863, 864.

in the statute referred to, the charge will, in general, be sufficiently set forth if the complaint and accusation are in the words by which the offence is created and described." [1]

§ 724. **How full the Allegation — Statutory Words.** — In drawing the indictment, the pleader should keep the language of the statute in mind. Therefore, in Tennessee, it must be averred that the acts constituting the offence were openly and publicly committed.[2] But while thus the indictment must follow the terms of the statute, there may be some difference of judicial opinion as to whether it need go beyond such terms, and allege more specific matter. We saw, in the last section, that such further expansion was not deemed essential in the case there mentioned. So a Missouri statute makes punishable "every person, married or unmarried, who shall be guilty of open, gross lewdness or lascivious behavior;" and it was held, that an indictment simply in these statutory words is good;[3] but this appears to be contrary to an earlier decision in the same State, where it was deemed that specific acts should be set out.[4] It is believed that our courts generally would not require the setting out of specific acts.

§ 725. *Evidence:* —

Circumstantial — Hearsay. — This offence may be proved by circumstantial evidence,[5] but not by hearsay,[6] such as rumor and talk in the neighborhood.

[1] Commonwealth *v.* Parker, 4 Allen, 313, 314; ante, § 557.

[2] The State *v.* Moore, 1 Swan, Tenn. 136.

[3] The State *v.* Bess, 20 Misso. 419.

[4] Dameron *v.* The State, 8 Misso. 494.

[5] Peak *v.* The State, 10 Humph. 99.

[6] Belcher *v.* The State, 8 Humph. 63; Buttram *v.* The State, 4 Cold. 171.

CHAPTER XXXII.

INCEST.

726. Introduction.
727–730. Law of the Offence.
731–736. The Procedure.

§ 726. **Order of the Discussion.** — We shall consider, I. The Law of the Offence; II. The Procedure.

I. *The Law of the Offence.*

§ 727. **Defined — Form of Marriage.** — When the parties to an act, or series of acts, of unlawful carnal intercourse, are related to each other within the degrees of consanguinity or affinity wherein marriage is prohibited by law,[1] their offence is called incest. If there were the form of a marriage between them, and it were voidable only, then, until sentence of nullity pronounced, the cohabitation would be lawful;[2] but, if it were a void marriage, it could give to the carnal commerce no protection.[3]

§ 728. **Common Law — Statutes.** — The offence of incest, like simple adultery and fornication, appears not to be indictable at the common law;[4] but it is indictable under the statutes of some, perhaps most of our States.[5]

[1] 1 Bishop Mar. & Div. § 313 et seq.

[2] 1 Bishop Mar. & Div. § 105, 116, 119, 320.

[3] 1 Bishop Mar. & Div. § 105, 119. Blackstone says: "In the year 1650, when the ruling powers found it for 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 offences 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 offence 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 seems always to have remained an offence in Scotland.

[4] Crim. Law, 5th ed. I. § 502.

[5] Cook *v.* The State, 11 Ga. 53; Peo-

§ 729. **Illegitimate Children.** — Where the relationship is by consanguinity, there is little doubt that illegitimate children are the same as legitimate, in respect of this offence; since the rule is so as to marriage;[1] indeed, the law seems to have been so held.[2]

§ 730. **Knowledge of the Relationship.** — According to the Scotch law, this crime of incest is not committed when the party has no knowledge of the relationship.[3] It is so also by the express provision of many of our statutes. How, in principle, it is where the statute is silent on this subject, the reader will see by consulting some earlier discussions in this volume.[4]

II. *The Procedure.*

§ 731. **General View.** — The discussions in the last four chapters will stand in the place of any minute elucidations in this. The statutory offence of incest assumes the various forms brought to view in those chapters, simply swelled by the aggravating matter of the relationship. The relationship, therefore, must be set out in the indictment and proved at the trial. With the exception of this particular, the indictment and the proofs are the same here as have been described in the last four chapters.

§ 732. **The Relationship.** — In these cases, as in others, the pleader must attend to the words of the statute on which he draws the indictment. Thus, where the words of the statute were, "if any father shall have sexual intercourse with his daughter, knowing her to be such;" and the indictment alleged, 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;" this was held to be insufficient, as not containing any averment of his knowledge of the relationship. The word "unlawfully"

ple *v.* Harriden, 1 Parker, 344; Attorney General *v.* Broaddus, 6 Munf. 116; Baker *v.* The State, 30 Ala. 521; Howard *v.* The State, 11 Ohio State, 328; United States *v.* Hiler, 1 Morris, 330. See the last case for an interpretation of the Iowa statute.

[1] 1 Bishop Mar. & Div. § 315.

[2] Baker *v.* The State, 30 Ala. 521.

[3] 1 Alison Crim. Law, 563; ante, § 356, 357. See Morgan *v.* The State, 11 Ala. 289; Delany *v.* People, 10 Mich. 241, 244.

[4] Ante, § 351–359, 362, 664, 665.

is not an equivalent for the words of the statute, therefore it does not constitute such an averment.[1] It is not, however, necessary in all cases that the exact statutory words should be used. Thus, in Michigan, the words of the statute are, "within the degrees of consanguinity within which marriages are prohibited or declared by law to be incestuous and void;" and an allegation was held to be sufficient which simply charged, that the defendant "did commit the crime of fornication" with one B, his daughter.[2]

§ 733. **Continued — Knowing.** — As to alleging knowledge of the relationship, the two instances mentioned in the last section will furnish the rule. If the statute expressly makes such knowledge an ingredient in the offence, it must be alleged; otherwise, it need not be.[3] And so, in simple adultery, the indictment need not aver that the defendant knew the other party to be married, in a case where the statute is silent on the point of knowledge.[4] In Alabama, under the statute against incest, an indictment charging that the defendant, "being then and there the father of one Elizabeth Baker, and within the degree of consanguinity within which marriages are declared by law to be incestuous and void, and then and there knowing the said Elizabeth to be his daughter, did then and there live with the said Elizabeth in a state of adultery," was held to be sufficient.[5] And it was held not to be necessary to charge a common knowledge of the relationship; but it is enough to allege, that the relationship was known to the defendant. "It is true," said the learned judge, "the statute defines the offence to be the living in a state of adultery of persons within the degrees of consanguinity, or relationship, whose marriages are declared by law to be incestuous and void, *knowing of such consanguinity;* but this, in our judgment, warrants no inference that the knowledge is to be common to both the parties, before the guilt of either can attach."[6]

§ 734. **Continued.** — In Illinois, the allegation that the act

[1] Williams *v.* The State, 2 Ind. 439.

[2] Hicks *v.* People, 10 Mich. 395.

[3] See, for the doctrine in this class of cases, ante, § 358.

[4] Commonwealth *v.* Elwell, 2 Met. 190.

[5] Baker *v.* The State, 30 Ala. 521.

[6] Morgan *v.* The State, 11 Ala. 289, 290, opinion by Goldthwaite, J.

was done by the defendant A, on the person of B, the said B then and there being the daughter of him, the said A, was held to be an adequate averment of the relationship of the parties.[1]

§ 735. **Proof of Relationship.** — In Tennessee it is held, that, on an indictment for incest, the relationship and pedigree of the parties may be proved by reputation.[2]

§ 736. **Continued — Confessions.** — On the indictment for incest, the same as for common adultery,[3] evidence of confessions by the defendant is admissible. Even the relationship of the parties may be proved in this way.[4]

CHAPTER XXXIII.

MARRIAGE LAWS.

§ 737. **General View.** — There are statutes in the several States intended to protect the institution of marriage, by inflicting penalties on the parties, and on magistrates, who violate their prohibitions. But these enactments are so diverse, and, at the same time, are so far considered in the "Com-

[1] Bergen *v.* People, 17 Ill. 426; S. P. Hicks *v.* People, 10 Mich. 395. See also Howard *v.* The State, 11 Ohio State, 328. In Virginia, the following indictment for an incestuous marriage pursues the words of the statute: —

"That William Tankersly, of the said County of Washington, yeoman, on the first day of March, in the year of our Lord, 1819, with force and arms, at the county aforesaid, and within the jurisdiction of the Superior Court of Law holden in and for the said County of Washington, unlawfully, willingly, and incestuously, did intermarry with, and take to be his wife, a certain Nancy Hutchins, the niece of the said William Tankersly, being the daughter of Elizabeth Hutchins, the sister of the same William Tankersly, and within the degrees prohibited by an act of the General Assembly of Virginia, intituled 'An Act to regulate the solemnization of marriages, prohibiting such as are incestuous, or otherwise unlawful, &c.' And that the said William Tankersly and the said Nancy Hutchins, then and there, from the said first of March, in the year aforesaid, until the taking of this inquisition, did unlawfully, willingly, and incestuously continue to cohabit and live together as man and wife, against the form of the Acts, &c., &c."

Upon this indictment, both parties were arrested and convicted; and the proceeding was held to be correct. On writ of error brought by her, who objected that she was not charged with having intermarried with him, White, J. observed: "It was impossible that he could have intermarried with her unless she had also intermarried with him." Hutchins *v.* Commonwealth, 2 Va. Cas. 331, 332. See also Attorney-General *v.* Broaddus, 6 Munf. 116.

[2] Ewell *v.* The State, 6 Yerg. 364. See 1 Bishop Mar. & Div. § 546–548.

[3] Ante, § 686.

[4] People *v.* Jenness, 5 Mich. 305; Morgan *v.* The State, 11 Ala. 289.

mentaries on the Law of Marriage and Divorce," written by the author of this work, that it does not seem wise to enter into a minute consideration of them here.[1]

§ 738. **Particular Points.** — A few points were mentioned in the earlier discussions of this volume;[2] others, in the author's work on the Criminal Law.[3] The offence of polygamy has already been treated of in the foregoing sections.[4] In the work on Marriage and Divorce were considered the construction and effect of a statute forbidding, after a divorce, the guilty party to enter into a second marriage. It was there seen that such a transaction is not polygamy, but is a special dereliction to be punished by an indictment drawn on the particular statute.[5]

§ 739. **Continued.** — The reader is referred, in a note,[6] to some cases in which a few other points will appear. And, on the whole, though some benefit to the reader would come from further extending this chapter, it is deemed best it should here close.

CHAPTER XXXIV.

ABORTION.

740, 741. Introduction.
742–750. Law of the Offence.
751–762. The Procedure.

§ 740. **General View.** — Abortion is in some sense a common-law offence, as well as a statutory one. Perhaps, therefore, the proper place for its treatment was in the author's other

[1] For a full discussion of the question of marriage, see 1 Bishop Mar. & Div. § 105–549; for a chapter on the "Wrongful Solemnization of Marriage," considered in respect of the criminal law, see ib. § 341 et seq.

[2] Ante, § 222, 254, 614, et seq.

[3] Crim. Law, 5th ed. I. § 373, 509, 555.

[4] Ante, § 577 et seq.

[5] 2 Bishop Mar. & Div. § 700; ante, § 666.

[6] The State *v.* Bray, 13 Ire. 289; The State *v.* Loftin, 2 Dev. & Bat. 31; The State *v.* McWhinney, 5 Blackf. 364; Smyth *v.* The State, 8 Eng. 696; Bailey *v.* The State, 34 Maine, 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.

works. But the fact, that, in England, from an early period, and generally in our States, its punishment is, in practice, almost exclusively under statutes, induced the author to assign it to the present volume.

§ 741. **Order of the Chapter.** — We shall consider, I. The Law of the Offence; II. The Procedure.

I. *The Law of the Offence.*

§ 742. **Connected with Homicides.** — Abortions, actual or attempted, not unfrequently result in the death of the woman. In such a case, the guilty party is indictable for the homicide as murder.[1] Or, again, if the pregnancy has progressed far enough, it may cause the child to be born alive, and then to die from injuries inflicted in the operation, or from premature exposure to the external world; the consequence of which will be, that, in this case the same as the other, the guilty person will be indictable for murder.[2] These are doctrines of the common law.

§ 743. **Continued — Statutes.** — In some of our States there are statutes in aid or modification of the common law on this subject. Thus, in Massachusetts, a statute was in 1845 enacted, which was afterward introduced into the General Statutes, as follows: "Whoever, with intent to procure miscarriage of any woman, unlawfully administers to her, or advises or prescribes for her, or causes to be taken by her, any poison, drug, medicine, or other noxious thing, or unlawfully uses any instrument or other means whatever with the like intent, or with like intent aids or assists therein, shall, if the woman dies in consequence thereof, be imprisoned in the state prison not exceeding twenty, nor less than five, years, and if the woman does not die in consequence thereof, shall be punished by imprisonment in the state prison not exceeding seven years, nor less than one year, and by fine not exceeding two thousand dollars."[3] The earlier statute had in it the words "then

[1] Crim. Law, 5th ed. II. § 691; Reg. *v.* Fretwell, Leigh & C. 161, 9 Cox C. C. 153; Commonwealth *v.* Hersey, 2 Allen, 173; The State *v.* Moore, 25 Iowa, 128.

[2] Crim. Law, 5th ed. I. § 328; II. § 691; Reg. *v.* West, 2 Car. & K. 784, 2 Cox C. C. 500; Storer & Heard Abortion, 153.

[3] Gen. Stats. c. 165, § 9; Commonwealth *v.* Brown, 14 Gray, 419; Commonwealth *v.* Jackson, 15 Gray, 187.

pregnant with child," which this one has not. Under the earlier statute, therefore, it is plain, that, for the offence to be committed, the woman must have been actually pregnant, and not merely believed to be so. And the court even expressed the opinion, that, if the fœtus, at the time of the operation, had lost its vitality, so that it could not mature into a living child, the offence would not, in law, be committed. Yet it was no objection that the woman was not, as the phrase is, "quick with child."[1] Probably, under the provision as it now stands, the court would hold actual pregnancy not to be necessary, if it were only believed to exist; at all events, this is plainly the better doctrine, though, on a point like this, judges appear to differ.[2]

§ 744. **Abortion as Common-law Offence.** — Whether, before the fœtus has quickened, an abortion procured with the mother's consent is an offence at the common law, the English books do not distinctly inform us; and the question for England has long been settled by statute in the affirmative. In this country, the tribunals of some of the States have decided in the negative; holding, that, until the woman is quick with child, if she consents, no indictment lies at the common law, — though, if she does not consent, the act is an aggravated assault.[3] The Pennsylvania court, however, discarded this doctrine of the necessity of a quickening; and the learned judge who delivered the opinion remarked with great force: "It is not the murder of a living child which constitutes the offence, 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."[4] If we look at the reason of the law, we shall prefer the Pennsylvania doctrine; because the public and private mischiefs are the same, whether the abortion takes place just before or just after the first movings of the coming human existence are perceptible to the expectant mother.

[1] Commonwealth *v.* Wood, 11 Gray, 85, 92.

[2] See Crim. Law, 5th ed. I. § 741 and the accompanying discussions.

[3] Commonwealth *v.* Parker, 9 Met. 263; Commonwealth *v.* Bangs, 9 Mass. 387; The State *v.* Cooper, 2 Zab. 52.

[4] Mills *v.* Commonwealth, 1 Harris, Pa. 631, 633, opinion by Coulter, J.

§ 745. **"Quick with Child."** — The phrase "quick with child" has been defined to mean, that the woman has felt the child move within her;[1] and a distinction between this expression and "with quick child," once taken by a learned judge,[2] has been discarded.[3]

§ 746. **Continued — Statute — Administering Drug.** — A statute in Ohio provides a punishment for "any physician or other person who shall wilfully administer to any pregnant woman, any medicine, drug, substance, or thing whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose." And it has been held, that the offence may be committed at any time during the period of gestation.[4] Likewise in Vermont, where it is a statutory offence to attempt to procure the "miscarriage" of a woman "pregnant with child," the court has held it not to be essential that the fœtus be alive at the time 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."[5] On the last point, as we have seen,[6] a contrary intimation has been made in Massachusetts; yet, in the latter State, as in the others, the fœtus need not have quickened.

§ 747. **Differing Statutes — (Points, in the Note).** — The offence of abortion, as actually perpetrated or as attempted, is defined and forbidden by statutes in England, and in probably every one of our own States. But the English statutory law has differed at different times in the terms in which it is expressed,[7] and there has been no uniformity of terms in our

[1] Goldsmith's Case, 3 Camp. 76; Rex *v.* Phillips, 3 Camp. 73.

[2] Reg. *v.* Wycherley, 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."

The State *v.* Cooper, 2 Zab. 52, 57; and see the authorities there cited; also Rex *v.* Russell, 1 Moody, 356, 360. See The State *v.* Smith, 32 Maine, 369.

[4] Wilson *v.* The State, 2 Ohio State, 319.

[5] The State *v.* Howard, 32 Vt. 380, 403.

[6] Ante, § 743.

[7] There have been certainly three (I cannot say how many more) successive English statutes against attempted abortion, in force at different times, the

American States. The only course, therefore, for the lawyer is to consult the statutes of his own State, and the decisions of the courts upon them if such there are; then, from the general principles of the criminal law and the other material thus before him, to draw the legal conclusion which his case requires. It is in the highest degree unsafe to rely upon points adjudicated elsewhere, or in former times, under statutes differing in their terms from his own. A few points adjudged will, nevertheless, be stated in a note.[1]

provisions whereof differ from one another so as to require, in some respects, different constructions; namely, Stat. 43 Geo. 3, c. 58, § 1; Stat. 7 Will. 4 & 1 Vict. c. 85, § 6; and the present statute of 24 & 25 Vict. c. 100, § 58, 59. See Crim. Law, 5th ed. I. § 741 and note; Greaves Crim. Law Acts, 82.

[1] 1. *England.* The prisoner was convicted on an indictment, under § 6 of 7 Will. 4 & 1 Vict. c. 85, for administering and causing to be taken by E. C. certain poison with intent to procure her miscarriage. It appeared that E. C., being pregnant, applied to the prisoner to get her something to procure miscarriage, and that the prisoner did procure a drug, which drug was given by the prisoner to E. C., and taken by her with intent to procure, and did in fact procure, miscarriage; but that the taking by E. C. was not in the presence of the prisoner. Held, that the conviction was right, inasmuch as there was a "causing to be taken," within the meaning of the statute. Reg. *v.* Wilson, 37 Eng. L. & Eq. 605, Dears. & B. 127, 7 Cox C. C. 190. In another case, under the same statute, the prisoner was convicted on an indictment containing several counts, for administering and causing to be taken by L. C. certain noxious drugs, with intent to procure abortion. It appeared that the prisoner delivered certain drugs to L. C., in order that she might take them with a view to produce abortion, and told her where she could procure other drugs with the same view; that the last-mentioned drugs were procured by L. C., and afterward made into pills by the prisoner, and that L. C. did, for the purpose aforesaid, take, not only the drugs so delivered to her by the prisoner, but also the drugs so procured by L. C., and made into pills by the prisoner; and that enough of each was taken to be noxious; but it did not appear that the prisoner was present when any of the drugs were taken. Held, that the conviction was right, and that the case was not distinguishable from the above case. Reg. *v.* Farrow, 40 Eng. L. & Eq. 550, Dears. & B. 164. See also Reg. *v.* Fretwell, Leigh & C. 161. Upon an indictment under 24 & 25 Vict. c. 100, § 59, for supplying a certain noxious thing, knowing that the same is intended to be used to procure a miscarriage, there must be proof of the noxious quality of the thing supplied. The supplying of innoxious drugs, with whatever intent, is not an offence within the statute. Reg. *v.* Isaacs, Leigh & C. 220. In order to constitute the offence created by this statutory provision, there is no need the intent to have the drug employed for the unlawful purpose should exist in the mind of any other person than the one supplying it. Reg. *v.* Hillman, Leigh & C. 343.

2. *Iowa.* Since the code, it is not a criminal offence to kill an unborn quick child, as the code repealed the former special provision, and such a child is not a human being within § 2508, at least before quickening. Abrams *v.* Foshee, 3 Iowa, 274.

3. *New Jersey.* In an indictment under the act providing, that, "if any person or persons maliciously, or with-

§ 748. **Administering Drug, continued — Attempt.** — A person indicted under a statute, for administering a drug, or doing some other like act, with the intent to procure an abortion, may be convicted, not alone when the proofs show an unsuccessful attempt, but equally when they show the attempt made successful; that is, show an abortion actually committed.[1]

§ 749. **Guilt of Woman — Consent, &c.** — A statute in Iowa is in the following words: "Every person who shall wilfully administer to any pregnant woman any medicine, drug, substance, or thing whatever, or shall use or employ any instrument, or other means whatever, with the intent thereby to procure the miscarriage of any such woman, unless the same shall be necessary to preserve the life of such woman, shall," &c. And it was held not to be an offence, within this provision, for a woman to procure an abortion on herself. "It is," said Baldwin, C. J. "clear to us from the wording of this act, that it was the person who used the means with the pregnant woman to procure the abortion, and not the woman herself, that the legislature intended to punish. We arrive at this conclusion from the direct and specific language of the act itself."[2] So, in New York, on the trial of an indictment for advising and procuring a pregnant woman to take a certain medicine with intent to procure her miscarriage, the female does not, it is deemed, stand legally in the situation of an accomplice. The law regards her rather as the victim

out lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow, any poison, drug, medicine, or noxious thing," he shall be punished, &c., it is not necessary to aver that the poison, &c., was actually taken or swallowed, nor need this be proved at the trial. "Under the statute," said the learned judge, "the defendant's guilt is complete by giving the advice with the intent specified in the act, and it is immaterial whether the advice be followed or not." The State *v.* Murphy, 3 Dutcher, 112, 115.

4. *Ohio.* The statute passed Feb. 27, 1834, providing for the punishment of the offence of killing a woman pregnant of a quick child, by administering to her medicine, or, &c., with intent to produce abortion, and thereby destroy the unborn child, was not repealed by the act of March 7, 1835. Robbins *v.* The State, 8 Ohio State, 131.

[1] Reg. *v.* Wilson, Dears. & B. 127.

[2] Hatfield *v.* Gano, 15 Iowa, 177, 178. See, ante, § 594, and the places there referred to. In England, a woman who procures, or attempts to procure, her own miscarriage is made criminal by express words of the statute, 24 & 25 Vict. c. 100, § 58. And see Reg. *v.* Fretwell, Leigh & C. 161, 9 Cox C. C. 152.

than the perpetrator of the crime.[1] And it is of no avail for the prisoner, on the trial of an indictment for abortion, that the woman consented;[2] or that her parents, desiring to screen her from disgrace, consented.[3] Of course, if the woman does not consent, the separate offence of assault is committed; but not if she does consent.[4]

§ 750. **Felony or Misdemeanor.** — The offence of abortion is misdemeanor at the common law, and it is the same under the statute of Illinois.[5] There are statutes in which it is, in some of its branches, felony; but the practitioner will be able readily to determine this question for himself, by examining the statutes of his own State.

II. *The Procedure.*

§ 751. *The Indictment:* —

Common Law — Assault and Administering, with Intent, &c. — It will be useful, in the first place, to see something of the common-law forms. The following is the first count of a form furnished by Chitty,[6] for assault and administering drugs, &c., to procure a miscarriage: —

"That E. F., late of, &c. [being a wicked, malicious, and evil disposed person, and not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil[7]], on, &c. [with force and arms[8]], at, &c., aforesaid, in and upon one A. E., the wife of F. E. [in the peace of God, and our said sovereign lord the king, then and there being[9]], and also then and there being big and pregnant with child, did make a violent assault, and that he the said E. F. then [and on divers other days and times, between that day and the day of the taking of this inquisition, with force and arms[10]], at, &c., aforesaid, knowingly,

[1] Dunn *v.* People, 29 N. Y. 523. But see People *v.* Josselyn, 39 Cal. 393.

[2] Crim. Law, 5th ed. I. § 257–260.

[3] Commonwealth *v.* Wood, 11 Gray, 85.

[4] Ante, § 491, 492, 500, 511.

[5] Holliday *v.* People, 4 Gilman, 111.

[6] 3 Chit. Crim. Law, 798.

[7] This allegation is never necessary in an indictment. Crim. Proced. 2d ed. I. § 501. And see ante, § 438 and note.

[8] In most of the States, expressly rendered unnecessary by statute, and generally held to be unnecessary even if there is no statute on the subject. Ante, § 376, 438 and note.

[9] Unnecessary. Crim. Proced. 2d ed. II. § 57, 504.

[10] It is unwise to use these words in a case of this sort. If the pleader is not particularly careful, there is in all cases danger from them; therefore, unless an offence is *in its nature* continuing, they are better omitted. Should an allegation refer all the acts to a particular day, the proof may still show them to have been performed on different days. The rule, on this point, is, that, if the acts are such as *in their nature* cannot all be done on one day, or, if so

unlawfully, wilfully, wickedly, maliciously, and injuriously, did give and administer, and cause and procure to be given and administered, to the said A. E., so being big and pregnant with child as aforesaid, divers deadly, dangerous, unwholesome, and pernicious pills, herbs, drugs, potions, and mixtures,[1] with intent feloniously, wilfully, and of his the said E. F.'s malice aforethought, to kill and murder the said child, with which the said A. E. was so then big and pregnant as aforesaid, by reason and means whereof, not only the said child whereof she the said A. E. was afterwards delivered, and which by the providence of God was born alive, became and was rendered weak, sick, diseased, and distempered in body, but also the said A. E., as well before as at the time of her said delivery, and for a long time, to wit, for the space of six months then next following, became and was rendered weak, sick, diseased, and distempered in body, and during all that time underwent and suffered great and excruciating pains, anguish, and torture, both of body and mind [and other wrongs to the said A. E., he the said E. F. then and there unlawfully, wilfully, wickedly, maliciously, and injuriously, did to the grievous damage of the said A. E.[2]] and against the peace of," &c.

§ 752. **Continued — Administering, where Woman consents.** — In Pennsylvania, the following was held to be adequate, — the objection, which was overruled, being, that the indictment should have charged "the intent to cause and procure the miscarriage and abortion of the child," instead of the pregnant mother: —

"That Jonathan Gibbons Mills, of, &c., on, &c., in the county, &c., with force and arms, wilfully, maliciously, unlawfully, and wickedly did administer to, and cause to be administered to and taken by, one Mary Elizabeth Lutz, single woman, she the said Mary Elizabeth Lutz being then and there big and pregnant with child, divers large quantities of deadly, dangerous, unwholesome, and pernicious pills, herbs, drugs, potions, teas, liquids, powders, and mixtures; with intent thereby then and there to cause and procure the miscarriage and abortion of the said Mary Elizabeth Lutz, and the premature birth and destruction of the said child, of which the said Mary Elizabeth Lutz was then and there big and pregnant; to the great damage of the said Mary Elizabeth Lutz, to the evil example of others in like cases offending, and against the peace and dignity of the Commonwealth of Pennsylvania."[3]

done, will not constitute in law the offence, then they must be charged as done on more days than one; but, in other cases, where, in their nature, they may be performed on more days than one, it is within the election of the pleader whether to set them out thus, or not. Crim. Proced. 2d ed. I. § 387–401.

[1] Davis says, in a note to one of his precedents: "It may be advisable in all cases, when the name of the medicine or drug is unknown, to allege in the indictment that it was a certain dangerous, &c., drug, potion, &c., 'the name of which is to the jurors aforesaid unknown.' But see 3 Chit. 798, note, where it is said the name of the poison is not material; cites 3 Camp. 75." Davis Pre. 35, note. See, as to this, post, § 755, 757.

[2] None of this necessary. Ante, § 438 and note; Crim. Proced. 2d ed. II. § 55, 56.

[3] Mills *v.* Commonwealth, 1 Harris, Pa. 631. Compare this case with Peo-

§ 753. **Observations on the Foregoing Forms — Quick with Child — Attempt.** — By comparing the foregoing forms with the adjudged law,[1] the reader will perceive, that, except as regards the simple assault charged in the English one, both are inadequate according to the views prevailing in some of our States. Thus, in Massachusetts, it is held to be necessary at the common law to charge, that the woman was quick with child.[2] Moreover, it appears to have been laid down in one of the Massachusetts cases, that an actual abortion, and not merely an attempt to procure it, should be charged.[3] This point, if so intended to be held, is clearly wrong. The other is right or wrong according to the view which the court may take of the law itself.

§ 754. **Under Statutes.** — This offence assumes, under statutes, a great variety of forms. It will not, therefore, much aid the practitioner to give him here a single general form of the indictment; and, indeed, it will in most instances be best for him to draw the indictment himself, with respect to the particular statute, and the particular facts of the case. Still, from an illustration or two, some advantage may be derived.

§ 755. **Indiana Statute and Form.** — A statutory provision in Indiana used to be in the following words: "Every person who shall wilfully administer to any pregnant woman any medicine, drug, substance, or thing whatever, or employ any instrument, &c., with intent thereby to procure the miscarriage of any woman," &c. And the following form of indictment was held to be sufficient; namely, —

"That, &c., on, &c., at, &c., did feloniously, wilfully, and unlawfully administer to one Lucinda Hill, then and there being pregnant with a child, a large quantity of medicine, with intent thereby feloniously, &c., to procure the miscarriage of said Lucinda Hill; the administering said medicine to said Lucinda Hill not then and there being necessary to preserve the life of said Lucinda Hill; contrary to the statute," &c.

It was deemed not necessary to set forth the name of the medicine, or to describe it as noxious. Blackford, J. observed: "This statute, so far as the present case is concerned, is simi-

ple *v.* Lohman, 2 Barb. 216. For other forms, see Davis Prec. 33 et seq.

[1] Ante, § 744.

[2] Commonwealth *v.* Bangs, 9 Mass. 387; Commonwealth *v.* Parker, 9 Met. 263.

[3] Commonwealth *v.* Bangs, supra.

lar to the 2d section of the statute of 43 Geo. 3; and it has been held, that, on the trial of an indictment on that section, the name of the medicine administered need not be proved; that the question is, whether the prisoner administered any matter or thing to the woman with intent to procure abortion.[1] If the name of the medicine need not be proved, there seems to be no good reason for naming it in the indictment."[2]

§ 756. **Continued.** — A present Indiana statute is, as far as concerns the present matter, as follows: "Every person who shall wilfully administer to any pregnant woman, or to any woman whom he supposes to be pregnant, any thing whatever, or shall employ any means with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, . . . shall," &c. And Bicknell furnishes the following form of the indictment: —

"That A. B. on, &c., at, &c., unlawfully and wilfully administered to C. D., who was then and there a pregnant woman [*or* 'a woman whom he then and there supposed to be pregnant,'] a large quantity of medicine, with intent then and there and thereby, unlawfully, to procure the miscarriage of the said C. D., the administration of said medicine not being then and there necessary to preserve the life of the said C. D., contrary," &c.[3]

§ 757. **Naming the Drug.** — Notwithstanding the doctrine that it is not necessary to name the medicine or drug,[4] it is often done in practice. The pleader will generally find it as convenient to name it, or to allege the name to be unknown, as to follow the Indiana forms. It will be better, therefore, that he should do so, at least, in one of the counts; for it is the fairer way, and it saves all question.[5] Still, Bicknell observes: "If the name of the medicine be stated, the proof need not correspond therewith."[6] The contrary doctrine to this was, however, laid down in the New York Supreme Court, though it was in a measure overturned in the Court of Appeals; the ground taken in the Supreme Court being, that the name of the drug is descriptive of the main allegation; and, in such

[1] Referring to Rex *v.* Phillips, 3 Camp. 73.

[2] The State *v.* Vawter, 7 Blackf. 592. S. P. Shotwell *v.* The State, 37 Misso. 359; The State *v.* Van Houten, 37 Misso. 357.

[3] Bicknell Crim. Pr. 469, 470; referring, for the statute, to Laws, 1859, p. 130; 2 G. & H. 469, § 36.

[4] Ante, § 751, note, 755.

[5] And see Train & Heard Preced. 9 and note.

[6] Bicknell Crim. Pr. 470, referring to 2 Ind. 617.

a case, it will not avail the pleader that he has laid the name under a *videlicet*.[1]

§ 758. **"Cause and procure."** — As many times observed, the pleader should attend to the particular words of the statute. Thus, where, in New Jersey, it was made indictable to do the criminal act "with intent to cause *and* procure the miscarriage of a woman," &c. an indictment was held to be bad which alleged, in some of the counts, that the intent was to "cause" the miscarriage, and in others, that it was to "procure" it, but in none of them connected the words "cause and procure," as in the statute.[2] The reader will observe, that, if the statutory term had been "cause *or* procure," the indictment would have been well enough; but, to commit any offence under the statute as actually drawn, the defendant must both "cause and procure."

§ 759. **Duplicity — Homicide.** — Under the Massachusetts statute before quoted,[3] it does not render a count double, but it is perfectly permissible, to charge that the defendant used instruments and administered drugs, and by both of these means the woman died.[4] The indictment, moreover, need not charge the offence as murder.[5]

§ 760. *The Evidence:* —

Woman as Witness. — The woman is a competent witness in these cases; but whether or not she is to be regarded as an accomplice, whose testimony needs confirmation, is a question on which the authorities appear to be not quite harmonious.[6] In California, it was deemed that this witness requires corroboration,[7] while the contrary appears to be the New York doctrine.[8] So in Massachusetts it is held, that the woman is not technically an accomplice, therefore the rules on the subject of accomplices do not apply to her. But the court apparently approve the course of the judge at the trial, who, after laying down this doctrine to the jury, added, "but, inasmuch as she

[1] Crichton *v.* People, 6 Parker C. C. 363, 1 Keyes, 341.

[2] The State *v.* Drake, 1 Vroom, 422.

[3] Ante, § 743.

[4] Commonwealth *v.* Brown, 14 Gray, 419.

[5] Commonwealth *v.* Jackson, 15 Gray, 187. See, also, Commonwealth *v.* Holmes, 103 Mass. 440.

[6] Ante, § 749.

[7] People *v.* Josselyn, 39 Cal. 393.

[8] Dunn *v.* People, 29 N. Y. 523.

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."[1] Now, according to some of the statutes, the woman would be actually an accomplice; then, probably, the rules governing the testimony of accomplices in other cases would apply to hers. According to other and most of the statutes she is not an accomplice; and, in such a case, the observation above quoted may not mislead. But, if we consider why an accomplice, in the technical sense, needs confirmation, we shall be satisfied that it is not so much because he is in morals a delinquent, as because he is guilty in law, and is testifying under the motive of screening himself from punishment. Such a person is, by his position, tempted to falsehood; not so a woman who, without legal guilt, has submitted to drugs or an instrument for the purpose of suffering a miscarriage.

§ 761. **Other Points — Secretion of Fœtus, &c.** — It would be easy to state a variety of other points adjudged; but, as they are special to the special cases, they will be dismissed with a mere digest of some of them in a note.[2] It may be added,

[1] Commonwealth *v.* Wood, 11 Gray, 85, 90, 93.

[2] In one case, the prisoner's counsel having avowed their intention to insist that one H. was the father of the child, and not the prisoner, it was held to be competent for the prosecutor to prove by the testimony of H., that he never had sexual intercourse with the woman upon whom the crime was committed. Dunn *v.* People, 29 N. Y. 523. In another case, it was held to be incompetent to prove that others than the prisoner had sexual intercourse with the woman; because the paternity of the child was of no consequence in this issue. Crichton *v.* People, 6 Parker C. C. 363. Various points have been adjudged on the Massachusetts statute quoted ante, § 743. Thus, on an indictment for procuring a miscarriage, the Commonwealth may introduce evidence of the health and spirits of the patient, and of stains and marks upon her bed-clothes, a month afterward. Again, after evidence introduced by the defendant that the patient was pregnant some months after the operation is alleged to have been performed, the Commonwealth may prove by her that she had sexual intercourse with the defendant between the times of the alleged operation and of the subsequent pregnancy. Commonwealth *v.* Wood, 11 Gray, 85. On the trial of an indictment upon this statute, against a physician for administering ergot, with intent to procure a miscarriage, whereby the woman died, evidence that the defendant was in the habit of receiving patients at his house for medical treatment, and that two young women, inmates of his family, were in the habit of attending them under the defendant's direction, and of carrying their meals to them, and that they so attended the woman whose death was alleged in the indictment, and did her chamber work, and under the defendant's directions gave her medicines and food; that they were present when the child was born, and

that, in an abortion case, the fact of a secretion of a fœtus about the building where the offence is alleged to have been committed, is admissible in evidence as tending to prove the *corpus delicti*.[1]

§ 762. **Burden of Proof.** — On a statute drawn like the Indiana one copied into a previous section,[2] it is a question of a sort upon which courts disagree,[3] whether it is for the prosecuting power or for the defendant to show, in the first instance, the necessity, or want of necessity, for procuring the miscarriage. According to a decision in Ohio, the burden of proof is not on the government to show that the abortion was not necessary to save the life of the mother; but on the defendant to establish, that it was done by the advice of two physicians.[4]

CHAPTER XXXV.

CONCEALMENT OF BIRTH, OR CHILD MURDER.

763. Introduction.
764–776. Law of the Offence.
777–780. The Procedure.

§ 763. **How the Chapter divided.** — We shall consider, I. The Law of the Offence; II. The Procedure.

told the defendant that they had got rid of her child, and that after the death of the woman the defendant directed them to say they gave her opium and camphor, not opium and calomel, and to say nothing about the ergot, and that he urged them to leave the house, which they did; is sufficient proof of a common purpose, to render evidence of other acts and declarations of the same persons, not in the defendant's presence, tending to show that they gave ergot to her, admissible against him, with instructions that it is to affect him only if the jury should be satisfied that the parties had a common purpose and design, and that the acts and declarations were done and made in pursuance thereof. And on an indictment for using instruments to procure a miscarriage, thereby causing death, injured parts of the body of the deceased woman preserved in spirits, may be exhibited to the jury in connection with the testimony of the physician who made the *post mortem* examination. Commonwealth *v.* Brown, 14 Gray, 419. For other points, see Commonwealth *v.* Holmes, 103 Mass. 440. And see Commonwealth *v.* Hersey, 2 Allen, 173.

[1] The State *v.* Howard, 32 Vt. 380, 405.

[2] Ante, § 756.

[3] See, for illustration, ante, § 648.

[4] Moody *v.* The State, 17 Ohio State, 110.

I. *The Law of the Offence.*

§ 764. *Historical View:* —

In General — 21 Jac. 1. — The facility with which the life of an infant at birth is extinguished, and the temptation to take it away, especially in cases of bastards, have led to the enactment of statutes both in England and in some of our States, as well as in Ireland and Scotland previous to their union with England, for the protection of the infant. By Stat. 21 Jac. 1, c. 27, it is provided, "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. **43 Geo. 3 — 49 Geo. 3 — 9 Geo 4.** — This act and the Irish statute were, by the Parliament of the United Kingdom, repealed in 1803; namely, by Stat. 43 Geo. 3, c. 58, § 3. Afterward, in 1828, the statute of 9 Geo. 4, c. 31, § 14, was passed, and it was for many years in practical force and use in England; though it has now given place to a somewhat better drawn enactment, founded upon it, being Stat. 24 & 25 Vict. c. 100, § 60. The statute of Geo. 4 was as follows: "That, if any woman shall be delivered of a child, and shall, by secret burying or otherwise disposing of the dead body of the said child, endeavor to conceal the birth thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labor, in the common jail or house of correction, for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, at, or after its birth: Provided always,

[1] See, for expositions of this statute, 1 Russ. Crimes, Grea. ed. 572; Archb. 1 East P. C. 228; 2 Hale P. C. 288; New Crim. Proced. 297.

that, if any woman tried for the murder of her child shall not be convicted thereof, it shall be lawful for the jury, by whose verdict she shall be acquitted, to find, in case it shall appear in evidence, that she was delivered of a child, and that she did, by secret burying or otherwise disposing of the dead body of such child, endeavor to conceal the birth thereof, and thereupon the court may pass such sentence as if she had been convicted upon an indictment for the concealment of the birth." The act which appears to be now in force in Scotland, — 49 Geo. 3, c. 14, — repealing the old Scotch law, is more broad than this one; declaring, 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. **24 & 25 Vict.** — The present English enactment, therefore, is 24 & 25 Vict. c. 100, § 60, as follows: "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, &c.; Provided, that, if any person tried for the murder of any child shall be acquitted, 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. **American Common Law.** — The date of Stat. 21 Jac. 1, c. 27 (A.D. 1623), is sufficiently early to make it common law in the greater part of our States. And though the Penn-

[1] 1 Alison Crim. Law, 153; Brown's Case, 1 Swinton, 482.

[2] Mr. Greaves tells us, that this statute was framed from Stats. 9 Geo. 4, c. 31, § 14 (ante, § 765), and 10 Geo. 4. c. 34, § 17, Irish; but was intended also to meet some defects which had been found to exist in those statutes. Greaves Crim. Law Acts, 84.

sylvania judges do not include it in their list,[1] Kilty says it was received in Maryland, and there were numerous convictions under it in early times.[2] The legislation, however, of most of the States has rendered this question one of little practical importance.

§ 768. **American Statutes.** — The American enactments differ from one another; but the prevailing form is substantially what is adopted in Massachusetts; namely, "If any woman conceals the death of any issue of her body, which, if born alive, would be a bastard, so that it may not be known whether such issue was born alive or not, or whether it was not murdered, she shall be punished," &c.[3] The reader will perceive, that this enactment is very nearly a copy of Stat. 21 Jac. 1, c. 27, before quoted; while yet it so differs from it as to render a following of the interpretations given to that enactment a little unsafe.

§ 769. *Interpretations of the Statutes:* —

General View. — The multiplicity of statutes, present and repealed, English and American, and their diverse terms, render it difficult to draw from the decisions of the past such general doctrines as can be made available in construing the differing enactments in our several States, in future causes. It may be observed, however, that the purpose of these statutes is to punish acts which, of themselves, are nearly or quite innocent, because of their being such as may, but do not necessarily, point to the perpetration of a heavier crime. While, therefore, all criminal statutes should be construed strictly, these should be specially so. In accordance with this view, Mr. East observes of Stat. 21 Jac. 1, c. 27: "This, being a very severe law, has always been construed most favorably for the unfortunate object of the accusation. If she 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

[1] Report of Judges, 3 Binn. 595, 623.

[2] Kilty Report of Statutes, 172. This statute of 21 Jac. 1, c. 27, was originally, by its terms, to continue only "until the end of the first session of the next Parliament;" but it was further continued by 3 Car. 1, c. 4, § 22, and made perpetual by 16 Car. 1, c. 4.

[3] Mass. Gen. Stats. c. 165, § 11; formerly R. S. c. 130, § 6.

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 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]

§ 770. **Concealment.** — It is perceived that the object of these statutes is to punish, and so to prevent, what they term "concealment," — some of them punishing the concealment of the "death," others the concealment of the "birth," of the child which may be shown to have died; the idea being, that such concealment is a badge of murder. We saw, in the last section, that, under the statute of James, which made punishable the concealment of the "death," if there was any person present, even an accomplice, the offence was not committed. Thus, continues Mr. East: "Jane Peat was indicted for the murder of her bastard child, and Margaret Peat her mother was indicted at the same time for being present aiding and abetting. It appeared that the prisoner Jane when in labor was heard by persons in an adjoining room to call to her mother, who was present with her. Heath, J. held that this took the case out of the statute; for, if any person be present, although privy to the guilt, there can be no concealment by the mother within the statute, and the case stands as at common law. And there being no evidence of guilt but the concealment by both the prisoners, they were acquitted by his direction."[2]

§ 771. **Continued — On Stat. Geo. 4.** — This negative statement, as to what is not a concealment, will be of some help; but the question does not depend solely on the meaning of the word "conceal," for it is to be construed in connection with other words, and they differ in the different statutes. Thus,

[1] 1 East P. C. 228. See post, § 771. [2] Rex *v.* Peat, 1 East P. C. 229.

Mr. Greaves observes: "The terms of the former enactments were 'by secret burying or otherwise disposing of the dead body,' and on these terms many questions had arisen."[1] These words were in Stat. 9 Geo. 4, c. 31, § 14. Let us look at some points decided, as to what is a concealment under this statute. One point is, that, to constitute a concealment within the meaning of this enactment, it was not necessary the body should have been put in what was meant to be its final resting place.[2] Still there must have been some act of disposal after the child was dead, and a mere denial was not sufficient;[3] for, if the woman went to a privy for another purpose, and there the child came from her unawares, and fell into the soil and was suffocated, her offence did not come within the statute, though she denied the birth;[4] or, if the woman was detected with the body in her possession, about to dispose of it, she could not be convicted of the offence.[5] Moreover, the con-

[1] Greaves Crim. Law Acts, 84.

[2] Thus, when the mother, recently delivered, placed the dead body of her child under a bolster on which she laid her head, meaning thereby to conceal it from a surgeon and to bury it afterward, the English judges, Pollock, C. B., dissenting, held the disposing of the child sufficient to bring the case within the statute. Said Parke, B.: "The body was not put in a final place of deposit, but that is not necessary; and there was a secret disposal of it within the statute." Reg. *v.* Perry, Dears. 471, 473, 6 Cox C. C. 531. S. P. Reg. *v.* Goldthorpe, 2 Moody, 244, Car. & M. 335; Reg. *v.* Farnham, 1 Cox C. C. 349. And see Boyles *v.* Commonwealth, 2 S. & R. 40.

[3] Reg. *v.* Turner, 8 Car. & P. 755.

[4] Reg. *v.* Turner, 8 Car. & P. 755; Reg. *v.* Coxhead, 1 Car. & K. 623. See Rex *v.* Cornwall, Russ. & Ry. 336.

[5] Rex *v.* Snell, 2 Moody & R. 44. In one case, the prisoner being a servant girl, "she appeared to be very ill, and her mistress sent for a surgeon. In the mean time the prisoner went up stairs, and when she came down she fell into a chair in a state of insensibility, and was so found by the surgeon. On examining the bedroom where she slept, which was also the room where her mistress slept, blood was observed on the floor, and, in an attic above, the dead body of a male child was found on the floor wrapped in bed-sheets, which had been removed from the room below. The head of the child was separated from the body, and a table-knife was lying on the floor near it. According to the medical evidence, the child had not been born more than two hours, and there was no doubt of its having been born alive. The prisoner stated, immediately after the discovery of the body of the child, that it was dead, and she cut off its head. The prisoner had not been suspected of pregnancy, and it appeared from her youth and inexperience that she might have been herself unconscious of the fact. Although it was proved that the knife was usually kept in the kitchen, it appeared that it might, at the time of its use, have been lying in the attic. The sheets, with the body, were found in the middle of the room." Talfourd, J. expressed the opinion that this was not a case of concealment. Reg. *v.* Goode, 6 Cox C. C. 318.

cealment, to be within this statute, must have been for the purpose of keeping the knowledge of the offence from the world at large; consequently, on the one hand, there might be a concealment though the fact was communicated to a confederate;[1] and, on the other hand, if the girl put the child away merely through fear of provoking her father, but for which she would have caused it to be buried in the churchyard, the offence is not committed.[2]

§ 772. **Continued.** — Moreover, under this statute, according to a ruling by Erle, J. there could be no concealment unless the child had been so long in its mother's womb, that, in the ordinary course of things, it would have a fair chance of being born alive. "It is not necessary," said the learned judge to the jury, "that it should have been born alive, but it must have reached a period when, but for some accidental circumstance, such as disease on the part of itself or of its mother, it might have been born alive. There is no law which compels a woman to proclaim her own want of chastity; and, if she had miscarried at a time when the fœtus was but a few months old, and therefore could have no chance of life, you could not convict her upon this charge. No specific limit 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] The statutory word, it should be remembered, is "child;" and the same word is employed in the present English enactment. Under this, on a trial before Smith, J. in a case where the woman had gone less than seven months, it was contended on her behalf, that here was a fœtus, but not a child. The learned judge said, he "should leave it to the jury to say, whether the offspring had so far matured as to become a child, or was only a fœtus, or the unformed subject of a premature miscarriage."[4] On the other hand, Martin, B. in a case before him, refused to yield to this doctrine, "stating that he saw nothing to limit the word 'child' in the statute to a child

[1] See ante, § 769.

[2] So the doctrine was laid down by Coltman, J. before a jury. Reg. *v.* Morris, 2 Cox C. C. 489.

[3] Reg. *v.* Berriman, 6 Cox C. C. 388, 390.

[4] Reg. *v.* Hewitt, 4 Fost. & F. 1101.

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." [1] The question appears never to have gone before the full bench of judges. Of course, though there is a concealment, if it was done by some other person without the privity of the woman, she must be acquitted; therefore an acquittal was ordered where it appeared that she had made child's clothes, and at her confinement had sent for a surgeon.[2]

§ 773. **Continued — On 24 & 25 Vict.** — A few cases have arisen on the present English enactment, 24 & 25 Vict. c. 100, § 60, before quoted.[3] We saw, in the last section, that, on this statute as on the preceding one, the judges differ as to the meaning of the word "child." The endeavor to conceal the birth must be by putting the child in some place where it is not likely to be found; for example, putting it in an open box in the prisoner's bedroom, and, on inquiry by the medical man, telling him it is in the box, is not a secret disposition within the statute.[4] In a late case, where the prisoner had put the body in a place partly exposed and partly not so, Bovill, C. J. said, in the Court for Crown Cases Reserved, in an opinion concurred in by the other judges: "It seems to me that what is a 'secret disposition' must 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. There would, in such a case, be a secret disposition of the body; and the jury must say, in each case, whether or not the facts show that there has been such a disposition. In this case, . . . the evidence of a secret disposition consisted in the situation

[1] Reg. *v.* Calmer, 9 Cox C. C. 506.

[2] Rex *v.* Higley, 4 Car. & P. 366. 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, Grea. ed. 574. And see Commonwealth *v.* Clark, 2 Ashm. 105.

[3] Ante, § 766.

[4] Reg. *v.* Sleep, 9 Cox C. C. 559. And see Reg. *v.* George, 11 Cox C. C. 41.

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."[1] This statute, it is perceived, makes punishable the secret disposing, not of a living child, but of the "dead body." Therefore, where a child was born alive, and the mother, to conceal the birth, left it in the corner of a field to die from exposure, and it was found dead, she was held not to have committed this statutory offence,[2] though she was guilty of a crime at the common law.

§ 774. **Within the Mischief — Whether born alive.** — From what has been already said it follows, that the mere concealment is not alone sufficient, but the case must come fully within the mischief to be remedied by the statute.[3] There is no need, as already observed,[4] the child should have been born alive.[5]

§ 775. **Accomplices.** — In Rhode Island it is held, that the mother alone can commit the offence created by this enactment, as a principal of the first degree; but, when she is guilty, other individuals may be guilty also of the principal offence, or guilty as accessories, on the ground of aiding and

[1] Reg. *v.* Brown, Law Rep. 1 C. C. 244, 246. And see Reg. *v.* Opie, 8 Cox C. C. 332; Reg. *v.* Clarke, 4 Fost. & F. 1040.

[2] Reg. *v.* May, 10 Cox C. C. 448, 15 W. R. 751, 16 Law Times, N. S. 362.

[3] Commonwealth *v.* Clark, 2 Ashm. 105; 1 East P. C. 228; ante, § 232.

[4] Ante, § 772.

[5] Reg. *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, 4th ed. 1095, 3 Camp. 371; Rex *v.* Dobson, 1 Lewin, 43. Contra, in North Carolina. The words of the statute were: "If any woman be delivered of issue of her body, male or female, which, being born alive, would by the laws of this State be a bastard, and she endeavors privately, either by drowning, or secret burying thereof, or in 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," &c. And the majority of the court, one judge dissenting, held, that the offence consists in concealing the death of a being on whom murder could be committed. Therefore, if the child is still-born, the concealment is no offence; but the burden of proof is on the defendant to show this fact. The State *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 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 attendant circumstances are sufficient to satisfy the jury that the mother wilfully and maliciously destroyed the child. Commonwealth *v.* McKee, Addison, 1.

abetting her.[1] The reader perceives, that the same doctrine likewise would follow from the terms of the English statute of 9 Geo. 4, c. 31, § 14;[2] the consequence of which would be, that, unless the woman was found guilty, all other guilty persons must escape. Therefore Mr. Greaves observes of this statute: "Cases have not unfrequently occurred where endeavors have been made to conceal the birth of children, and there has been no evidence to prove that the mother participated in those endeavors, though there has been sufficient evidence that others did so, and under the former enactments [that is, Stat. 9 Geo. 4, c. 31, § 14, &c.], under such circumstances, all must have been acquitted," — a defect met by the late provisions.[3] If the mother employed an accomplice to do the active work of concealment, she could be convicted as principal in the first degree, though she was not continually present with the accomplice; as, for example, though she remained in bed while he buried the body.[4] But where the woman 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."[5]

§ 776. **Conclusion — Statute.** — What is thus said under this sub-title will be of help to the practitioner, if, instead of implicitly following it, he will look carefully into the terms of the statute of his own State, compare them with the English provisions, and make use of the English expositions as hints, not as absolute guides. But here, as under every other title in the law, it is impossible that the elucidations of an author should supply the place of thought and carefulness in those who use his book.

II. *The Procedure.*

§ 777. **Indictment.** — We have seen, that the statutory provisions on this subject are not uniform. Still it will be everywhere helpful to the practitioner to have before him an

[1] The State *v.* Sprague, 4 R. I. 257.

[2] Ante, § 699.

[3] Greaves Crim. Law Acts, 84. And see, on this question, Reg. *v.* Bird, 2 Car. & K. 817; Reg. *v.* Skelton, 3 Car. & K. 119.

[4] Ib.; Rex *v.* Douglas, 7 Car. & P. 644.

[5] Reg. *v.* Bate, 11 Cox C. C. 686, 688.

indictment drawn upon a statute which has been set out in full. He can then compare the statute with his own, and make use of the form here given as suggestive of the proper form of the indictment upon his own statute. Archbold furnishes the following, drawn upon the before recited statute of 9 Geo. 4, c. 31, § 14: —

"That A, of, &c., on, &c., in the county aforesaid, being then and there big with a child, was then and there delivered of the said child alive, which said child then and there instantly died; and that the said A, being so delivered of the said child as aforesaid, did then and there unlawfully endeavor to conceal the birth of the said child, by secretly burying ('*by secret burying or otherwise disposing of*') the dead body of the said child; against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown, and dignity."[1]

§ 778. **Views concerning this Form.** — This author proceeds: "Add a second count, stating that the child was born dead, and state the means of concealment specially, when it is otherwise than by secret burying. An indictment for concealing the birth 'by secretly disposing of the dead body,' &c., without showing the mode of disposing of it, is bad.[2] Where the indictment charged that the defendant cast and threw the dead body of the child into the soil in a certain privy, 'and did thereby then and there unlawfully dispose of the dead body of the said child, and endeavor to conceal the birth thereof,' it was held sufficient; the word 'thereby' being referred as well to the endeavor as to the disposing of the body. The indictment need not state whether the child died before, at, or after its birth."[3] Still it "must expressly allege the child to be dead, for it is only an offence to conceal the dead body."[4]

§ 779. **Death — Manner of Death — Pennsylvania.** — The Pennsylvania statute is, or was, as follows: "If any woman shall endeavor privately, either by herself or by the procurement of others, to conceal the death of any issue of her body, male or female, which, if it were born alive, would by the law be a bastard, so that it may not come to light, whether it was born

[1] Archb. Crim. Pl. & Ev. 10th Lond. ed. 435.

[2] Reg. *v.* Hounsell, 2 Moody & R. 292.

[3] Reg. *v.* Coxhead, 1 Car. & K. 623.

[4] Rex *v.* Davis, 1 Russ. Crimes, Grea. ed. 574.

dead or alive, or whether it were murdered or not, every such mother, being convicted," &c. And, in accordance with the English doctrine as stated in the last section, it is held to be necessary that the fact of the death should appear in the allegation.[1] Still it has been held to be sufficient, on this point, to charge, that the defendant afterward, &c., "the said infant having, on the day and year aforesaid, died, did endeavor privately to conceal the death of said infant;"[2] because, as we have seen,[3] a material allegation in an indictment is good though made in the participial or even adverbial form. But, contrary to the doctrine of the last section, it is held in this State not to be necessary for the indictment to set out in what manner or by what acts the mother endeavored to conceal the death.[4]

§ 780. **Evidence — Verdict.** — "Upon a prosecution under [the statute mentioned in the last section]," said Rogers, J. "the prosecutor 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."[5] Hence it follows that 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.[6] In one case, the only evidence on the point of bastardy was, 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. expressed to the jury the opinion, that, if this evidence was believed, it was sufficient.[7] Clear identification of the body has been held, in these cases the same as in murder, to be important.[8] Some further hints respecting the evidence may be gathered from the discussions in other parts of this chapter.

[1] Douglass *v.* Commonwealth, 8 Watts, 535; Act of 1794, § 17.

[2] Boyles *v.* Commonwealth, 2 S. & R. 40.

[3] Ante, § 421, in brackets, in the second form.

[4] Boyles *v.* Commonwealth, supra.

[5] Douglass *v.* Commonwealth, 8 Watts, 535. And see Rex *v.* Poulton, 5 Car. & P. 329; Commonwealth *v.* McKee, Addison, 1, 2.

[6] Boyles *v.* Commonwealth, 2 S. & R. 40.

[7] Rex *v.* Poulton, supra.

[8] Reg. *v.* Williams, 11 Cox C. C. 684.

CHAPTER XXXVI.

CARRYING WEAPONS.

781, 782. Introduction.
783–793. Law of the Offence.
794–801. The Procedure.

§ 781. **Diversities of Statutes.** — In this chapter, as in the last, the author and reader must alike be embarrassed by the diversities in the language of the statutes of the several States, and those of the same State at different times, on the general subject. Still, if the discussion will be less interesting and less satisfactory on this account, it is not the less demanded; and, though it cannot accomplish all which might be desired, it will be in its measure helpful to courts and practitioners.

§ 782. **How the Chapter divided.** — We shall divide the discussion into I. The Law of the Offence; II. The Procedure.

I. *The Law of the Offence.*

§ 783. **Stat. of Northampton, &c.** — Blackstone says: "The offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and it is particularly prohibited by the statute of Northampton, 2 Edw. 3, c. 3, upon pain of forfeiture of the arms, and imprisonment during the king's pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armor." [1] This statute, with the exception of the part providing for its enforcement, is as follows: "That no man, great nor small, of what condition soever he be, — except the king's servants in his presence, and his ministers in executing of the king's precepts, or of their office, and such as be in their company assisting them, and also [those of feats of arms of peace] upon a cry made for arms to keep the peace, and the same

[1] 4 Bl. Com. 149.

in such places where such acts happen, — 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 to forfeit their armor to the king, and their bodies to prison at the king's pleasure." [1]

§ 784. **Common Law.** — The offence created by this statute is said in England to have been such also by the earlier common law.[2] The same thing has moreover been very properly held in the United States; and so here, whether we receive the English statute or not, we hold as criminal by our common law the going or riding about armed, with unusual and dangerous weapons, to the terror of the people.[3] But the statute bears date long anterior to the settlement of this country, it is of a sort adapted to the wants of every civilized community; and, if the question is deemed important, no reason can well be assigned why it should not be regarded as common law in our several States.

§ 785. **Statutes — Dangerous Weapons.** — The offence thus described, it is seen, is the going about with dangerous weapons, to the terror of the people. In aid, also, of the common law with us on this subject, statutes have been passed in some of the States.[4]

§ 786. **"Secret" or "Concealed" Weapons.** — But a greater danger may, under some circumstances, be found in the act of going about with secret or concealed weapons; therefore we have, in some of the States, statutes upon this subject. They are intended for the protection of the community against the assaults of those who carry such weapons.[5] The words of the Indiana enactment were, "every person, &c., who shall wear or carry any dirk, pistol, sword, or any cane or other

[1] And see Crim. Law, 5th ed. II. § 492.

[2] Knight's Case, 3 Mod. 117, Comb. 38.

[3] The State *v.* Huntly, 3 Ire. 418.

[4] Nunn *v.* The State, 1 Kelly, 243. The following cases are under statutes relating to the carrying of arms by negroes and slaves: The State *v.* Harris, 6 Jones, N. C. 448; The State *v.* Hannibal, 6 Jones, N. C. 57; The State *v.* Chavers, 5 Jones, N. C. 11.

[5] Haynes *v.* The State, 5 Humph. 120; Evins *v.* The State, 46 Ala. 88.

dangerous weapon concealed, shall," &c., proceeding then to point out the punishment; [1] but they were afterward slightly altered to read as follows: "every person, not being a traveller, 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, shall, on conviction thereof, be," &c.[2] The language of the statutes of the other States which have adopted this provision is similar.[3]

§ 787. **"Carries" — "Conceals" — One Instance — Habit.** — The statute of Alabama provides a punishment for "any one who carries concealed about his person a pistol, or any other description of fire-arms; not being threatened with or having good reason to apprehend an attack, or travelling, or setting out on a journey." And the court, by Rice, C. J. observed: "The word 'carries,' in the section above cited, was used as a synonym of 'bears;' and the word 'concealed,' as therein used, means wilfully or knowingly covered or kept from sight. Locomotion is not essential to constitute a carrying within the meaning of that section." Therefore it was held, that one, who, being in another's room wherein there are several persons, has in his vest-pocket a pistol, and wilfully or knowingly covers or keeps it from sight, commits the offence defined by the statute.[4] And in Georgia, under a like statute, it was held to be inadmissible for the defendant to show, that, at times other than the one in question, he carried the weapon openly; and such, indeed, was his habit.[5] So, in a Virginia case, where the evidence showed that in a single instance only the defendant had been seen with a weapon concealed, yet the circumstances were such as to render it probable this was his general practice, the majority of the court affirmed a judgment of conviction against him.[6] These authorities establish, what is plain in principle, that this offence, like larceny, murder, and most other crimes, may be committed by a single

[1] The State *v.* Duzan, 6 Blackf. 31.

[2] Bicknell Crim. Pr. 397, referring to Laws, 1859, p. 129; 2 G. & H. 480.

[3] See Haynes *v.* The State, supra.

[4] Owen *v.* The State, 31 Ala. 387, 389.

[5] Washington *v.* The State, 36 Ga. 242.

[6] Hicks *v.* Commonwealth, 7 Grat. 597.

transaction, and need not, to be indictable, be ripened into a habit or continuing practice.

§ 788. **Partly concealed — "Secrete."** — Moreover, the Georgia court held, that, though the weapon is partly hidden from view, yet, if a pistol, for example, is so far exposed upon the person as to enable every one plainly to see what it is, the act of so carrying it does not violate this statute.[1] This seems not to be the doctrine in Florida; the statute of which State, however, is in different words. It is: "That hereafter it shall not be lawful for any person in this State to carry arms of any kind secretly on or about their person, &c. Provided, that this law shall not be so construed as to prevent any person from carrying arms openly outside of all their clothes." Upon this it is held, that a man violates the statute who carries about his person a weapon partly concealed.[2]

§ 789. **Motive.** — The motive for carrying the weapon, it has been held in Indiana, is not material, and so the offence is committed if the purpose is merely to exhibit it as a curiosity.[3] And, in a Kentucky case, it is somewhat indistinctly laid down, that proof of the defendant's having been shot at two years previously is not admissible in his defence.[4] On questions of this sort there may be some difference of opinion;[5] but the latter doctrine, as thus stated, is undoubtedly correct, and so may be the former. Yet, in reason, there may be circumstances in which the right of self-defence will justify the carrying of a concealed weapon for the purpose; and, should such a case arise (and it must be an extreme one, out of the ordinary course of things, or it could not arise), doubtless this should be held to be an exception, engrafted by the common law upon the general terms of the statute.[6]

§ 790. **"Bowie-knife."** — Under a statute of this kind, a knife which in some of its essential particulars is like a bowie-knife, is a "bowie-knife or knife or instrument of like kind or de-

[1] Stockdale *v.* The State, 32 Ga. 225; Killet *v.* The State, 32 Ga. 292.

[2] Sutton *v.* The State, 12 Fla. 135.

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

[4] Hopkins *v.* Commonwealth, 3 Bush, 480.

[5] Ante, § 238.

[6] Ante, § 7, 123, 131, 141, 351–359, 362.

scription;" but, where all the essential particulars are different, it is not such a knife.[1]

§ 791. "**Pistol.**" — The Indiana court has held, that a pistol, carried concealed about the person, need not be loaded to be within the act.[2] Still, according to the Alabama court, if the instrument has no mainspring or other necessary parts of a lock, and can be fired off only by the use of a match, or in some other such way, it is not a pistol. Said Peck, C. J.: "A pistol, to be within the purview and meaning of the statute and the mischief and evil intended to be prevented, must have such a degree of perfectness as that it may reasonably be carried and used as a weapon."[3]

§ 792. *Constitutionality of these Statutes:* —

Right to keep and bear Arms. — The Constitution of the United States provides, 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."[4] This provision is found among the amendments; and, though most of the amendments are restrictions on the General Government alone, not on the States, this one seems to be of a nature to bind both the State and National legislatures; and doubtless it does. As to its interpretation, if we look to this question in the light of juridical reason, without the aid of specific authority, we shall be led to the conclusion, that the provision protects only the right to "keep" such "arms" as are used for purposes of war, in distinction from those which are employed in quarrels, brawls, and fights between maddened individuals; since such, only, are properly known by the name of "arms;" and such, only, are adapted to promote "the security of a free State." In like manner, the right to "bear" arms refers merely to the military way of using them, not to their use in bravado and affray. Still, the Georgia tribunal seems to have held, that a statute prohibiting the open wearing of arms upon the person violates this provision of the Constitution, though a statute against the wearing of the arms concealed does not.[5] And, in accord with the latter branch of

[1] Sears *v.* The State, 33 Ala. 347.
[2] The State *v.* Duzan, 6 Blackf. 31.
[3] Evins *v.* The State, 46 Ala. 88, 89.
[4] Const. U. S. amendm. art. 2.
[5] Nunn *v.* The State, 1 Kelly, 243; Stockdale *v.* The State, 32 Ga. 225.

this Georgia doctrine, the Louisiana court has laid it down, that the statute against carrying concealed weapons does not infringe the constitutional right of the people to keep and bear arms; for this statute is a measure of police, prohibiting only a particular mode of bearing arms, found dangerous to the community.[1]

§ 793. **Continued.** — Of a similar nature to this provision in the Constitution of the United States, are provisions found in the constitutions of several of the States. And the Alabama court has held, that the statute against carrying concealed weapons is not in violation of the constitutional guaranty, to every citizen, of the right "to bear arms in defence of himself and the State."[2] The Constitution of Kentucky declares, that "the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned;" and a majority of the court held the statutory provision against carrying concealed weapons, to be in violation of this constitutional guaranty. The learned judge who delivered the opinion said: "To be in conflict with the constitution, it is not essential that the act should contain a prohibition against bearing arms in every possible form; it is the *right* to bear arms in defence of the citizens and the State that is secured by the constitution, and whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution."[3] On the other hand, a similar clause in the Arkansas Constitution was declared by the Arkansas court not to be violated by this enactment, — the object of which is, the court considered, not to prevent the carrying of weapons in self-defence, but only to regulate the manner of carrying them.[4] And the Arkansas doctrine is the one approved generally by the American tribunals.[5]

[1] The State *v.* Jumel, 13 La. An. 399.

[2] Owen *v.* The State, 31 Ala. 387. And see Cockrum *v.* The State, 24 Texas, 394.

[3] Bliss *v.* Commonwealth, 2 Litt. 90.

[4] The State *v.* Buzzard, 4 Ark. 18.

[5] Aymette *v.* The State, 2 Humph. 154; The State *v.* Reid, 1 Ala. 612; The State *v.* Mitchell, 3 Blackf. 229. The North Carolina court held, that the "act to prevent free people of color from carrying fire-arms" does not violate this constitutional provision; for, first, these people are not in the fullest sense citizens; or, secondly, if they are, they "occupy such a position in society as justifies the legislature in adopting a course of policy in its acts peculiar to them." The State *v.* New-

II. *The Procedure.*

§ 794. *Indictment:* —

New York Statute and Form. — The New York amended act of 1866, c. 716, provides as follows: —

"§ 1. Every person who shall within this State use, or attempt to use, or, with intent to use against any other person, shall knowingly and secretly conceal on his person, or with like intent shall wilfully and furtively possess any instrument or weapon of the kind commonly known as slung-shot, billy, sand club or metal knuckles, and any dirk or dagger (not contained as a blade of a pocket knife), or sword-cane or air-gun, shall be deemed guilty of felony, and, on conviction thereof, may," &c.

"§ 2. The having possession of any of the weapons mentioned in the first section of this act by any other than a public officer, wilfully and secretly concealed on the person or knowingly and furtively carried thereon, shall be presumptive evidence of so concealing and possessing or carrying the same with the intent to use the same in violation of the provisions of this act."

This statute, it is perceived, differs considerably from most of those which were discussed under the last sub-title. It has certainly no relation to "bearing arms" within the constitutional guaranty; in some respects, it resembles the English provision against garroting copied into a previous section.[1] The following is a form of the indictment which has been used in Albany city and county: —

"That A, &c., on, &c., at the city and county aforesaid, did, knowingly and secretly, conceal on his person, and wilfully and furtively possess an instrument or weapon of the kind commonly known as slung-shot, billy, sand club and metal knuckles, and a dirk and dagger (not contained as a blade of a pocket knife), and also a sword-cane and air-gun, with intent to use the same, and each of them, against some other person; against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity."[2]

som, 5 Ire. 250. This was the doctrine laid down before the late changes in our National and State constitutions placed all persons, who are native-born, on equal footing among us, whatever may have been their former status.

[1] Ante, § 531.

[2] This form was kindly furnished me by N. C. Moak, Esq., the present district attorney. It was drawn, I presume, by some one of his predecessors, I do not know by whom.

§ 795. **Observations on this Form.** — It is perceived that this form is drawn entirely on the first section of the statute, with no reference to the second. That is plainly correct; for the second section refers merely to the evidence. It uses the dangerous word "or," in one place, — "instrument *or* weapon." But, in the present instance, this cannot be said to be wrong; because, in the statute, the two words which are connected by the "or," namely, "instrument" and "weapon," are employed as being alike in meaning, and explanatory each of the other.[1] Still, as the *question* might be raised whether this is so, why not avoid it by transferring to the indictment only one of the words, and dispensing with both "or" and "and"? Or, why not connect the two words by "and," instead of "or"? In the latter case, the thing must be proved to be both an "instrument" and a "weapon;"[2] and, if it is one of these, and the two words are identical in meaning, it is both. In another place, where the statute has the word "sand club *or* metal knuckles," the pleader puts "and" into the indictment for the statutory "or;" and this is well as a mere question of pleading, but if the writer understands the meaning, it requires the proofs to show that the weapon is both. Why, then, use both words in the allegation, when one will do as well? But the real difficulty, in this case, is in construing the statute. Now, it is always necessary for the pleader, before proceeding to draw an indictment on any statute, to consider how the statute will be interpreted by the courts; and, in most instances, he cannot make the indictment right, unless he first understands how the interpretation will be.[3] If he is in doubt, he may, in different counts, draw his indictment on the several different theories which occur to his mind as to its interpretation. As to the present statute, seeing that "and" may be interpreted as "or" when the sense requires it,[4] and the printed marks of punctuation are not necessarily to be regarded,[5] the author, if he were called upon to construe this statute, would insert a comma after the word "club," and another after the

[1] Crim. Proced. 2d ed. I. § 590.
[2] Ib. I. § 588.
[3] See Crim. Proced. 2d ed. I. § 628, and accompanying sections; post, § 796, 797.
[4] Ante, § 243.
[5] Ante, § 78.

word "cane," and he would change the word "and" occurring between "knuckles" and "any" into "or." The meaning is now plain; and, if this is the true meaning, the foregoing form of the indictment is not right. It charges the defendant with possessing a "weapon of the kind commonly known as slung-shot-billy-sand club and metal knuckles," while the statute does not contemplate the existence of any such weapon. To fill the statute, as thus interpreted, if the pleader wishes to put into the one count all which the statute prohibits, he should say, "a weapon commonly known as slung-shot, and another weapon commonly known as billy, and another weapon commonly known as sand club," &c.[1] Of course, if the statute is not interpreted in this way, the indictment should not be so drawn. And the writer has before him no means of ascertaining how the enactment is interpreted by the New York courts.

§ 796. **Massachusetts — Having Weapon when arrested, &c.** — In Massachusetts, also, there is a provision differing somewhat from those which are discussed under the last sub-title. It is: "Whoever when arrested upon a warrant of a magistrate issued against him for an alleged offence against the laws of this State, and whoever when arrested by a sheriff, deputy-sheriff, constable, police officer, or watchman, while committing a criminal offence against the laws of this State, or a breach or disturbance of the public peace, is armed with, or has on his person, slung-shot, metallic knuckles, billies, or other dangerous weapon, shall be punished," &c.[2] Upon this, the author has before him two reported cases, and in both the indictment or complaint was held to be inadequate. In the first, the allegation was, that the defendant was arrested while committing the crime of drunkenness, and, at the time of the arrest, was armed, &c. The court, in considering the sufficiency of what was thus set out against the defendant, followed the direction given in the last section; namely, it, in the first place, construed the statute. Waiving the question whether drunkenness was one of the crimes meant by the statute, the learned judge observed: "This enactment was intended to apply only to legal arrests made by virtue of a warrant, or in

[1] See Crim. Proced. 2d ed. I. § 588 and note. [2] Gen. Stats. 164, § 10.

pursuance of some valid legal authority. Its manifest purpose was to prohibit and restrain the carrying of weapons by offenders, and thus to give security to officers when acting in the lawful discharge of their duty. But it was not designed to apply 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." Therefore, in some way, the complaint must show that the arrest was a lawful one. By the law of Massachusetts, officers have no general authority to make arrests without warrant for drunkenness; they can do so only in certain specified instances. In this case, therefore, as the complaint neither set out a warrant, nor entered into particulars by which the lawfulness of the arrest without warrant appeared, it was insufficient.[1] In the other case, the indictment set out an arrest on a warrant by a police officer; but, as by the laws of Massachusetts police officers have not necessarily the power of serving processes of this sort, and can do so only when particularly appointed with the power, and the allegation did not mention the sort of appointment, it was held to be insufficient.[2]

§ 797. **Indiana — Concealed Weapons.** — The terms of the statute of this State have already been given.[3] And it is held that an information on the clause against carrying concealed weapons, which substantially follows the words of the statute, is sufficient; it need not go beyond them and allege, that the defendant unlawfully carried, or was in the habit of carrying, or carried with intent, &c. If the reader will look at the terms of the enactment, he will see that it was necessary for the court, as in the last section, to construe the statute, in order to determine what was sufficient in allegation; for, if another plausible meaning had been given to the provision, a different result as to the form of the information would have become necessary. The following form was deemed to be adequate: —

[1] Commonwealth *v.* O'Connor, 7 Allen, 583, 584, opinion by Bigelow, C. J.

[2] Commonwealth *v.* Doherty, 103 Mass. 443.

[3] Ante, § 786.

"That A., &c., on, &c., at, &c., he not then and there being a traveller, did then and there wear and carry concealed about his person, a dangerous and deadly weapon, to wit, a fire-arm called a revolver, contrary," &c.[1]

Moreover, an indictment for carrying concealed a pistol, contrary to this prohibition, need not aver the pistol to have been loaded; because the statute does not make this fact material to the offence.[2]

§ 798. **Kentucky.** — In Kentucky, an indictment under the act of March, 1854, prohibiting the carrying of concealed weapons, is held to be good if it distinctly charges, that the instrument carried was a deadly weapon, and carried concealed; though it does not add, that the defendant did not come within the exceptions mentioned in the second section of the act.[3]

§ 799. *Evidence:* —

Concealed Weapon. — If the indictment is for carrying a concealed weapon, the evidence must show, not only that the prisoner had a weapon at the time and place charged, but that he had it concealed about his person.[4]

§ 800. **How much of the Allegation.** — Of course, it is necessary to prove only so much of the allegation as shows an offence. Thus, where the charge was, that the defendant carried "deadly weapons; to wit, a bowie-knife, and also a dirk or dagger;" and he was shown to have carried a bowie-knife, this was held to be sufficient for his conviction, though there was no proof of his having carried the dirk or dagger.[5]

§ 801. **Conflicting Testimony — Witness seeing — Not seeing.** — In Georgia, on the trial of an indictment for unlawfully carrying a deadly weapon, the prosecutor swore positively, that, during a quarrel between himself and the defendant, he saw a pistol about the person of the latter. Another witness swore, that he was present at the quarrel, saw no pistol, looked closely to see if he could see any thing of the kind, and must have seen it if the defendant had it about his person. It was held

[1] The State *v.* Swope, 20 Ind. 106.

[2] The State *v.* Duzan, 6 Blackf. 31. And see The State *v.* Swope, supra; ante, § 791.

[3] Commonwealth *v.* McClanahan, 2 Met. Ky. 8. See ante, § 605, 606.

[4] Washington *v.* The State, 36 Ga. 242.

[5] Commonwealth *v.* Howard, 3 Met. Ky. 407.

not to be error for the court to charge the jury, that both witnesses might have sworn truly, and that the preponderance of the evidence was in favor of the positive testimony of the prosecutor, whose attention, excited by the quarrel, was directed toward the weapon.[1] With regard to this case it may be observed, that, in an exact view, it is hardly a matter for the law to determine, what weight is to be given to the testimony of the conflicting witnesses under such circumstances, but this is peculiarly a question for the jury. When two persons look together at one point for an object, and one says he saw it, and the other says he did not see it, the testimony is certainly conflicting; though, assuming both to be honest, it is somewhat more probable the one was mistaken who thinks he did not see than the one who thinks he did. But many a man has most sincerely believed he saw a thing, when, in truth, he did not.

CHAPTER XXXVII.

ELECTION FRAUDS AND OBSTRUCTIONS.[2]

802. Introduction.
803–826. Law of the Offence.
827–843. The Procedure.

§ 802. **How the Chapter divided.** — Let us examine this subject in the following order: I. The Law of the Offence; II. The Procedure.

I. *The Law of the Offence.*

§ 803. **How at Common Law.** — It being "of the highest importance that persons be elected to carry on the government in its various departments, and that in every case a suitable choice be made, any act tending to defeat these objects — as, forcibly or unlawfully preventing an election from being held, bribing or corruptly influencing an elector, receiv-

[1] Fitzgerald *v.* The State, 12 Ga. 213.

[2] For matter relating to this title, see ante, § 205, 223; post, § 931 et seq.

ing as an elector a bribe, casting more than one vote, 'the taking or giving of a reward for offices of a public nature,' and the like — is punishable under the criminal common law." [1]

§ 804. **Under Statutes — Scope of this Discussion.** — But, notwithstanding these broad and plain doctrines, the common law is not much resorted to on this subject. In fact, this subject, in all its branches, has been pretty fully covered by legislation in probably every one of our States; and, as respects what is supposed to be within the jurisdiction of the National Government, by acts of Congress. It is not proposed, in this chapter, to bring under review the national legislation and the principles governing it. We shall confine ourselves to various points, some of them of an isolated nature, which have arisen under the statutes of the several States. Election bribes were somewhat considered by the author in connection with the general subject of bribery; [2] and betting on elections will come up for discussion in another connection in the present volume.

§ 805. *As to the Officers of Elections:* —

In General — New Hampshire Statute — Mistake. — The statutes of the several States prescribe the duties of the respective officers who conduct the elections, and provide penalties for breaches of duty. Thus, by a statute in New Hampshire, "if any selectman, at any session holden for the correction of any list of voters, shall neglect or refuse to insert, on said list, the name of any person who is a legal voter, having satisfactory evidence thereof," "or shall, at any time, insert on the list the name of any person not a legal voter, knowing such to be the case; or shall knowingly erase therefrom, or omit to insert, the name of any legal voter, he shall be punished," &c. And it was held, that a mere innocent mistake, as to whether a person is entitled or not to have his name put upon the voting list, will not subject to indictment a selectman who acts honestly and according to his best judgment. Though, in such a case,[3] a civil action may be maintained, an indictment cannot be. Said Gilchrist, J.: "The selectmen [to be indictable]

[1] Crim. Law, 5th ed. I. § 471.

[2] Crim. Law, 5th ed. II. § 85 et seq.; Crim. Proced. 2d ed. II. § 126 et seq.

[3] See Byler *v.* Asher, 47 Ill. 101; Bevard *v.* Hoffman, 18 Md. 479.

must know that the name rejected is that of a legal voter; that the facts that have been exposed to the notice of the board are true; and that they do, in point of law, constitute the right of the party to vote. This is not a case in which knowledge of the law must be presumptively imputed to the party proved to be in possession of all the facts."[1]

§ 806. **Mistake, continued — Judicial Capacity.** — And, in general, though the statutes of the States differ in their terms, it is held that those who are intrusted by law with the duty to pass upon the qualifications of voters, whether in the act of making out or revising voting lists, or of receiving or rejecting votes at the polls, perform therein judicial or *quasi* judicial functions, and are not answerable to an indictment when what they do through mistake either of law or fact is done honestly.[2] Thus, it is on this ground held in Delaware, that a presiding officer at an election is not criminally responsible for any mistake which he may honestly make in receiving or refusing to receive a vote.[3]

§ 807. *As to the Voter:* —

Nature of the Right. — Whatever theories may be maintained as to the sacredness of the right to vote, and as to the existence of the right itself as a natural one, it is, among all nations, practically granted by the governing power to such, and such only, of the people as it pleases. In point of governmental theory, therefore, the right to vote is not a natural or an inalienable one, but it is a mere political privilege allowed by the governing power.[4] Now, by the political theory on which our institutions are built, the governing power is in the people, who, therefore, are to determine in what hands the elective franchise shall be placed. In practice, the popular voice is spoken in constitutional conventions, and is embodied in the constitutions of the several States. And, from it, so embodied,

[1] The State *v.* Smith, 18 N. H. 91, 94.

[2] Byrne *v.* The State, 12 Wis. 519; The State *v.* Daniels, 44 N. H. 383; Bevard *v.* Hoffman, supra. And see The State *v.* Staten, 6 Cold. 233. But see Huber *v.* Reily, 3 Smith, Pa. 112.

[3] The State *v.* McDonald, 4 Harring. Del. 555; The State *v.* Porter, 4 Harring. Del. 556. See Crim. Law, 5th ed. I. § 460, 462.

[4] Ridley *v.* Sherbrook, 3 Cold. 569; Anderson *v.* Baker, 23 Md. 531; Blair *v.* Ridgely, 41 Misso. 63.

there is no appeal short of revolution. The law of the constitution is the measure of the right.[1]

§ 808. **Continued — Who the People to determine the Right.** — But, behind the doctrine thus stated, there lies a question; namely, who are the people whose voice, as thus explained, gives form to the right. For, if we undertake to be perfectly logical here in our reasoning, we are driven back to some law, having an existence independent of the constitutional convention, by which the qualifications of voters to the convention shall be ascertained. It is not proposed to enter into a wide field of discussion here, or to cite authorities; but, by the public law of nations as now expounded and practised, such voters are, in the absence of a special rule, all the male persons who have reached the age of majority. Yet, in many instances if not in most, there is practically a special rule differing more or less from this. Thus, if one of our organized Territories is to become a State, either the territorial legislature calls a constitutional convention, or Congress passes an act authorizing such a convention, and then the power moving in the matter, whether territorial or national, fixes the qualifications of voters for delegates to the convention. Or, a convention may even be held without any authority previously granted; and, in any one of these three cases, if a constitution is practically adopted, and approved by Congress, and the State has the machinery of government running, there is, as a general proposition, no way short of a revolution by which what has been done can be undone. An exception to this broad proposition is, that, if Congress deems the government of a State not to be "republican," or *a fortiori*, if the State ceases to have a government, this national legislature may, and by the terms of the United States Constitution must, authorize the assembling of a new constitutional convention to be composed of delegates elected by such voters as Congress sees fit to designate.[2] And what is thus done cannot, as in the former supposed instances, be undone except by revolution.

[1] The State *v.* Staten, 6 Cold. 233; Huber *v.* Reily, 3 Smith, Pa. 112; Blair *v.* Ridgely, supra; Anderson *v.* Baker, supra.

[2] And see Crim. Law, 5th ed. I. § 160–171; Matter of Hughes, Phillips, 57.

The doctrines of this section and the last are in a measure qualified by the fifteenth amendment to the national Constitution, which provides that the right of the citizen to vote shall not be denied or abridged on account of race, color, or previous condition of servitude.[1]

§ 809. **Legislative Power over Elections — Elective Franchise.** — The right of voting, therefore, which is conferred by the constitution of the State, cannot be abrogated or abridged by the State legislature.[2] Neither — speaking now of the vote for State officers — can it be taken away by Congress, except in the manner and to the extent pointed out in the last section.[3] But it is competent for the legislature of the State to pass laws in aid and in regulation of the right. Such laws must be reasonable; and not, under color of regulating the right, take it away.[4] For example, registration laws may be passed; and, when they are, one who by the constitution is entitled to vote, cannot exercise the right except in compliance with them;[5] or, if an election is held without the prior registration required by the statute, it is void.[6] We saw, in another connection,[7] that it is competent for the legislature to provide, as a punishment for crime, the forfeiture of an office, or of the capacity to hold office. Now, offices, the reader will note, are held under our written constitutions; and so, by legislation, wrong-doers are compelled to forfeit, for their crimes, constitutional rights. In like manner, they may be thus made to forfeit the right to vote.[8] This, which looks like a legislative power over a constitutional right, may perhaps be supported on a variety of reasons; but an obvious reason is, that, since a man may waive, should he choose, a constitutional right,[9] if he does what the legislature has declared shall debar him of it, he waives it by this act.

[1] Cooley Const. Lim. 2d ed. 599.

[2] Monroe *v.* Collins, 17 Ohio State, 665; Davies *v.* McKeeby, 5 Nev. 369; Page *v.* Allen, 8 Smith, Pa. 338; The State *v.* Staten, 6 Cold. 233; Cooley Const. Lim. 2d ed. 599.

[3] Huber *v.* Reily, 3 Smith, Pa. 112; Ridley *v.* Sherbrook, 3 Cold. 569.

[4] Monroe *v.* Collins, supra; Patterson *v.* Barlow, 10 Smith, Pa. 54.

[5] Byler *v.* Asher, 47 Ill. 101; The State *v.* Staten, supra; Cooley Const. Lim. 2d ed. 601, 602.

[6] The State *v.* Albin, 44 Misso. 346.

[7] Crim. Law, 5th ed. I. § 944.

[8] Huber *v.* Reily, 3 Smith, Pa. 112.

[9] Crim. Law, 5th ed. I. § 995; Crim. Proced. 2d ed. I. § 112, 117 et seq.

§ 810. **Congress over State Voters.** — It seems to have been conceded, that Congress may impose the forfeiture of the right to vote in a State for State officers, as a penalty for the violation of national law;[1] but, on principle, there is more than doubt of this, except in a case where the State concurs in the arrangement. The State can permit any person it pleases to vote; not so much, perhaps, in the case now under consideration, by way of protecting any supposed right in the voter, as by serving itself by having the vote. And if a State has excluded from suffrage a person who has committed a crime against the United States, the pardon of the offender by the President, though it restores him to his national rights, does not reinvest him with the right to vote under the State laws.[2]

§ 811. **Voting out of the State.** — In several of our States, there have been adopted statutory or constitutional provisions, under which soldiers temporarily out of the State, in the service of the United States, are authorized to cast their votes, if otherwise qualified, at elections for the choice of State officers. Where this is done by statute, the enactment has been in some of the States held to be unconstitutional and void, while in others it has been pronounced to be within the legislative authority. The constitutions of the States differ; and doubtless the decision should be the one way or the other according to the terms of this instrument. Thus, where the provision was, that "every white freeman of the age of twenty-one years, having resided in the State one year, and in the election district *where he offers to vote* ten days immediately preceding such election," should be a voter, it was by the majority of the court deemed that the act of offering the vote implied the personal presence of the voter; therefore, that a statute permitting persons who were not even within the State to vote was unconstitutional. Said Woodward, J.: "To 'offer to vote' by ballot is to present one's self, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. The ballot cannot be sent by mail or express, nor can it be

[1] Huber *v.* Reily, 3 Smith, Pa. 112.

[2] Ridley *v.* Sherbrook, 3 Cold. 569; Crim. Proced. 2d ed. I. § 920.

cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicile."[1]

§ 812. **Continued.** — Returning now to the question as it stands, aside from the special terms of the particular constitution, we saw in another connection,[2] that, as a general proposition, — perhaps as a proposition to which there is no exception, certainly as one to which the exceptions are few, — no State can extend her laws over persons, even her own citizens, who may be temporarily out of the State; and that there is a difference, in this respect, between the powers of the individual States, and those of the United States. Yet we saw also,[3] that an act may, in law, be within a State, while the personal presence of him who performs it is out of the State. And it is sufficiently plain, in principle, that the case of an individual casting a vote at one of these elections is of this sort; that is, though he may be out of the State when he casts his vote, yet the act takes effect within the State, and not in the locality where his personal presence is. Upon this principle, therefore, the class of provisions now in contemplation stand, and they are no violation either of the Constitution of the United States, or of any general rule of international law or comity.

§ 813. **Continued.** — Yet a case came before the court of Pennsylvania, wherein, this principle not being adverted to, it was held, that, if at such an election a foreigner, serving the United States, and owing no allegiance temporary or otherwise to the State of Pennsylvania, casts illegally his vote, the Pennsylvania courts have no jurisdiction to punish the offence.[4]

[1] Chase *v.* Miller, 5 Wright, Pa. 403, 419. See Hulseman *v.* Rems, 5 Wright, Pa. 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 question of the constitutionality of these enactments, 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 State, 573; The State *v.* Main, 16 Wis. 398.

[2] Crim. Law, 5th ed. I. § 152, 184.

[3] Ib. I. § 110–112.

[4] Commonwealth *v.* Kunzmann, 5 Wright, Pa 429. Woodward, J. observed as follows: "If the legislature of Pennsylvania provided by law, that any of her citizens, qualified electors, happening to be in the District of Columbia on election day, might hold a valid election there, and an election was held pursuant to such law without objection from the local authorities, we are to hold the jurisdiction of our courts to extend to any of our own citizens

§ 814. **Effect of Informalities.** — There seems to be no certain rule, derivable from the cases, on the question of what informalities in the manner of holding an election will exempt persons from responsibility under the statutes against illegal voting. In North Carolina, certain irregularities of this sort were held not to invalidate the election itself; and, consequently, not to excuse the voter.[1] And in Maine some such defects appear to be regarded in the same way;[2] while other defects are deemed to render the proceeding void, and consequently to free the persons voting from criminal liability.[3]

§ 815. **Oath — Perjury.** — It is no impediment to sustaining a prosecution against one for illegal voting, that he took an oath affirming his qualifications, and is therefore indictable also for perjury.[4] The perjury and the illegal voting are, it is seen, distinct acts.

§ 816. **What is Voting.** — As to what constitutes a "voting," the Tennessee court held, on an indictment for illegal voting, that, if one is at the polls on an election day, and there, stand-

who should violate any of the provisions of the law. We could not call on the judicial tribunals of the District to punish the infraction. They would not execute our law, and the fraudulent vote of the defendant would be an offence against no law of their own. It would be an offence only against our statute, and must be so laid in the indictment. But the whole statute would be there, the penal sections as well as the enabling clauses; and, if in an attempt to exercise the privileges of the statute, a citizen incurred its penalties, he would be answerable in our criminal courts, when he returns into our jurisdiction. As much so as false swearing under a commission issued out of our courts, or a forged acknowledgment of a deed under our act of 1828, would be indictable and punishable here. His liability to our jurisdiction rests, however, be it observed, on his citizenship in Pennsylvania. [Here, as the reader has seen in the text, ante, § 812, the learned judge, through inadvertence, errs. Waiving the point, whether, under any circumstances, there would be a liability in such a case, growing out of citizenship, as suggested by the judge, the real and substantial ground of jurisdiction in all such cases is, that the act of wrong takes effect in Pennsylvania; and, if a foreigner should commit it, the Pennsylvania courts ought to punish it as much as if it were committed by a citizen. And see Crim. Law, 5th ed. I. § 112–116.] It is because the volunteer soldier, in the service of the General Government, is a citizen of Pennsylvania, that the general election law attends him beyond our territory, and becomes a rule of action for him wherever he is. It is no rule for the citizens of other States, or for unnaturalized foreigners, simply because we have no power to prescribe rules of action for the citizens and subjects of foreign governments." p. 437, 438. See The State *v.* Main, 16 Wis. 398.

[1] The State *v.* Cohoon, 12 Ire. 178.

[2] The State *v.* Bailey, 21 Maine, 62.

[3] The State *v.* Williams, 25 Maine, 561.

[4] The State *v.* Minnick, 15 Iowa, 123.

ing before the judges, delivers his vote to the proper officer, and by order of the judges his name is announced and registered by the clerk, he has voted; though the officer should neglect till the polls are closed to put the vote into the box for safe-keeping.[1]

§ 817. **Residence of Voter.** — To gain a residence in a place, entitling one to vote, within the meaning of the election laws, he must be there with the intention of remaining;[2] if he goes to the place merely for the purpose of voting, he does not become thereby a resident.[3] So the mere presence of a person as a soldier in the service of the United States does not make him a resident entitled, therefore, to vote.[4]

§ 818. **"Offering" — "Promising" — Municipal Corporation.** — Under the Delaware statute it is held, that there is no difference between "offering" and "promising" a reward to a voter.[5] In Tennessee, it has been held not indictable to cast a ballot illegally for the officers of a municipal corporation.[6]

§ 819. **Nature of the Evil Intent.** — Questions of considerable difficulty have arisen as to what sort of evil intent is necessary to bring a defendant within the inhibitions of this class of statutes. The language of the enactments differs, the views of judges differ; and, out of these two causes combined, much confusion has grown. Let us, therefore, look at some of the statutory words; and at the expositions actually given them by the courts.

§ 820. **"Knowingly and Fraudulently" — Ignorance of Law — Opinions of Non-professional Persons — Of the Judges of Elections.** —The statute of North Carolina provides a punishment, "if any person shall hereafter *knowingly and fraudulently* vote at any election, who by law shall not be entitled to vote at such election." And the court has decided, that, where one takes advice from a person not a member of the bar, concerning his right to vote, he cannot set up this advice as a defence to a

[1] Steinwehr *v.* The State, 5 Sneed, 586. See The State *v.* Elwood, 12 Wis. 551.

[2] The State *v.* Marshall, 45 N. H. 281.

[3] The State *v.* Minnick, 15 Iowa, 123.

[4] Devlin *v.* Anderson, 38 Cal. 92.

[5] The State *v.* Harker, 4 Harring. Del. 559.

[6] The State *v.* Liston, 9 Humph. 603. As to which, see query, Crim. Law, 5th ed. I. § 471, note.

charge of illegal voting; and probably the result would be the same, if the advice came from a member of the bar.[1] But, said the judge: "It would have been a different question 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." The general doctrine of this case seems to be, that, under this statute, as at the common law,[2] defendants are conclusively presumed to know the law, while still they are excusable for a mistake of the facts.[3] In a subsequent case, in the same State, it was held, that the mere opinions of the judges of the election, not communicated to the defendant, favorable to his right to vote, could not avail him on an indictment for voting without right; and, observed the learned judge: "It is neither a justification nor excuse for such an act, that other persons advised the party that it was lawful; and much less, that other persons thought and believed it to be lawful."[4]

§ 821. **Continued.** — In almost the same language is the statute of Tennessee; providing, that "any person who shall *knowingly* vote at any election, not being at the time a qualified voter in the county in which he so votes, shall be adjudged guilty of a misdemeanor." And the court, after first remarking that the legislature did not intend by these words "to violate a fundamental principle of the criminal law," took the broad ground, that, though one does not "know" he is not a qualified voter, yet if this lack of knowledge is produced by ignorance of the law it will not excuse an act of illegal voting. Thus, if a person under twenty-one years of age is not entitled by law to vote, and a defendant knowing himself to be under this age voted, yet supposed he was entitled, he violated the statute. The doctrine, in other words, was, that the defendant is to be convicted, whenever there is shown to have been, within his knowledge, a state of facts which would legally disqualify him from voting.[5]

[1] See Crim. Law, 5th ed. I. § 298; post, § 824, 825.

[2] Crim. Law, 5th ed. I. § 292 et seq.

[3] The State *v.* Boyett, 10 Ire. 336, opinion by Pearson, J.

[4] The State *v.* Hart, 6 Jones, N. C. 389.

[5] McGuire *v.* The State, 7 Humph.

§ 822. **Continued — Presumed Knowledge of Law.** — If the reader will examine the discussion on "Ignorance of Law and Fact," in the author's work on the Criminal Law,[1] he will see that the general doctrine is not exactly as it was thus assumed to be by the Tennessee court. Though pure ignorance of law is never an excuse for its violation, while pure ignorance of fact unaccompanied by carelessness or other moral fault always is, yet where, to constitute a crime, a person doing the forbidden act must be in a particular frame of mind which the law points out, he is excused, if, by reason of his mistaking the law, the *fact* of this particular frame of mind does not exist. Thus, as there observed, "to constitute larceny, there must be an intent to steal, which involves the knowledge that the property taken does not belong to the taker; yet, if all the facts concerning the title are known to the accused, and so the question is one merely of law whether the property is his or not, still he may show, and the showing will be a defence to him against the criminal proceedings, that he honestly believed it his through a misapprehension of law."[2] Therefore, applying this doctrine to the present case, if the statute punishes illegal voting, not in every instance, but only when the person illegally voting "knows" he is not a qualified voter, — making the *fact* of knowledge in the mind of the defendant one of the elements essential to the crime, — it is immaterial whether the absence of this element from a case was produced by ignorance of law or ignorance of fact.

§ 823. **Continued — "Fraudulently."** — A decision in Rhode Island more nearly conforms to this better doctrine. There the statute made it punishable "if any person in any election shall *fraudulently* vote, not being qualified, or having voted in one town or ward or district, or shall vote twice at the same election for the same candidate, or for different candidates for the same office, or twice in different places at the same election;" and, upon an indictment founded on the first clause, it was held, that, if a voter knows all the facts relating to his qualification, and, believing these facts to qualify him while

54. The English case of Reg. *v.* Price, 3 Per. & D. 421, 11 A. & E. 727, seems to confirm this view.

[1] Crim. Law, 5th ed. I. § 292 et seq.

[2] Ib. I. § 297.

they do not, casts, illegally, yet with an honest purpose, his vote, he is not indictable. The prisoner, in the case before the court, had been challenged at the polls; yet he persisted in his right, and voted. Said Ames, C. J: "It is insisted, that, as the facts were called to the attention of the prisoner before he voted, by a person who challenged his vote, and threatened to prosecute him if he voted, the prisoner voted at his peril. It is evident that the prisoner 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, c. 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 Mierelles *v.* Banning,[1] 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 commission, and such having been the practice of the office for more than thirty years, was not liable to the penalty."[2]

§ 824. **Continued — "Knowingly" — "Wilfully."** — The words of the Massachusetts enactment are: "If any person, *knowing* himself not to be a qualified voter, shall, at any election, *wilfully* give in a vote for any officers to be then chosen, he shall forfeit," &c.[3] And the court does not hold defendants to be, under this statute, conclusively bound to know the law. "In order," said the judge, "to convict a party under this statute, which is extremely liberal in this respect, 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

[1] Mierelles *v.* Banning, 2 B. & Ad. 909.

[2] The State *v.* Macomber, 7 R. I. 349, 353.

[3] Mass. R. S. c. 4, § 6. In the Gen. Stats. c. 8, § 30, the provision is subjected to slight verbal changes, but it is the same in substance.

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." [1]

§ 825. **Continued — Voting Twice.** — We come now to a different form of the statutory provision; that is, a form in which such words as "knowingly," "fraudulently," "wilfully," and the like, are not employed. Thus, in Vermont, there is the following: "If any person shall on the same day vote in more towns than one for the same officers, he shall forfeit a sum not exceeding one hundred dollars." And upon this it is held, that, if a man under no mistake of the facts, but, mistaking the law, votes in two towns, supposing, at the casting of each ballot, he is entitled to cast it, he is indictable, however innocent in point of morals may be his real motive. In the case in which this point was decided, a young man, just of age, voted in the town where his father lived; being told, and believing, that he had the right to vote there. He then went to his work in an adjoining town; and there he was told, that he was wrong in voting in the former town, but had the right to vote here. Thereupon the case was submitted to those officers of the town who, by law, were intrusted with the duty of passing upon the qualifications of voters; he disclosed to them the facts without reserve, including the fact of his former vote; and they decided, that, under all the facts, and notwithstanding his former vote, he was still entitled to vote in this town. The court, however, held his act to be in violation of the statute, and his conviction to be right.[2] Now, that this is

[1] Commonwealth *v.* Bradford, 9 Met. 268, 272, opinion by Shaw, C. J. Of the like sort, is the Iowa doctrine. The State *v.* Sheeley, 15 Iowa, 404. And see Reg. *v.* Dodsworth, 8 Car. & P. 218. As to the duties and liabilities of an inspector of elections in New York, see People *v.* Pease, 30 Barb. 588.

[2] The State *v.* Perkins, 42 Vt. 399. Steele, J. in delivering the opinion of the court, observed: "The second ground of defence is, that the respondent, when he voted in Plainfield, believed himself a voter there, and afterwards, finding he was mistaken, voted in Barre, where he really belonged, and that he did not wilfully cast any illegal vote at all. This ground is not tenable; because the offence consists in voting in more than one town, and not in any corrupt design. After having voted in Plainfield, he was disrobed of all right to vote for the same officer elsewhere, even though his vote in Plainfield was illegal, and not entitled to be counted. His second vote was illegal, whether the first was or not,

a hard case, and one in which the prosecuting officer, if fully cognizant of the facts, ought not to press a conviction,[1] no thoughtful reader will question. Still the decision is undoubtedly sound in law, unless, adopting the view already mentioned,[2] we hold that the officers of the election in the town where the man cast his second vote (for the first vote was of itself alone no violation of *this* statute) acted in a judicial capacity; in which case, as they were the judges, the matter passed upon became, in the absence of any fraud practised by the defendant, *res judicata*, and, though wrongly adjudged, protected him, who, with the public on the other side, was the party, from legal consequences following at the suit of the public. This point was not presented in the case, therefore in another case of the like sort it will be open for examination.[3] In terms differing in no material respect from this Vermont statute is a California one, which provides a punishment for "any person who shall vote more than once at any election;" and it was held, that, if a person 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 found in the statute.[4] This case is not inconsistent with the Vermont doctrine; for the Vermont case illustrates the rule that ignorance of the law does not excuse the otherwise criminal act, while the California case illustrates the proposition that ignorance of fact does excuse.[5]

§ 826. *Other Points:* —

Civil Suit — Corrupt Agreements, &c. — In a Vermont civil suit the following points were decided: The defendant being indebted to the plaintiff who was a candidate for the office of town representative, the parties agreed, that the former should use his influence for the plaintiff's election, doing what he could to effect it, and that, if the plaintiff was elected, this should be

and whether his action be attributable to corruption or only to ignorance. The policy of the statute is to guard against illegal voting, by throwing upon the voter the necessity of determining for himself, to some extent, where he belongs; and, if in doubt, compelling him to confine his vote to one place. He, of his own free will, voted in more than one town for the same officer, and this is precisely the act against which the statute has pronounced a penalty." p. 402.

[1] Crim. Proced. 2d ed. I. § 290, 291.

[2] Ante, § 806. And see ante, § 820.

[3] Bishop First Book, § 393.

[4] People *v.* Harris, 29 Cal. 678.

[5] Crim. Law, 5th ed. I. § 292 et seq.

equivalent to a discharge of the debt. Nothing was specifically said about the defendant's voting for the plaintiff, but he did vote for him, which he would not have done, neither would he have favored his election, but for the agreement. The plaintiff was elected. No actual discharge of the debt was given by the plaintiff after the election. And it was held, that this agreement was void, constituting no impediment to the plaintiff's recovery of the debt. It was also held not to be necessary to the invalidity of such an agreement that it should be secret, or to be kept secret. If, for money or other personal profit, a voter agrees to exert his influence in an election against what he believes to be for the public good, the agreement is void, even though, in the exercise of such influence, he resorts to no unlawful means.[1]

II. *The Procedure.*

§ 827. *Indictment:* —

General View. — The statutes creating the various offences discussed in this chapter are so numerous, and their terms are so diverse, that it is not best to attempt here to furnish the reader with forms of the indictment on every one of them. A few examples, followed by a statement of some decided points, will suffice; for the forms here given can be easily varied to fit the particular statute and occasion.

§ 828. **Against Officers of Election — Refusing to receive Vote.** — An Indiana statute is as follows: "Any inspector or judge of any election held within this State, who shall knowingly and wilfully, or corruptly, refuse or neglect to receive the vote of any legal voter, at any election held within this State, shall be deemed guilty of a misdemeanor, and, on conviction," &c. And the following is a form drawn on this provision: —

"That on, &c., at, &c., an election was held, pursuant to law, for a Governor for the State of Indiana, and that A. B. was then and there the inspector of said election, and that C. D. was [then and there] one of the electors competent to vote at said election; and that the said C. D. then and there offered to vote at said election, and then and there tendered his ballot to said inspector for that purpose; and the said A. B., being such inspector, then and there, know-

[1] Nichols *v.* Mudgett, 32 Vt. 546. See also People *v.* Pease, 30 Barb. 588; Liness *v.* Hesing, 44 Ill. 113.

ingly and wilfully neglected and refused to receive the said vote of the said C. D., he, the said C. D., being then and there a legal voter competent to vote at said election, contrary," &c.[1]

§ 829. **Voter — Casting more than One Vote.** — The following is a statute of Maine: "At any meeting for the election of any public officer, where a list of voters is necessary, if any person wilfully votes before the presiding officer has had opportunity to find his name on said list, or knowing that it is not on it, or wilfully gives any false answer or statement to the selectmen or other officers when previously preparing such list, or presiding at such meeting, in order that his name may be entered on such list or his vote received; or casts more than one vote at one balloting; or is disorderly at such meeting, he shall," &c.[2] And the following was held, on demurrer, to be a good indictment on the clause against casting more than one vote at one balloting: —

"That on, &c., at Augusta, in the county of Kennebec, a meeting of the inhabitants of said Augusta, in the county aforesaid, for the election of Governor of the State aforesaid, and representative to Congress for the third congressional district of said State, and State senators for the seventh senatorial district of said State, and a sheriff, treasurer, county commissioner, clerk of the Supreme Judicial Court, judge of probate, and register of probate for the county of Kennebec aforesaid, and representatives to the legislature for said Augusta, was then and there duly held; and, at said election, a list of the voters of said Augusta was necessary. And the jurors aforesaid, upon their oath aforesaid, do further present, that William Boyington of said Augusta, in said county of Kennebec, did then and there, at the meeting and election aforesaid, wilfully, knowingly, and unlawfully, cast and give in more than one vote, ballot, and list of persons then and there to be elected and chosen into the said offices, at one balloting, at the choice and election aforesaid, against the peace of said State, and contrary to the form of the statute in such case made and provided."[3]

§ 830. **Voting not being qualified.** — The Rhode Island statute has already been given.[4] On this statute, the following form of the indictment was, in a sharply contested case, employed without any objection appearing in the report: —

"That A, &c., at, &c., on, &c., at the annual election for State officers, to wit, for governor, lieutenant-governor, senators, representatives, secretary of state, attorney-general, and general treasurer, held in the town of Portsmouth, and

[1] Bicknell Crim. Pr. 466, 467; referring, for the statute, to Laws Spec. Sess. 1858, p. 40.

[2] Maine R. S. of 1857, c. 4, § 61; R. S. of 1871, c. 4, § 64.

[3] The State *v.* Boyington, 56 Maine, 512.

[4] Ante, § 823.

in all the other towns and cities of this State, on, &c., did fraudulently vote, not being qualified to vote according to the constitution and laws of this State;[1] and then and there well knowing that he had no right to vote at said election, according to the constitution and laws of this State," &c.[2]

§ 831. **Attempting to prevent one from Voting.** — A statute in New Hampshire makes punishable "any person who shall attempt or procure, by threats or intimidation, any other person to avoid voting at any town meeting." And the following form of the indictment was held to be sufficient, and not ill as charging two offences in one count: —

"That A, &c., on, &c., at, &c., with force and arms, did make an assault upon one B, and him the said B did then and there beat, bruise, kick, wound, and ill treat, attempting thereby by intimidations to procure the said B to avoid voting at the annual town meeting of said town of Haverhill, the said town meeting being then and there legally and duly held and in session, contrary," &c.[3]

§ 832. **Alleging the Election, &c.** — It seems to have been deemed necessary, in England, in this class of cases, to set out the writ or precept under which the election is held.[4] But, if this is so, the doctrine could apply in this country only to special elections held under writ or warrant, and not to our usual elections established in time and place by public law. It is seen that the foregoing forms do not contain matter of this sort; yet, in some way, the indictment must affirmatively show that the election was a lawful one, held for purposes known to the law.[5] Even in an information against a justice of the peace for corruption in the election of a clerk, it must appear that an election was duly held, and the defendant's vote was then given.[6]

§ 833. **Continued.** — In New Hampshire it has been adjudged to be sufficient, on the point now under consideration, to allege, in an indictment for illegal voting at a town meeting, that the meeting was duly holden, without stating how or by what authority it was called.[7] So, in Maine, the allegation, in an indictment for illegal voting, "that the inhabitants were convened, according to the constitution and laws of the State, in

[1] See post, § 835.

[2] The State *v.* Macomber, 7 R. I. 349.

[3] The State *v.* Hardy, 47 N. H. 538.

[4] Reg. *v.* Bowler, Car. & M. 559; Reg. *v.* Ellis, Car. & M. 564.

[5] Tipton *v.* The State, 27 Ind. 492, 493.

[6] Newell *v.* Commonwealth, 2 Wash. Va. 88.

[7] The State *v.* Marshall, 45 N. H. 281.

legal town meeting, for the choice of town officers," is held to be sufficient to let in proof of the legality of the meeting. There need not be an averment, that the inhabitants were summoned by warrant from the selectmen, duly and legally served. Neither is it necessary to allege, that the inhabitants were assembled in town meeting to give in their votes, ballots, or lists for the persons to be voted for; nor that the accused was an elector entitled to vote at the meeting.[1] And in Iowa, in an indictment for voting without being qualified, the averment that the defendant voted at a certain election authorized by law, then and there held, implies the averment that it was held by the proper officers. It is not necessary to aver and prove in what the disqualification consists; but, if the defendant admitted his disqualification in general terms, this is sufficient.[2] Where the indictment is for voting in a town in which the defendant is not a resident, it is not necessary to set out the name of the person voted for, or state what officers were to be elected.[3]

§ 834. **Continued.** — If, in Massachusetts, the indictment contains the allegation that a meeting of the inhabitants of the town of A was duly held, this will be sustained by proof that a meeting was held of the inhabitants who were qualified to vote. It is no cause for arresting judgment, on an indictment for giving false answers to selectmen, and for voting wilfully, without being qualified, for governor, lieutenant-governor, and senators for the district of M, that the district of M is not alleged to be in the Commonwealth.[4]

§ 835. **Want of Qualification.** — The reader may have observed, that the foregoing form for voting without being qualified does not set forth the particular in which the lack of qualification consists.[5] This, moreover, has been adjudged to be adequate.[6] To the author, it seems to be adequate in principle; because, in the first place, this is a negative averment, and negative averments do not in general need to be made so full as affirmative ones;[7] and, in the next place,

[1] The State *v.* Bailey, 21 Maine, 62. And see The State *v.* Marshall, supra.

[2] The State *v.* Douglass, 7 Iowa, 413.

[3] The State *v.* Minnick, 15 Iowa, 123, 125.

[4] Commonwealth *v.* Shaw, 7 Met. 52.

[5] Ante, § 830.

[6] Ante, § 833.

[7] Ante, § 382.

qualification is a compound fact, consisting of several particulars, and particulars of this sort need not generally be alleged,[1] therefore the particulars of its negation, or a denial of the fact, need not be.[2] Still there might be a disqualification of such a special kind that, on principle, it ought to be alleged. And, contrary perhaps to the general doctrine of this section, it is held in New Jersey, that the indictment for illegal voting, to be sustained, must specify the particular disability of the defendant.[3] Also in an indictment for unlawfully advising another to vote, the disability of the person advised must be stated.[4]

§ 836. **Allegation of Voting.** — An indictment for illegal voting, drawn upon the statute of New Jersey, charged that the defendant did wilfully and unlawfully give in his vote. And this was held to be, in substance, a charge that he unlawfully and wilfully voted.[5]

§ 837. **Voting in Two Places.** — In Rhode Island, the offence committed by one who, "having voted in one town or ward or district," at the same election, "shall vote in another town or ward or district," as defined in the election law,[6] is a local offence; and the places at which the two votings occurred necessarily enter into the description of it. Therefore an indictment which does not with legal certainty allege the places of voting cannot be supported under the statute; and, if the places are alleged, a variance from them, or either of them, in proof, will be fatal on the trial. Where an indictment contained two counts, which laid the votings alternately in the order of time, in Providence and North Providence, and the jury could not determine from the proof in which town the last, or illegal, voting took place, it was held that they were not warranted in returning a verdict of guilty upon either or both of the counts.[7]

§ 838. **Judge of the Election — Unlawfully receiving Vote —**

[1] Ante, § 828. And see ante, § 706.

[2] And see Commonwealth *v.* Gray, 2 Duvall, 373; The State *v.* Daniels, 44 N. H. 383.

[3] The State *v.* Moore, 3 Dutcher, 105.

[4] The State *v.* Tweed, 3 Dutcher, 111.

[5] The State *v.* Moore, 3 Dutcher, 105. See Reg. *v.* Bowler, Car. & M. 559.

[6] See ante, § 823.

[7] The State *v.* Fitzpatrick, 4 R. I. 269.

Other Judges. — A statute in Kentucky makes punishable "any judge or sheriff who shall knowingly and unlawfully receive the vote of any other than a qualified voter." And an indictment against one of the judges, charging that he knowingly and unlawfully received the vote of a person not entitled to vote, omitting any mention of the action of the sheriff and other judges in the premises, was held to be good. "If, as charged," said Robertson, J. "Thompson voted, and the appellee, as one of the judges of the election, knowing that he was not a qualified voter, nevertheless received his vote, or did not object to it, his act was criminal, however the other judges and sheriff may have acted."[1]

§ 839. **Continued — Appointment — Knowledge.** — Where an indictment averred that certain persons were judges of the election, this was held to be equivalent to an averment that these persons were duly made and appointed judges; therefore it was sufficient.[2] An indictment against a proper officer for refusing to put a name on the voter's list, should allege that he knew the person was entitled to vote.[3]

§ 840. **"Falsely and Fraudulently" for "Wilfully" — "Unlawfully" for "Illegally."** — In England, a statute[4] having made it punishable "if any person shall *wilfully* make a false answer" concerning his qualifications as a voter, an indictment alleging that the defendant "falsely and fraudulently" did the forbidden thing, omitting the word "wilfully," was adjudged to be ill.[5] But where, in Tennessee, the statute had the words "*illegally* voting," &c., and an indictment charged that the defendant did "*unlawfully* vote," &c., this was held not to be ill as departing from the terms of the statute; for, said the judge, "the words are synonymous."[6]

§ 841. *Evidence:* —

Variance — Surplusage — Official Character. — An indictment, on the Revised Statutes of Massachusetts, for wilfully giving false answers to selectmen presiding at an election, alleged,

[1] Commonwealth *v.* Gray, 2 Duvall, 373. See People *v.* McManus, 34 Barb. 620; Byrne *v.* The State, 12 Wis. 519.

[2] The State *v.* Randless, 7 Humph. 9.

[3] The State *v.* Daniels, 44 N. H. 383.

[4] The Municipal Corporations Act, 5 & 6 Will. 4, c. 76, § 34.

[5] Reg. *v.* Bent, 1 Den. C. C. 157.

[6] The State *v.* Haynorth, 3 Sneed, Tenn. 64.

that such false answers were given by the defendant with the fraudulent intent to procure his name to be placed on the list of voters, and to obtain permission to vote. The evidence was, that the defendant's name was on the list of voters when he gave the false answers. Thereupon it was held, that the allegation of the intent to procure his name to be placed on the list of voters could not be rejected as surplusage, and that there was a material variance between the allegation and the proof. On such an indictment, it is not necessary to prove that the selectmen were legally chosen and qualified; it is sufficient, if it be proved that they were acting as selectmen.[1]

§ 842. **Residence — Domicile — Presumption.** — To establish, in New Hampshire, the fact that the defendant was not entitled to vote under a statute requiring a six months' residence in the ward where he offered his vote, it may be shown that he had not actually lived within the ward during the six months, and this will be sufficient in the absence of proof that he was away for a temporary purpose.[2]

§ 843. "**Strong Corroborating Circumstances.**" — A statute in Kentucky provides, that a person accused of receiving a bribe for his vote shall not be convicted "on the testimony of a single witness, unless sustained by strong corroborating circumstances." If, therefore, in addition to the direct testimony of a witness that he sent the defendant a bribe, it merely appears that on the day of the election several friends of the candidate had with the candidate private interviews, such interviews do not constitute the "strong corroborating circumstances" required by the statute for the conviction of the defendant.[3]

[1] Commonwealth *v.* Shaw, 7 Met. 52.

[2] The State *v.* Marshall, 45 N. H. 469.

[3] Russell *v.* Commonwealth, 3 Bush, 281.

CHAPTER XXXVIII.

GAMING — THE LAW OF THE OFFENCE.

844, 845. Introduction.
846–848. Common Law of the Subject.
849–851. The old English Statutory Law.
852–854. The American Legislation.
855–881. Expositions of Doctrines.

§ 844. **General View — Course of the Discussion.** — The statutes of our several States are so numerous, and so diverse in their provisions, that it will not be wise to undertake any discussion of the law of this offence which, to readers who do not first place before them the statutes of their own State, will seem full or even adequate. The discussion which will be given, however, will be helpful in two ways: in the first place, it will contain such a citation of adjudged cases as will enable the reader to find, in his books of reports, fuller elucidations of points which are here only touched; and, in the second place, it will impart absolute doctrines, intelligible to those who read the discussion with the statutes before them, at points where, without the statutes, it will seem unsatisfactory and perhaps not clear.

§ 845. **How the Chapter divided.** — We shall consider I. What is the Common Law on the Subject; II. The old English Statutory Law; III. The American Legislation; IV. Expositions of Doctrines.

I. *What is the Common Law on the Subject.*

§ 846. **Nature of Offence — Under ancient Common Law.** — The vice of gaming has prevailed in all ages, and among all people. It seems founded on the love of the marvellous, one of the properties inherent in the human mind. And so, like every other departure from the true rule of right, it is, in another view, but the action, wrongful indeed, of a faculty given to man by his Maker for good and valuable uses. The

offence is not recognized under the ancient common law of England;[1] consequently an indictment will not ordinarily lie here for an act of gaming, not prohibited by some statute, English or American.[2] Whether the old English enactments have the force of common law with us, we shall see presently.

§ 847. **An Element of some other Offence.** — But gaming may constitute an ingredient in a common-law offence; for we saw in another connection,[3] that public gaming-houses are indictable common-law nuisances. And we have elsewhere taken notice,[4] that cheating by false dice is a crime. There seems also to be a doctrine, neither distinct in its limits nor firm on the authorities, that some kinds of games are, from their peculiar nature, offences at the common law.[5]

§ 848. **Wagers — Civil Action.** — Moreover, wagers, which are a species of game, are in civil jurisprudence held to be so far unlawful, that, under many circumstances, or even, according to the views of some judges, under all circumstances,[6] an action to recover them cannot be maintained. What are the limits of the doctrine concerning wagers, it not being uniform in all the States, is a question aside from our present inquiry.[7] And this caution will not be useless, that, although an action could not be sustained for the recovery of a particular wager, the result would not necessarily follow that the parties to it could be indicted. In Scotland, no action is maintainable on any gaming contract whatever; but undoubtedly no mere gaming, in distinction from keeping a gaming-house and the like, is indictable under the common law of that country.[8]

[1] Bell *v.* Norwich, 3 Dy. 254 *b*; Case of Monopolies, 11 Co. 84, 87 *b*.

[2] Crim. Law, 5th ed. I. § 504, 1135; 1 Hawk. P. C. Curw. ed. p. 721; 1 Russ. Crimes, Grea. ed. 455; 1 Gab. Crim. Law, 451; United States *v.* Milburn, 4 Cranch C. C. 719.

[3] Crim. Law, 5th ed. I. § 1135 et seq.; ante, § 546.

[4] Crim. Law, 5th ed. II. § 157.

[5] Ib. I. § 504.

[6] Lewis *v.* Littlefield, 15 Maine, 233.

[7] And see Ball *v.* Gilbert, 12 Met. 397; Gibbons *v.* Gouverneur, 1 Denio, 170; Ellis *v.* Beale, 18 Maine, 337; Dunman *v.* Strother, 1 Texas, 89; Crow *v.* The State, 6 Texas, 334; Bryant *v.* Mead, 1 Cal. 441; Trenton 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; Commonwealth *v.* Gourdier, 14 Gray, 390, 391; Sutphin *v.* Crozer, 1 Vroom, 257, reversed, 3 Vroom, 462; Lear *v.* McMillen, 17 Ohio State, 464. See post, § 872 et seq.

[8] Greenhuff's Case, 2 Swinton, 236.

II. *The old English Statutory Law.*

§ 849. **Stat. 17 Edw. 4 — 33 Hen. 8.** — Stat. 17 Edw. 4, c. 3, made it a misdemeanor for any person to use the game of klosse, half-bowl, kayles, hand-in-hand, or queckbord, or to suffer another to play at either of these games in his house. But the subsequent enactment of 33 Hen. 8, c. 9, repealed "all other statutes made for the restraint of unlawful games;" and so, as this act of Edw. 4 was not in force when our colonies were settled, there appears to be no principle on which it can be deemed a part of our common law.

§ 850. **Stat. 33 Hen. 8, continued.** — Stat. 33 Hen. 8, c. 9, is the leading one of the old English enactments. The "bowyers, fletchers, stringers, and arrowhead makers" complained, that their business had become unprofitable by reason of the people following gaming instead of archery; and so this statute directs, that the people exercise themselves with long bows, and every man have one bow and at least four arrows, and every boy over seven years of age have furnished him one bow and at least two arrows. It then lays down many inhibitions against gaming-houses, and against gaming under particular circumstances. For instance, § 16 provides, "That no manner of artificer or craftsman of any handicraft or occupation, husbandman, apprentice, laborer, servant at husbandry, journeyman, or servant of artificer, mariners, fishermen, watermen, or any serving man shall 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. **Continued — Whether Common Law with us — Other Statutes, and whether Common Law.** — This statute, according to Kilty, had never any force in Maryland,[2] and it was prob-

[1] See 1 Hawk. P. C. Curw. ed. p. 721–725.

[2] Kilty Report of Statutes, 75.

ably not received in any of the colonies.[1] Its date (A. D. 1541) is sufficiently early to make it common law here; but there are several objections, apparent on the face of the whole enactment, too obvious to need any explanation, showing, that it could not have become a part of our common law. There are, moreover, the acts of 16 Car. 2, c. 7 (A. D. 1664);[2] 10 & 11 Will. 3, c. 17 (A. D. 1699);[3] 9 Anne, c. 6 (A. D. 1710);[4] 9 Anne, c. 14;[5] and 10 Anne, c. 26.[6] But although these have furnished the basis for American legislation, none of them probably are common law with us; or are, at least, to be relied on as the foundation of an indictment.[7] The consequence is, that our common law, like the English, does not make the playing at games of any kind, except as before explained,[8] an indictable offence.

III. *The American Legislation.*

§ 852. **Particular Prohibitions enumerated — Authorities referred to.** — The legislation of the several States need not be presented here at large; because each practitioner will refer for himself to his own statutes. But it may be observed, that the enactments on this subject have principally for their object the suppression of public gaming, which leads to public evils. For instance, the keeping of a bowling-alley,[9] a billiard-table,[10]

[1] See Dunman *v.* Strother, 1 Texas, 89, 92. It is not set down by the Pennsylvania judges as in force in that State. Report of Judges, 3 Binn. 595.

[2] See 1 Hawk. P. C. Curw. ed. p 726, 729.

[3] Ib. p. 733, 734.

[4] Ib. p. 734.

[5] Ib. p. 727, 728–731.

[6] Ib. p. 734.

[7] Dunman *v.* Strother, 1 Texas, 89, 92. In United States *v.* Dixon, 4 Cranch, C. C. 107, 108, 109, Cranch, C. J. observed: "The British statutes 16 Car. 2, c. 7, against deceit in gaming; 9 Anne, c. 14, § 1, avoiding securities for money lost at gaming; ib. § 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."

[8] Ante, § 847.

[9] The State *v.* Currier, 23 Maine, 43; Commonwealth *v.* Stowell, 9 Met. 572; Commonwealth *v.* Drew, 3 Cush. 279; Needham *v.* The State, 1 Texas, 139; The State *v.* Hay, 29 Maine, 457; Commonwealth *v.* Goding, 3 Met. 130.

[10] Smith *v.* The State, 22 Ala. 54; The State *v.* Mosely, 14 Ala. 390; Mayers *v.* The State, 3 Eng. 222; Blanton *v.* The State, 5 Blackf. 560; The State *v.* Mathews, 2 Brev. 82; Harbaugh *v.* People, 40 Ill. 294; Gibbons *v.* People, 33 Ill. 442: Commonwealth *v.* Emmons, 98 Mass. 6; Com-

or a faro bank or other like device;[1] or, according to some of the statutes, the public racing of horses;[2] or the having of facilities for gaming, or the allowing of gaming, in places where intoxicating liquors are sold,[3] or in public houses;[4] or gaming in public places,[5] to which youth will be allured; or on particular days, as, for instance, on the Sabbath day;[6] or the betting on games played by others,[7] or betting on public elections,[8] together with some other forms of wager;[9] or the encouraging of gaming in others,[10] — each of these, made indictable by statutes in various States, is distinguishable from mere private playing; because its tendency is to affect other persons than the players themselves.

§ 853. **Secret or Open.** — It may be added, that the evil is not confined to places the doors of which are thrown open, and to which all persons indiscriminately have access; but the lure is the more effectual when the idea of secrecy is woven

monwealth *v.* Sylvester, 13 Allen, 247; Ward *v.* The State, 17 Ohio State, 32.

[1] Commonwealth *v.* Wyatt, 6 Rand, 694; Ervine *v.* Commonwealth, 5 Dana, 216; Commonwealth *v.* Burns, 4 J. J. Mar. 177; The State *v.* Markham, 15 La. An. 498.

[2] The State *v.* Fidler, 7 Humph. 502; Fiddler *v.* The State, 7 Humph. 508; Van Valkenburgh *v.* Torrey, 7 Cow. 252; Shropshire *v.* Glascock, 4 Misso. 536; Boynton *v.* Curle, 4 Misso. 599; Gibbons *v.* Gouverneur, 1 Denio, 170; The State *v.* Posey, 1 Humph. 384; Ellis *v.* Beale, 18 Maine, 337; The State *v.* Ness, 1 Ind. 64; Watson *v.* The State, 3 Ind. 123; Huff *v.* The State, 2 Swan, Tenn. 279; Redman *v.* The State, 33 Ala. 428; Goldsmith *v.* The State, 1 Head, 154.

[3] Ante, § 294; The State *v.* Black, 9 Ire. 378; The State *v.* Terry, 4 Dev. & Bat. 185; The State *v.* Coleman, 3 Ala. 14; Burdine *v.* The State, 25 Ala. 60; Marston *v.* Commonwealth, 18 B. Monr. 485; Cole *v.* The State, 9 Texas, 42; The State *v.* Hix, 3 Dev. 116.

[4] Commonwealth *v.* Tilton, 8 Met. 232; The State *v.* Smitherman, 1 Ire. 14; The State *v.* Records, 4 Harring. Del. 554; Commonwealth *v.* Price, 8 Leigh, 757.

[5] Ante, § 298, 299.

[6] The State *v.* Fearson, 2 Md. 310; The State *v.* Conger, 14 Ind. 396.

[7] Bagley *v.* The State, 1 Humph. 486; Crow *v.* The State, 6 Texas, 334; Torney *v.* The State, 13 Misso. 455; Horton *v.* The State, 8 Eng. 62; Ward *v.* The State, 22 Ala. 16; Bachellor *v.* The State, 10 Texas, 258, 262; The State *v.* Bates, 10 Misso. 166; Eubanks *v.* The State, 5 Misso. 450.

[8] Doyle *v.* Commissioners Baltimore County, 12 Gill & J. 484; Veach *v.* Elliott, 1 Ohio State, 139; The State *v.* Cross, 2 Humph. 301; Morgan *v.* Pettit, 3 Scam. 529; The State *v.* McLelland, 4 Sneed, 437; Commonwealth *v.* Kennedy, 15 B. Monr. 531.

[9] The State *v.* Posey, 1 Humph. 384; Parsons *v.* The State, 2 Ind. 499; Dunman *v.* Strother, 1 Texas, 89; Commonwealth *v.* Shelton, 8 Grat. 592; Dobkins *v.* The State, 2 Humph. 424; Bagley *v.* The State, 1 Humph. 486; Barret *v.* Hampton, 2 Brev. 226; Smoot *v.* The State, 18 Ind. 18.

[10] Fugate *v.* The State, 2 Humph. 397; The State *v.* Ebert, 40 Misso. 186; Hitchins *v.* People, 39 N. Y. 454; The State *v.* Hall, 3 Vroom, 158.

into the charm: therefore gaming under such circumstances comes within the mischief of public gaming, and statutes are directed for its suppression.

§ 854. **Other Distinctions in the Statutes.** — There is also a difference whether the playing is at a game of chance or of skill;[1] whether there is betting or not;[2] whether the party offends in a single instance or habitually;[3] and, in some of the States, whether the playing is with a white person, a negro,[4] or in former times with a slave.[5] And the encouragement of gaming by permitting one's premises to be used for this purpose is a thing of special consideration, which is sometimes made indictable.[6] But it is needless here to undertake a complete enumeration of the incidents in this general offence, against which legislation has been directed.

IV. *Expositions of Doctrines.*

§ 855. **Construction of the Statutes.** — We have already seen what are the peculiar doctrines, applicable in some localities, concerning the interpretation of these statutes.[7]

[1] The State *v.* Nates, 3 Hill, S. C. 200.

[2] The State *v.* Purdon, 3 Misso. 114; The State *v.* Albertson, 2 Blackf. 251; Vicaro *v.* Commonwealth, 5 Dana, 504.

[3] Estes *v.* The State, 2 Humph. 496; Commonwealth *v.* Hopkins, 2 Dana, 418; Commonwealth *v.* Moore, 2 Dana, 402.

[4] Johnson *v.* The State, 8 Ga. 453; The State *v.* Nates, 3 Hill, S. C. 200.

[5] The State *v.* Laney, 4 Rich. 193. See The State *v.* Pemberton, 2 Dev. 281.

[6] The State *v.* Mathis, 3 Pike, 84; Roberts *v.* Commonwealth, 11 B. Monr. 3; Calvert *v.* Commonwealth, 5 B. Monr. 264.

[7] Ante, § 55. And see ante, § 135, 294, 298, 299; Crim. Law, 5th ed. I. § 686. For the interpretation of sundry statutes concerning gaming, see Buck *v.* The State, 1 Ohio State, 61; Johnson *v.* The State, 8 Ga. 453; Commonwealth *v.* Chubb, 5 Rand. 715; Eubanks *v.* The State, 5 Misso. 450; Ervine *v.* Commonwealth, 5 Dana, 216; Hinkle *v.* Commonwealth, 4 Dana, 518; Veach *v.* Elliott, 1 Ohio State, 139; The State *v.* Laney, 4 Rich. 193; The State *v.* Mathews, 2 Brev. 82; The State *v.* Bates, 10 Misso. 166; Baker *v.* The State, 2 Har. & J. 5; Pitman *v.* Commonwealth, 2 Rob. Va. 800; Lowry *v.* The State, 1 Misso. 722; The State *v.* Fidler, 7 Humph. 502; Fiddler *v.* The State, 7 Humph. 508; Shropshire *v.* Glascock, 4 Misso. 536; Boynton *v.* Curle, 4 Misso. 599; The State *v.* Nates, 3 Hill, S. C. 200; Smith *v.* The State, 5 Humph. 163; Howlett *v.* The State, 5 Yerg. 144; The State *v.* Smitherman, 1 Ire. 14; Commonwealth *v.* Shelton, 8 Grat. 592; Grizewood *v.* Blane, 20 Eng. L. & Eq. 290, 11 C. B. 526; Vicaro *v.* Commonwealth, 5 Dana, 504; Ervine *v.* Commonwealth, 5 Dana, 216; Commonwealth *v.* Drew, 3 Cush. 279; Commonwealth *v.* Goding, 3 Met. 130; Commonwealth *v.* Tilton, 8 Met. 232; Commonwealth *v.* Wyatt, 6 Rand. 694; Commonwealth *v.* Garland, 5 Rand. 652; The State *v.* Gupton, 8 Ire. 271; Ward *v.* The State, 22 Ala.

§ 856. **Whether Constitutional — Lotteries — Taxing Gaming-house — Prohibitory By-laws.** — The question of the constitutionality of sundry laws prohibiting lotteries has been discussed by the courts;[1] but we shall treat of lotteries under a separate title. So the courts have considered the questions of the right to tax gaming-houses,[2] and the power of municipal corporations to pass by-laws against gaming,[3] affirming the right and power as to both in some cases and circumstances which have arisen,

16; Baker *v.* The State, 2 Har. & J. 5; McGowan *v.* The State, 9 Yerg. 184; The State *v.* Mosely, 14 Ala. 390; Bagley *v.* The State, 1 Humph. 486; Parsons *v.* The State, 2 Ind. 499; The State *v.* Allaire, 14 Ala. 435; Ashlock *v.* Commonwealth, 7 B. Monr. 44; Ellis *v.* Beale, 18 Maine, 337; English *v.* Young, 10 B. Monr. 141; Van Valkenburgh *v.* Torrey, 7 Cow. 252; The State *v.* Posey, 1 Humph. 384; Johnson *v.* Lansley, 12 C. B. 468, 22 Eng. L. & Eq. 468; Hickerson *v.* Benson, 8 Misso. 8; Smith *v.* The State, 22 Ala. 54; The State *v.* Black, 9 Ire. 378; Commonwealth *v.* Terry, 2 Va. Cas. 77; Windsor *v.* Commonwealth, 4 Leigh, 680; The State *v.* Terry, 4 Dev. & Bat. 185; Smith *v.* The State, 23 Ala. 39; Burdine *v.* The State, 25 Ala. 60; The State *v.* Mathis, 3 Pike, 84; Roberts *v.* Commonwealth, 11 B. Monr. 3; Calvert *v.* Commonwealth, 5 B. Monr. 264; Blanton *v.* The State, 5 Blackf. 560; Stith *v.* The State, 8 Eng. 680; Commonwealth *v.* Price, 8 Leigh, 757; Reg. *v.* Ashton, 1 Ellis & B. 286, 16 Eng. L. & Eq. 346; The State *v.* Ness, 1 Ind. 64; Hinkle *v.* Commonwealth, 4 Dana, 518; The State *v.* Purdom, 3 Misso. 114; Estes *v.* The State, 2 Humph. 496; Higdon *v.* Heard, 14 Ga. 255; O'Blennis *v.* The State, 12 Misso. 311; Commonwealth *v.* Burns, 4 J. J. Mar. 177; The State *v.* Doon, R. M. Charl. 1; Rodgers *v.* The State, 26 Ala. 76; Bryan *v.* The State, 26 Ala. 65; Norton *v.* The State, 15 Ark. 71; Conner *v.* Ragland, 15 B. Monr. 634; The State *v.* Hawkins, 15 Ark. 259; Huff *v.* The State, 2 Swan, Tenn. 279; Germania *v.* The State, 7 Md. 1; Elliott *v.* The State, 26 Ala. 78; Myers *v.* The State, 3 Sneed, 98; Spaight *v.* The State, 29 Ala. 32; The State *v.* McLelland, 4 Sneed, 437; Ritte *v.* Commonwealth, 18 B. Monr. 35; Randolph *v.* The State, 9 Texas, 521; The State *v.* Herryford, 19 Misso. 377; Windham *v.* The State, 26 Ala. 69; Commonwealth *v.* Wilson, 9 Leigh, 648; The State *v.* Fulton, 19 Misso. 680; The State *v.* Smith, 19 Misso. 683; The State *v.* Horan, 11 Texas, 144; Cole *v.* The State, 9 Texas, 42; Barker *v.* The State, 12 Texas, 273; Commonwealth *v.* Kennedy, 15 B. Monr. 531; Jones *v.* The State, 26 Ala. 155; Marston *v.* Commonwealth, 18 B. Monr. 485; Watson *v.* The State, 3 Ind. 123; Wade *v.* Deming, 9 Ind. 35; Johnson *v.* The State, 4 Sneed, 614; The State *v.* Kelly, 24 Texas, 182; Goldsmith *v.* The State, 1 Head, 154; The State *v.* Maurer, 7 Iowa, 406; Commonwealth *v.* Pattee, 12 Cush. 501; The State *v.* Keisler, 6 Jones, N. C. 73; The State *v.* Hope, 15 Ind. 474; People *v.* Markham, 7 Cal. 208.

[1] Commonwealth *v.* Dana, 2 Met. 329; The State *v.* Allen, 2 McCord, 55; Freleigh *v.* The State, 8 Misso. 606; The State *v.* Sterling, 8 Misso. 697; Phalen *v.* Commonwealth, 1 Rob. Va. 713; The State *v.* Phalen, 3 Harring. Del. 441; Wendover *v.* Lexington, 15 B. Monr. 258.

[2] Washington *v.* The State, 8 Eng. 752. As to lotteries, see The State *v.* Allen, 2 McCord, 55.

[3] The State *v.* Hay, 29 Maine, 457. As to the general power of making by-laws and their effect, see ante, § 18–26.

while the contrary would be held under others. Concerning the power to pass prohibitory laws on the general subject, no doubt can be stirred; for it is clearly within the scope of legislation.[1]

§ 857. *Particular Terms explained:* —

Game — Unlawful Game — "Game," or "gaming," is not one of those words which have received an exact meaning in the law.[2] And though it is found in many statutes, ancient and modern, we must construe them on the idea, either that the makers had only an indefinite notion of its signification, or that, understanding it to be flexible in meaning, they meant to have its precise sense gathered from its relation to other words in the statute, from the reason of the law, and from the circumstances surrounding. Bouvier defines it to be, "a contract between two or more persons, by which they agree to play by certain rules at cards, dice, or other contrivance, and that one shall be the loser and the other the winner."[3] But while this definition may accurately express the signification of the word as sometimes used, it does not give correctly the

[1] People *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 legislatures." There may, of course, be unconstitutional legislation on this subject by reason of the peculiar provisions employed, as well as on any other. The following is a digest of some points; but the reader is cautioned against inferring, that, because a point has been held in a way there mentioned in some other State than his own, it will consequently be held in the same way in his own State. The provisions of our State constitutions differ somewhat, and different judges differ somewhat in their interpretations: the statute of Arkansas (Rev. Sts. c. 128, § 5,) providing that "no person shall have or use any billiard-table or ninepin alley, without first paying to the sheriff the tax required by this act," is repugnant to the constitution, and void. Stevens *v.* The State, 2 Pike, 291. Keeping a billiard-table is not a privilege within the meaning of the Constitution of Arkansas, allowing a tax to be imposed on merchants, hawkers, pedlers, and "privileges," and therefore is not taxable. Ib. Nor is the keeping of a stallion. Gibson *v.* County of Pulaski, 2 Pike, 309. A statute making the keeping of a billiard-table a penal offence punishable by fine, and at the same time providing that a person convicted under it shall not be again prosecuted for keeping the same table within one year from the conviction, is void as to the proviso of exemption, because it indirectly levies a tax upon the keeping of a billiard-table. The State *v.* Hanger, 5 Pike, 412. The legislature cannot restrain any one from making or using a billiard-table, but may, by law, so regulate the use of it as to prevent any injury therefrom to the public morals or public good. Stevens *v.* The State, 2 Pike, 291.

[2] Ante, § 268, 269.

[3] Bouv. Law Dict. tit. Gaming.

whole of it. In the South Carolina court, a learned judge observed: "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 without 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 any thing was bet or not." [1] The Tennessee court has defined gaming 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." [2] It is perilous to undertake to give an original definition of a word so elastic in its use, and of such uncertain meaning; yet the author will venture the following, as indicating the sense in which it is more commonly employed: a contest of chance, or of skill disconnected from the idea of useful production, wherein the party in whose favor the result appears, is termed the winner, and the other party is termed the loser. Whether or not the thing lost or won, to be within the true meaning of this definition, need be any thing more than the reputation among the players for good playing, — as, whether it must be money or money's worth, — and whether or not the contest must be in any or what sense unlawful, we shall consider in subsequent sections.

§ 858. **Continued.** — In a Tennessee case, the jury rendered the following special verdict, upon which the court adjudged the defendant to be guilty of gaming: "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

[1] The State *v.* Nates, 2 Hill, S. C. 200.

[2] Harrison *v.* The State, 4 Cold. 195, 198; The State *v.* Smith, Meigs, 99, copying the definition from the latter case.

bottle of champagne. The defendant did play in this game, in Maury county, in less than six months preceding this presentment, and 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." And the learned judge who delivered the opinion of the court said: "What is gaming? It is defined by the Act of 1799, c. 8, § 2, to be a playing 'at any match or matches at cards, dice, billiards, or any other game of hazard or address, for money or other valuable thing.' By the same section, to 'encourage or promote' is the same offence; 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 ten-pins, 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." [1]

§ 859. **Unlawful Game.** — The phrase "unlawful game" would seem to be used in distinction from "lawful game," and to imply that there are games which are lawful. Still on looking

[1] Walker *v.* The State, 2 Swan, Tenn. 287, 289, 290, 291, opinion by Caruthers, J. In Massachusetts it was said: "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." Commonwealth *v.* Taylor, 14 Gray, 26, 29, Shaw, C. J. s. p. Commonwealth *v.* Gourdier, 14 Gray, 390; The State *v.* Maurer, 7 Iowa, 406. And see post, § 860 and note.

into the books we find that it is as little defined in the law as is the single word gaming. Attempts have been made to restrict its effect in a statute to such games as had been declared in previous enactments to be unlawful. But although this is a consideration which properly enters into the question, and is in many cases the test to determine the result,[1] yet it is by no means always so. Thus, the tenth section of the Kentucky Act of 1833, against owners using their houses for gaming purposes, employs 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 the meaning of the expression in the way suggested, but held, that the criterion to determine whether any particular game is within the prohibition is the one furnished by the words "won or lost;" and so an unlawful game is any game at which betting is done.[2] And in Massachusetts, under a statute differently worded, cock-fighting was held to be an unlawful game, principally because of its barbarous nature, making it unlawful at the common law.[3]

§ 860. **Gaming, continued.** — And even the word gaming, without the prefix unlawful, seems usually to imply something of an unlawful nature: as, betting on the sport; being, indeed ordinarily an ingredient in its signification; or a game of an evil or immoral tendency. And so, in England, where a tavern license contained the provision that the party licensed "do not knowingly suffer any unlawful games, or any *gaming* whatsoever," in the premises, the court held the provision 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

[1] Commonwealth *v.* Goding, 3 Met. 130.

[2] Vicaro *v.* Commonwealth, 5 Dana, 504. And see Ervine *v.* Commonwealth, 5 Dana, 216.

[3] Commonwealth *v.* Tilton, 3 Met. 232. In the Law Dictionary of Jacob, tit. Gaming, we read: "a person was convicted of keeping a cockpit; and the court resolved it to be an unlawful game within the Stat. 33 Hen. 8, c. 9, and fined him 40*s.* a day. Keb. 510. But if the guests in an inn or tavern call for a pair of dice, or tables, and for their recreation play with them; or, if any neighbors play at bowls for their recreation, or the like; these are not within the statute; if the house be not kept for gaming, nor the gaming be for lucre or gain. Dalt. c. 46."

convicted for that; but this conviction does not state that such was the case."[1] And under an English statute which provided, "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void," the judges held that a colorable contract for the sale and purchase of railway shares, where, 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 within the provision.[2] In Tennessee, the doctrine appears to have been laid down, that there can be no gaming without a wager;[3] but this proposition, pretty clearly, would not be everywhere received in a universal sense. In other words, it is true generally, not always.[4]

§ 861. **Continued.** — On the whole, we must close this topic where we began it, by saying, that the law has not yet drawn about this word lines enabling us absolutely to go further than lay down the proposition, that it means something more than a mere innocent sport; but how much, or what more, must be determined by every court, on consideration of the entire legislation of the State concerning the subject, and of such other matters as the principles of a sound legal interpretation demand.[5] As to the nature of the winning or losing, something more will appear further on.

§ 862. **Game of Chance — Of Hazard — Horse-racing — Dog-race — "Pari Mutuel."** — The words "game of chance," or

[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.

[3] Dobkins *v.* The State, 2 Humph. 424. See ante, § 857, 858.

[4] And see ante, § 857; The State *v.* Fearson, 2 Md. 310.

[5] The reader may derive some light by consulting the following cases, in addition to those already referred to: Cameron *v.* The State, 15 Ala. 383; Swallow *v.* The State, 20 Ala. 30; The State *v.* Records, 4 Harring. Del. 554; Commonwealth *v.* Shelton, 8 Grat. 592; The State *v.* Smitherman, 1 Ire. 14; Howlett *v.* The State, 5 Yerg. 144; Shropshire *v.* Glascock, 4 Misso. 536; Boynton *v.* Curle, 4 Misso. 599; The State *v.* Fidler, 7 Humph. 502; Fiddler *v.* The State, 7 Humph. 508; Commonwealth *v.* Terry, 2 Va. Cas. 77; Commonwealth *v.* Stowell, 9 Met. 572; Smith *v.* The State, 5 Humph. 163; Commonwealth *v.* Garland, 5 Rand. 652; Wade *v.* Deming, 9 Ind. 35; Harbaugh *v.* People, 40 Ill. 294; The State *v.* Fulton, 19 Misso. 680; The State *v.* Smith, 19 Misso. 683; The State *v.* Haydon, 31 Misso. 35; The State *v.* Ebert, 40 Misso. 186; Hitchins *v.* People, 39 N. Y. 454; The State *v.* Cooster, 10 Iowa, 453; McDaniel *v.* Commonwealth, 6 Bush, 326; Commonwealth *v.* Taylor, 14 Gray, 26; Commonwealth *v.* Gourdier, 14 Gray, 390; The State *v.* Hall, 3 Vroom, 158.

"game of hazard," are employed in some of the statutes. They are used undoubtedly as distinguished in meaning from such words as "game of skill." Therefore, in Iowa, horse-racing is held not to be a game of chance.[1] But is horse-racing simply, without something added to it, even a game? It has been held in Missouri, in the words of the learned judge, to be a "great perversion of language to call a horse-race a *gambling device*."[2] And according to an Arkansas decision a horse-race is not a game either of "hazard or skill;" the necessary result of which doctrine appears to be, that it is not a game. The case was, that a statute made it punishable "if any person shall be guilty of betting any money or any valuable thing on any game of hazard or skill;" and the court adjudged that a bet upon a horse-race is not within the statute.[3] So, in Tennessee, horse-racing along a public road is held not to be "gaming."[4] In England, a dog-race appears not to be regarded as a "game of chance;" that is, a statute[5] having declared to be a vagrant "every person," in certain places, "playing or betting, &c. with any table or instrument of gaming or any coin, &c., at any game or pretended game of chance," one who, within a prohibited place, deposited a half-sovereign as a wager on a dog-race was adjudged not to be within the statutory terms.[6] Whether, in this respect, a horse-race is to be regarded the same as a dog-race, the court, in a subsequent case, left undecided; but, the defendants being the proprietors of an instrument which they called a "*pari mutuel*," at which persons betting on a horse-race deposited their money, and the disposition of the money, to be indicated by the instrument, depended partly on the result of the race, and partly upon the numbers depositing money in this way and the horse on which such depositors bet, they were held to have violated the statute. "It was urged upon us in the argument," said Cockburn, C. J. "that the betting here being on the event of a

[1] Harless *v.* United States, 1 Morris, 169.

[2] The State *v.* Hayden, 31 Misso. 35.

[3] The State *v.* Rorie, 23 Ark. 726. Under the Tennessee act of 1833, there may be a "horse-race" though there is no wager, and no previous agreement to run the race. Goldsmith *v.* The State, 1 Head, 154.

[4] Harrison *v.* The State, 4 Cold. 195. See post, § 872, 873.

[5] 31 & 32 Vict. c. 52, § 3.

[6] Hirst *v.* Molesbury, Law Rep. 6 Q. B. 130.

horse-race, it could not be considered as wagering on a game of chance, a horse-race not properly coming within such a definition. It is unnecessary to determine whether, if this instrument had been used simply for registration of bets on the event of a horse-race, the use of it would have been within the statute. Whether a horse-race be in itself a game of chance or not, 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]

§ 863. **Continued — Tenpins — Shuffleboard — Rondo.** — Of the meaning of the phrase now under consideration, Ruffin, C. J. sitting in the North Carolina court, observed: "The phrase 'game of chance' is not one long known in the law, and having therein a settled signification, but was introduced into our statute-book by the act of 1835. As 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. . . . Though our knowledge of such subjects is very limited, yet we believe, 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." Thereupon it was held that the game of tenpins is not a game of chance.[2] On the other hand, where the question was left to the jury, the game of "shuffleboard" [3] and the game of "rondo" [4] were severally determined, the former in North Carolina, the latter in Missouri, to be games of this sort.

§ 864. **Faro Bank — "Same or like Kind" — Hap-hazard — Blind-hazard — Skin-cap — Games of Chance.** — A statute of Virginia provides, that "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, shall," &c.

[1] Tollett *v.* Thomas, Law Rep. 6 Q. B. 514, 520, 521.

[2] The State *v.* Gupton, 8 Ire. 271.

[3] The State *v.* Bishop, 8 Ire. 266.

[4] Glascock *v.* The State, 10 Misso. 508.

And the court has 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 judge observed: "The court is not advised that there are or can exist but two kinds or classes of games of chance. The first is, where the chances are equal, all other things being equal. The second is, where, all other things being equal, the chances are nevertheless unequal, that is, in favor of one side. 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 his favor; and this is the distinctive character which marks them as games of the same or like kind."[1]

§ 865. **Continued — 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." And the observation was let fall, that, "if 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. **Continued — Roulette, &c. — Where there is a Fund.** — A statute in Kentucky provided, that "whoever shall set up, exhibit, or keep, for himself or another, &c., any faro

[1] Daniel, J. in Commonwealth *v.* Wyatt, 6 Rand. 694, 702.

[2] The State *v.* Red, 7 Rich. 8. And see Crow *v.* The State, 6 Texas, 334. See McGowan *v.* The State, 9 Yerg. 184, to the point, that mere colorable changes in a game, after the enactment of a legislative prohibition, do not prevent the prohibition from attaching.

bank, gaming table, machine, or contrivance used in betting, or other game of chance, whereby money or other thing is or may be won or lost, shall be fined," &c. And the court, by Stites, J. giving a construction to this statute, employed the following language: "It is obvious, we think, from the language of the section, and the severe punishment denounced against any violation thereof, that 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. This is the character of gaming-table, machine, and contrivance mentioned and intended to be embraced in the section in question; and those who are guilty of keeping or setting up such tables, machines, or contrivances, are those intended to be rendered infamous, and disqualified from voting and holding office. To convict under this section it should appear, that the table, machine, or contrivance was such as is *ordinarily* used for gambling for money or property." [1]

§ 867. **Continued — Gambling Device — Cards.** — A Missouri statute is as follows: "Every person who shall 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 chance for money or property," &c. And it is held, that cards are a gambling device within the meaning of this provision.[2]

§ 868. **Parties changing Name of Game — "Device."** — And it has been held, that parties cannot evade a statute by calling the game which it prohibits by some other name.[3] On this point, Lipscomb, J. in the Texas court, employed the following language: "There was a time when so much regard was paid to the name of a game, that, when a game was prohibited, those professors of the science of gambling had only to change the name of the game to avoid the penalty, and the history of

[1] Ritte *v.* Commonwealth, 18 B. Monr. 35, 39, 40.

[2] The State *v.* Herryford, 19 Misso. 377.

[3] The State *v.* Maurer, 7 Iowa, 406.

jurisprudence will show the following absurdities: When the game of roulette was prohibited, those astute, scientific gentlemen changed the name to rouge et noir, from that to roulette poulette, and then to A B C, and to E O, and the last to O E. But such shallow devices can no longer be made available. Common sense has triumphed over such absurdities. And by the introduction of the word 'device' into our statute, courts will inquire, not into the name, but the game, to determine whether it is a prohibited game." [1]

§ 869. **Continued — Device for Cards — Ramps — Dominos.** — In Alabama it is made penal "if any person plays, &c., with cards, or dice, or with any device or substitute for the same," under circumstances which the statute further points out.[2] And it is held that a game of "ramps" falls within the prohibition. Said Goldthwaite, J. in the case in which this point was adjudged: "The record shows that every ingredient in the offence charged was clearly established, except the fact as to whether the game was played with a substitute or device for cards. . . . 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 evidence, that the dominos were used by the appellant as

[1] Smith *v.* The State, 17 Texas, 191, 192. The statute, on which this opinion was pronounced, is not given in the report. In Alabama, a conviction cannot be had under an indictment for gaming, on proof that the defendant played a game of euchre with dominos, if the jury are satisfied that euchre with dominos is an older game than euchre with cards, and that both cards and dominos are still in common use in playing euchre; unless they are also satisfied, that, in the particular game played, dominos were used as a substitute for cards, though the fact of their being such substitute was not known to the players at the time. Harris *v.* The State, 33 Ala. 373. If a statute prohibits "pool," it is immaterial that it is played on a tenpin alley instead of on a billiard-table. The State *v.* Kelly, 24 Texas, 182. And see Cohen *v.* The State, 17 Texas, 142; Smith *v.* The State, 17 Texas, 191.

[2] Windham *v.* The State, 26 Ala. 69, 70.

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.** — By some of the statutes, the very essence of the offence consists in a wager or bet. The two words "wager" and "bet" are distinguishable from each other in meaning; thus, in an Indiana case, 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 or authority that makes it mean the subject on which a bet is laid." Consequently, where a statute made punishable "every person 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," it was held not to be violated where one lost five dollars 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. **Continued.** — Still, in other respects, the words wager and bet seem substantially of one meaning. They imply a risk, not merely on one side, but on both sides; though they do not require the risk to be even.[3] And in Alabama it is laid down, that the wager is complete when the offer to bet is accepted. The placing of money or its representative on the gaming-table is such an offer; and, if no objection is made by the owner of the table, the offer must be deemed to be accepted, and the offence against the statute complete, though the game should never be played out, and the bet be neither lost nor won.[4]

§ 872. **Continued — Horse-racing, continued — Elections.** — "Gaming" and "betting" are, like wager and bet, not synonymous terms, yet they are closely allied in meaning, though not so closely as the other. Under the Virginia statute, which provides a punishment for every person "who, at, &c., shall play at any game whatever, except bowls, backgammon, draughts, or any licensed game; or bet on the hands or sides of others who do play;" the betting of money on a horse-race [5] is held

[1] Bryan *v.* The State, 26 Ala. 65.
[2] Smoot *v.* The State, 18 Ind. 18.
[3] Quarles *v.* The State, 5 Humph. 561; post, § 937.
[4] The State *v.* Welch, 7 Port. 463.
[5] See ante, § 862.

not to be prohibited.[1] But in Indiana the contrary is held;[2] so under the statute of Maine also, which however is not in the same words.[3] In Tennessee, the laying of a bet on an election is held not to be gaming.[4]

§ 873. **Horse-racing, continued — Statute silent as to Penalty.** — In some of the States horse-racing is regarded as an amusement so innocent that wagers upon the result are collectible in the courts of law.[5] But in other States, the contrary view is taken; and there are, moreover, in many States, statutes intended to suppress or control both racing and wagers.[6] A race with mares, or with mules, is a "horse-race," within a prohibiting statute on this subject.[7] If there is a statute forbidding horse-racing on a public road, and the statute provides no punishment, the act is indictable, therefore, as a misdemeanor at the common law.[8]

§ 874. **Thing staked or bet — "Money."** — Some of the statutes make it, in some or all of the circumstances, one of the ingredients of the offence that "money or other valuable thing" be played for or bet. And we saw in the earlier part of this volume,[9] that, as a general doctrine, the word "money" means only that which is a legal tender. It does not, for example, include bank-notes, United States treasury warrants, and the like. Consequently the betting of any thing other than coin is not ordinarily a betting of money,[10] while it may be within other words of the statute. But it has been held, as in harmony with this doctrine, that the betting of checks

[1] Commonwealth *v.* Shelton, 8 Grat. 592. See also The State *v.* Moseley, 14 Ala. 390; Baley *v.* The State, 1 Humph. 486.

[2] Wade *v.* Deming, 9 Ind. 35.

[3] Ellis *v.* Beale, 18 Maine, 337. See also Bledsoe *v.* Thompson, 6 Rich. 44.

[4] The State *v.* Smith, 1 Meigs, 99.

[5] Barret *v.* Hampton, 2 Brev. 226; Kirkland *v.* Randon, 8 Texas, 10; McElroy *v.* Carmichael, 6 Texas, 454; Dunman *v.* Strother, 1 Texas, 89. See McElroy *v.* Chancellor, 8 Texas, 270; Johnson *v.* Lansley, 12 C. B. 468, 22 Eng. L. & Eq. 468.

[6] The State *v.* Posey, 1 Humph. 384; Gibbons *v.* Gouverneur, 1 Denio, 170; Bledsoe *v.* Thompson, 6 Rich. 44; Van Valkenburgh *v.* Torrey, 7 Cow. 252; Ellis *v.* Beale, 18 Maine, 337; Lewis *v.* Littlefield, 15 Maine, 233; Huff *v.* The State, 2 Swan, Tenn. 279; Myers *v.* The State, 3 Sneed, 98; Watson *v.* The State, 3 Ind. 123. And see ante, § 848.

[7] Goldsmith *v.* The State, 1 Head, 154.

[8] Redman *v.* The State, 33 Ala. 428. See ante, § 138; Crim. Law, 5th ed. I. § 237.

[9] Ante, § 346.

[10] Horton *v.* The State, 8 Eng. 62; Johnston *v.* The State, Mart. & Yerg. 129.

or counters of a faro bank, which the parties agree are the representatives of money between themselves, is a betting of money.[1] And the same has been held of playing at cards, with the understanding that the loser shall pay the liquor bill for the company; the thing bet being deemed money, rather than liquor.[2] "A game of hazard," observed Shaw, C. J. "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."[3]

§ 875. **Continued — "Valuable Thing."** — In accordance with this doctrine, a "thing" may be "valuable," if value can practically be obtained for it, though intrinsically and legally it is of no worth. Therefore, in Illinois, a statute having made it penal to play for money or other "valuable thing," a case was held to be within the statutory term, where the playing was for a

[1] Ashlock *v.* Commonwealth, 7 B. Monr. 44; Walton *v.* The State, 14 Texas, 381. And see ante, § 346; The State *v.* Welch, 7 Port. 463.

[2] Bachellor *v.* The State, 10 Texas, 258, 262. See The State *v.* Leighton, 3 Fost. N. H. 167; People *v.* Sergeant, 8 Cow. 139. And see ante, § 858, note.

[3] Commonwealth *v.* Taylor, 14 Gray, 26, 29. And see Commonwealth *v.* Gourdier, 14 Gray, 390; McDaniel *v.* Commonwealth, 6 Bush, 326; The State *v.* Cooster, 10 Iowa, 453. Taking a chance in a raffle regularly licensed and paid for is not gaming within the Alabama Code, § 3243. Hawkins *v.* The State, 33 Ala. 433. Accordingly, it has been held in Mississippi not to be gaming to play on a licensed billiard-table, the loser to pay for the use of the table; for that is in accordance with the rule of the game, and the winner makes no profit by it, which is of the essence of gaming. And Fisher, J. observed: "To constitute gaming, one or the other of the parties must expect to profit by the game." Blewett *v.* The State, 34 Missis. 606, 614. On the other hand, in Ohio, where there was no such special circumstance as the license, one who keeps a billiard saloon was held to violate the statute "for the prevention of gaming," if he allows persons to play on condition that the fee for the use of the table be paid by the loser. Ward *v.* The State, 17 Ohio State, 32. In New Jersey, a tenpin alley, kept for hire by the game, where the practice is for the loser of the game to pay for the use of the alley, is not on this account a common gaming nuisance. The State *v.* Hall, 3 Vroom, 158. In New York, one who keeps a shop for the sale of beer, cigars, &c., and allows his customers to play games for such articles, he furnishing them at the end of the games and charging the loser therefor, is guilty of violating the statute against gambling, although such gambling takes place only occasionally. Hitchins *v.* People, 39 N. Y. 454. In Illinois, simply keeping billiard-tables for the amusement and exercise of persons desiring to use them for that purpose, although it may be the custom for the parties to play for the purpose of determining who are to pay for the use of the tables, is not "keeping a common gaming-house" within the meaning of § 129 of the Criminal Code. Harbaugh *v.* People, 40 Ill. 294.

twenty-five cent check, being one of many issued by a private person, redeemable in sums of one dollar; the issuing of them having been without legal authority, and they being perhaps not collectible by a suit at law. Said Beckwith, J.: "The articles or things played for may be intrinsically valueless; but, if they are understood to represent value, and are such that the winner can in fact, without any violation of the law, obtain value for them, we think that they are within the letter and spirit of the statute. Checks or counters are intrinsically valueless. There is no legal obligation to pay value for them. But, if they are understood by the parties to represent value, and the winner can, in fact, obtain value for them, we think gaming for them is in effect gambling for things of value."[1]

§ 876. **Setting up Gambling Devices — Permitting Gaming.** — References have already been given to various authorities under this head.[2] A statute in Missouri having made it an offence if any one shall "set up or keep" any gambling device designed, &c., for "playing any game of chance for money or other property, and," continues the statute, "shall induce, entice, or permit any person to bet or play at or upon any such gaming-table," &c., it was held that the offence of enticing might be committed though no money was bet or won.[3] Under a statute like this, punishing the defendant for setting up a gambling device "in a house to him belonging, or by him occupied, or of which he has at the time the possession or control," it is a sufficient defence that he had sublet the premises to a third person, who had the exclusive right and possession.[4]

§ 877. **Admitting Minors to Games — Mistake of Age.** — A statute in Massachusetts makes punishable "the keeper of a billiard room or table, or bowling alley, who admits a minor thereto without the written consent of his parent or guardian;"[5] and, in one case, it appearing that the minor was almost twenty-one years old when admitted, that he did busi-

[1] Gibbons *v.* People, 33 Ill. 442, 446.

[2] Ante, § 852, 854.

[3] The State *v.* Fulton, 19 Misso. 680; The State *v.* Smith, 19 Misso. 683. See ante, § 867; post, § 899, note.

[4] The State *v.* Ebert, 40 Misso. 186; Scott *v.* The State, 29 Ga. 263. And see Robbinson *v.* The State, 24 Texas, 152. See, as to the Arkansas statutes and their interpretation, The State *v.* Stillwell, 20 Ark. 96; Stith *v.* The State, 13 Ark. 680. As to Indiana, see The State *v.* Hope, 15 Ind. 474.

[5] Mass. Gen. Stats. c. 88, § 71.

ness independently of his parents, that he appeared to be fully grown; and, on being asked by the defendant before his admission whether or not he was a minor, replied that he was not, — this evidence was held to be immaterial, and it was excluded. "It did not," said Bigelow, C. J. "tend to prove or disprove any essential fact. It did not show, or have any tendency to show, either that the alleged minors were of age, or that the defendant did not actually admit them to the billiard room kept by him. Nor was it material to show that the defendant did not know or have reason to believe that the alleged minors were under age. The prohibition of the statute is absolute. The defendant admitted them to the room at his peril, and is liable to the penalty whether he knew them to be minors or not. The offence is of that class where knowledge or guilty intent is not an essential ingredient in its commission, and need not be proved."[1] This decision belongs to a class already discussed in this volume, wherein the Massachusetts court has made a wide departure from more just doctrines held in England and elsewhere in our country. According to the better view, it would not be necessary to allege or prove that the defendant knew the individual admitted to be under age; but, if the case was one in which the admitting of a person of full age would be no dereliction of moral, social, or legal duty, and the defendant, acting with due care and caution, was misled as to the fact, and honestly believed the person admitted to be of full age, this, on being affirmatively shown by him, would be a good defence.[2]

§ 878. **Place of the Gaming.** — Under some of our statutes, the place in which the gaming is carried on becomes an element of importance. In the earlier parts of this volume we saw what are the meanings of some of the words employed to designate the place; as, "public place,"[3] "public house,"[4]

[1] Commonwealth *v.* Emmons, 98 Mass. 6. It was also held to be irrelevant and immaterial to prove, in such a case, that the defendant had previously forbidden the minors to enter, or that he was not present when they were permitted to be there, if they were actually present in the room, and were suffered to remain, either by the defendant or by his servants or agents, who had the charge of the room.

[2] Ante, § 351–359, 632, 664, 665.

[3] Ante, § 298; Purcell *v.* Commonwealth, 14 Grat. 679; Commonwealth *v.* Sylvester, 13 Allen, 247.

[4] Ante, § 299.

"outhouse;"[1] to which may be added "outhouse where people resort,"[2] "highway,"[3] "the premises,"[4] "public gambling-house,"[5] and the like. These we need not here explain. A statute of Alabama provides a punishment for "every person who keeps a billiard-table in connection with a house where spirituous liquors are retailed, as an appendage thereto;" and the construction is, that the room for gaming need not be under the same roof with the other; but, if the two constitute one establishment and are contiguous, the case is within the prohibition.[6] There are various other statutes to prevent gaming in particular places, in distinction from gaming generally; but they have not led to such expositions of doctrine as to render advisable a further consideration of this particular topic.[7]

§ 879. **Common Gambler.**[8] — In some of the States, it is an offence by itself to be a common gambler. There are some analogies[9] from which we may infer, that at least three instances of gaming must be shown, to constitute the offence; and there is reason to believe that this may be deemed, on consideration, to be the true view. But in a Kentucky case, the court held that evidence of one instance of playing an unlawful game is sufficient, when taken in connection with circumstances, like the display of gaming implements. And the judge observed: "While many acts of gaming may be palliated, so as to show that the general conduct and practices

[1] Ante, § 291; Smith *v.* The State, 37 Ala. 472.

[2] Swallow *v.* The State, 20 Ala. 30; The State *v.* Norton, 19 Texas, 102, 205; Wheelock *v.* The State, 15 Texas, 260; Cain *v.* The State, 30 Ala. 534.

[3] Mills *v.* The State, 20 Ala. 86. It was held in this case, that "highway," as the word is used in the statute, means a public road, in distinction from a private or neighborhood road.

[4] The State *v.* Black, 9 Ire. 378. And see ante, § 221.

[5] Lockhart *v.* The State, 10 Texas, 275; Rice *v.* The State, 10 Texas, 545; And see Buck *v.* The State, 1 Ohio State, 61.

[6] Smith *v.* The State, 22 Ala. 54. And see The State *v.* Smitherman, 1 Ire. 14.

[7] See the following cases: Commonwealth *v.* Price, 8 Leigh, 757; Mount *v.* The State, 7 Sm. & M. 277; Buck *v.* The State, 1 Ohio State, 61; Stith *v.* The State, 8 Eng. 680; Blanton *v.* The State, 5 Blackf. 560; Calvert *v.* Commonwealth, 5 B. Monr. 264; Baker *v.* The State, 2 Har. & J. 5; The State *v.* Records, 4 Harring. Del. 554; The State *v.* Fearson, 2 Md. 310; The State *v.* Mathis, 3 Pike, 84; Roberts *v.* Commonwealth, 11 B. Monr. 3.

[8] And see, as to gaming-houses, Crim. Law, 5th ed. I. § 1135 et seq.

[9] Crim. Law, 5th ed. I. § 1137; II. § 64.

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." In the same case, evidence that the defendant "was and is by reputation a common gambler," was held to be inadmissible against him.[1]

§ 880. **Felony or Misdemeanor.** — In some of our States, gaming is, not felony, but misdemeanor;[2] and probably it is so in all of them.

§ 881. **Persons assisting at the Game — Accomplices.** — Under the Kentucky statute of 1823, which provides, that no one shall "set up or keep" any gaming-table, &c., "or shall keep any bank, and shall induce or permit any person or persons to bet any money or other thing against the said bank or game," the court has held, that one need not bet or play himself, to come within the inhibition; also that, if one deals the cards at the table or bank, he commits the offence, though he has no personal interest in the profits of the game.[3] So if one makes a bet, by procuring another to lay the wager for his profit;[4] or bets, while another furnishes the money;[5] he commits the same offence as if he personally staked his own money.[6] But in Alabama, "under," as observed by one of the learned judges, "the act of Feb. 17, 1854, as amended by the act of Feb. 8, 1858, it is the betting at tenpins, and not merely playing the game, that constitutes the offence." Therefore it is held, that a person who joins in a game of tenpins at the request of others who are betting upon it, without betting himself, is not an "accomplice" within the meaning of the provision of the Code, which forbids a conviction upon the uncorroborated testimony of an accomplice. "As the witness," said

[1] Commonwealth *v.* Hopkins, 2 Dana, 418, opinion by Underwood, J. And see The State *v.* Markham, 15 La. An. 498.

[2] People *v.* Shear, 7 Cal. 139.

[3] Commonwealth *v.* Burns, 4 J. J. Mar. 177.

[4] Williams *v.* The State, 12 Sm. & M. 58. But see, on this general doctrine, O'Blennis *v.* The State, 12 Misso. 311; English *v.* Young, 10 B. Monr. 141.

[5] Iseley *v.* The State, 8 Blackf. 403. And see, on this point and the last, Commonwealth *v.* Drew, 3 Cush. 279; Hinkle *v.* Commonwealth, 4 Dana, 518; The State *v.* Purdon, 3 Misso. 114; Ward *v.* The State, 22 Ala. 16.

[6] For other points, see Elliott *v.* The State, 26 Ala. 78; Johnson *v.* The State, 4 Sneed, 614.

R. W. Walker, J. "did not bet, and was not concerned in the bets made by others who took part in the game, he could not have been indicted; and, therefore, was not an accomplice." [1]

CHAPTER XXXIX.

GAMING — THE PROCEDURE.

882, 883. Introduction.
884–888. Procedure under the English Law.
889–892. American Statutes and Forms of Indictment.
893–917. Discussions of the American Procedure.
918–926. Special Views as to Betting on Games.
927–930. As to Horse-racing and the like.

§ 882. **General View.** — If, in discussing the law of the offence in the last chapter, we found it necessary, from the diversity of the statutes, to present fragmentary views, and mere points, at many places where principles would have been more satisfactory both to writer and reader; so, in this chapter, we shall encounter the same necessity in treating of the procedure. And here, as there, if the reader would derive the greatest benefit from the chapter, he should first examine the statutes of his own State, and then compare their provisions with these elucidations as he proceeds. He will thus be able to gain definite ideas, and render this general discussion particular and practical.

§ 883. **How the Chapter divided.** — The object of a division, in a case like this, being the mere practical one of helping the reader to find things, we shall pursue the following order: I. Something of the Procedure under the English Law; II. Illustrations of American Statutes, with Forms of the Indictment on them; III. Discussions of Doctrines, and Points, relating to the American Procedure; IV. Special Views as to Betting on Games; V. As to Horse-racing and the like.

[1] Bass *v.* The State, 37 Ala. 469.

I. *Something of the Procedure under the English Law.*

§ 884. **English Statutes — 9 Anne — 8 & 9 Vict. &c.** — In the last chapter, a general view was presented of the earlier English statutory law on this subject.[1] Stat. 9 Anne, c. 14, appears to have remained in force in England until 1845, when it was repealed by the 15th section of Stat. 8 & 9 Vict. c. 109, entitled "An Act to amend the Law concerning Games and Wagers."[2] This statute of Anne, enacted in 1710, is, in its 5th section, as follows: "If any person or persons whatsoever, &c., do or shall, by any fraud or shift, cosenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at or with cards, dice, or any the games aforesaid [that is, cards, dice, tables, or other games whatever], or in or by bearing a share or part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever; or shall, at any one time or sitting, win of any one or more person or persons whatsoever above the sum or value of ten pounds; that then every person or persons so winning by such ill practices as aforesaid, or winning at any one time or sitting above the said sum or value of ten pounds, and being convicted of any of the said offences, upon an indictment or information to be exhibited against him or them for that purpose, shall forfeit five times the value of the sum or sums of money, or other thing, so won as aforesaid; and, in case of such ill practice as aforesaid, shall be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury; and such penalty to be recovered by such person or persons as shall sue for the same by such action as aforesaid."

§ 885. **Form of Indictment for winning Money at Cards.** — Upon this statute, Archbold gives us the following form of an indictment for winning money at cards, &c., by fraud: —

"That J. S., late of, &c., on, &c., at the parish aforesaid, in the county aforesaid, by fraud, shift, cosenage, circumvention, deceit, unlawful device, and ill

[1] Ante, § 849 et seq.

[2] For the subsequent legislation, see this statute of 8 & 9 Vict. c. 109; 17 & 18 Vict. c. 38; 31 & 32 Vict. c. 52.

practice, in playing at and with cards, to wit, at a certain game of cards called *Rouge et noir*, with one J. N., unlawfully did win, obtain, and acquire to himself a large sum of money, to wit, the sum of sixty pounds, of the moneys of the said J. N. [*or* certain valuable things, to wit, one —— of the value of —— and one —— of the value of ——, of the goods and chattels of the said J. N., *or* being the property of the said J. N.], to the great damage of the said J. N., to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown, and dignity." [1]

§ 886. **Evidence on the above.** — As to the evidence under this form of the indictment, Archbold says: [2] "To maintain this indictment, it is necessary, not only to prove that J. S. won of J. N. the money, &c., laid in the indictment, or some part of it,[3] but also to prove that it was won by 'fraud, shift, cosenage, circumvention, deceit, unlawful device, or ill practice.' [4] A variance between the indictment and evidence, as to the game played (if stated), would be fatal." But, we may add, a smaller sum won, than is laid in the indictment, may well be proved. If, however, the allegation is of winning bills of exchange, the evidence must support this descriptive matter as laid.[5]

§ 887. **Indictment for winning more than Ten Pounds at One Sitting.** — Archbold has the following form, drawn also on the the foregoing statute: —

"*Commencement as in the last precedent:* in the county aforesaid, by playing at and with cards, to wit, at a certain game at cards called *Rouge et noir*, with one J. N., unlawfully did win of the said J. N., at one time and sitting, above the sum and value of ten pounds, that is to say, the sum of sixty pounds, of the moneys of the said J. N., to the great damage of the said J. N., &c., &c., *as in the last precedent.*" [6]

§ 888. **Evidence on the above.** — Under this form of the indictment, there may be a conviction for winning a less sum than ten pounds.[7] Moreover, Archbold says concerning the evidence: "All the prosecutor has to prove is, that J. S. won of J. N., at one sitting, a sum exceeding ten pounds, at the game specified in the indictment. Where two persons played

[1] Archb. Crim. Pl. & Ev. 10th Lond. ed. 657.
[2] Ib. 657, 658.
[3] See Rex *v.* Darley, 1 Stark. 359.
[4] See Rex *v.* Rogier, 2 D. & R. 431, 1 B. & C. 272.
[5] Rex *v.* Darley, supra.
[6] Archb. Crim. Pl. & Ev. 10th Lond. ed. 658.
[7] Rex *v.* Darley, 1 Stark. 359.

at cards from Monday evening to Tuesday evening, without intermission, except an hour or two at dinner, &c., it was holden to be one sitting, within the meaning of the above statutes." [1]

II. *Illustrations of American Statutes, with Forms of the Indictment on them.*

§ 889. **Playing for a "Valuable Thing."** — A statute in Illinois "makes it a penal offence for any person to play for money or other valuable thing at any game with cards, dice, checks, or at billiards." And the indictment, in a case already mentioned,[2] where the "valuable thing" was a check practically but not legally redeemable, was in the following form: —

"That A, &c., on, &c., at, &c., unlawfully did then and there play at a game at billiards for checks and promissory notes, payable and redeemable in currency by Cyrus A. Bradshaw, articles and things of value, to wit, of the value of one dollar, contrary," &c.[3]

§ 890. **Permitting Gambling Device on one's Premises.** — A statute in Missouri makes punishable "every person who shall permit any gaming-table, bank, or device prohibited by the sixteenth section, to be set up or used for the purpose of gaming in any house, building, shed, booth, shelter, lot, or other premises to him belonging or by him occupied, or of which he hath at the time possession or control." And the following was held to be a good indictment on this provision, against the objection that it did not aver the actual using of the device by persons engaged in playing for money or other property: —

"That A, &c., on, &c., with force and arms, at, &c., unlawfully did permit a certain gambling device called a pack of cards, being a gambling device adapted, used, and designed for the purpose of playing games of chance for money or property, &c., against the peace," &c.[4]

[1] Bones *v.* Booth, 2 W. Bl. 1226.

[2] Ante, § 875.

[3] Gibbons *v.* People, 33 Ill. 442. See post, § 900.

[4] The State *v.* Scaggs, 33 Misso. 92. Where the provision was: "Every person who shall 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 chance for money or property, and shall induce, entice, or permit any person to bet or play at or upon any such gaming-table or gambling device, or at or upon any game played at or by means of such table or

§ 891. **Permitting Gaming.** — By a statute in Iowa, "If any person keep a house, shop, or place resorted to for the purpose of gambling, or permit any person in any house, &c., under his control or care to play at cards, dice, &c., for money or other thing, such offender shall be fined," &c. And, on the latter clause of this statute, the following form of the indictment was held to be adequate: —

"That A, &c., on, &c., at, &c., being then and there the keeper of a house resorted to for the purpose of gambling, knowingly, wilfully, and unlawfully did permit and suffer evil disposed persons, whose names are to the jurors unknown, then and there to play at cards for money, whiskey, and other property, to the manifest corruption of good morals, contrary to the provisions of the Code," &c.[1]

It is perceived, that, to bring a defendant within the latter clause of this statute, the house or other place need not be one "resorted to for the purpose of gambling." Yet under the form of indictment as above drawn, the house is alleged to be of this sort; and probably this allegation could not be rejected as surplusage, but must be proved. This form of the indictment, therefore, however good in law it may be, is practically objectionable. The following is suggested as a substitute: —

That A, &c., on, &c., at, &c., unlawfully did permit B and C to play at cards for money and other valuable things, at a house there situate, and then and there under the control of him the said A, contrary, &c.

It is perceived, that such objections as might be made to this form could be brought equally against the other, which was held to be sufficient.

gambling device, or on the side or against the keeper thereof, shall," &c., — the following was held to be sufficient: —

"That A, &c., on, &c., and on divers other days and times, between that day and the day of the finding of this indictment, at, &c., unlawfully did set up and keep a certain table and gambling device, commonly called a faro bank, the same being then and on said other days and times there a gambling device, adapted, devised, and designed for the purpose of playing a game of chance for money and property; and did then and on said other days and times there induce, entice, and permit certain persons, [whose names are] to the jurors aforesaid unknown, to bet and play at and upon a game played at and by means of such gambling device, on the side and against the keeper thereof, against," &c.

There was nothing said in the case about the method in which the time was laid. The State *v.* Fulton, 19 Misso. 680. And see The State *v.* Smith, 19 Misso. 683. It is, at least, practically better in a case like this to charge the offence to have been committed on a particular day, and no more. Ante, § 722, 751 and note.

[1] The State *v.* Middleton, 11 Iowa, 246.

§ 892. **Permitting Gambling Table to be exhibited.** — A statute in Alabama is, or was formerly, as follows: "If any person shall hereafter be guilty of keeping or exhibiting any gaming-table called A B C, or E O, or roulette, or rowley powley, or rouge et noir, or thimbles, sometimes called three ticket lottery, or chuckerluck, or faro bank," &c. And then by another section, referring to this, "if any owner or occupant of any house, outhouse, or other building, booth, or tent, shall knowingly permit or suffer any of the tables or banks particularly or generally described as aforesaid to be carried on or exhibited in his house, outhouse, or building, booth, or tent, and be thereof convicted, he shall be fined in a sum not exceeding two thousand dollars: Provided always, that, if any owner or occupant of any house, outhouse, or other building, booth, or tent, shall give information to any judge or justice of the peace of the proper county, against any person keeping, exhibiting, or concerned or interested in said table or bank, within six days after the same comes to his knowledge, he or they, so informing, shall not be liable to the penalties of this section." And the following form of the indictment was held to be good; the objections urged being, that the names of the persons setting up the device should have been alleged, that the device should have been stated to be intended for gaming, and that the proviso should have been negatived: —

"That A, &c., on, &c., at, &c., being the occupant of a certain house at the race track near the city of Montgomery, in said county, did then and there unlawfully and knowingly permit and suffer a certain gaming table, called a faro bank, to be exhibited and carried on in said house, by him the said A so occupied as aforesaid, contrary," &c.[1]

III. *Discussions of Doctrines, and Points, relating to the American Procedure.*

§ 893. **Proviso — Two Statutes.** — We saw, in the last section, that a proviso in the form there given need not be negatived.[2] But a case of a different sort arose in Kentucky. There a statute provided, that, "if any person shall set up, or cause

[1] Clark *v.* The State, 19 Ala. 552. See post, § 894, 895. Though there are statutes in Alabama regulating the form of the indictment, it was conceded that this one must conform to the principles of the common law.

[2] And see ante, § 605, 606; Romp *v.* The State, 3 Greene, Iowa, 276.

to be set up, or permit to be played upon or keep any billiard table, he shall," &c. Afterward it was enacted, "that nothing in said chapter shall be construed as applying to any billiard tables kept by any citizens of this Commonwealth in their houses, for the amusement of themselves or their families, and not kept or used for hire or profit, directly or indirectly." And it was held, that, under these two provisions construed together, it becomes necessary to negative the matter contained in the second one. "We do not," said Hardin, J. "regard the alteration effected by the amendatory act as in the nature of a proviso or exception — as contained in a distinct clause of the act defining the offence — not necessary to be negatived in the indictment. But we think the amendment operates to qualify the context of the statute defining the offence."[1]

§ 894. **Alleging Names of Third Persons.** — In principle, and on authority, the question whether or not the name of a third person should be alleged in an indictment depends, in some measure, upon the nature of the thing charged against the defendant. And it is believed to be the better doctrine in principle, and the doctrine which most prevails in matter of authority, that, when the gaming appears by the indictment or in the proofs to have been carried on with a third person, the name of such third person should be alleged if known; or, if not known, the allegation should be, that the name is to the jurors unknown.[2] It was, for instance, so laid down in Indiana, the court observing: "We conceive that the third person's name is required in such cases, not because he is injured, but because his designation is a material part of the offence."[3] When, therefore, the indictment charged the defendant with having unlawfully won, &c., of several persons whom it mentioned by name, "and others," it was held to be insufficient. It should have stated who these "others" were, or have set down an excuse for the omission.[4] In Illinois, however, it

[1] Holt *v.* Commonwealth, 2 Bush, 33, 35.

[2] See Crim. Proced. 2d ed. I. § 545–552, 566–584.

[3] Butler *v.* The State, 5 Blackf. 280.

[4] The State *v.* Irvin, 5 Blackf. 343. See, also, as sustaining the doctrine of the text, The State *v.* Maxwell, 5 Blackf. 230; Groner *v.* The State, 6 Fla. 39; Barkman *v.* The State, 13 Ark. 703; Jester *v.* The State, 14 Ark. 552; Buck *v.* The State, 1 Ohio State, 61. In Georgia it was held, that an indictment which does not state with

was held by the majority of the court, that, in an indictment for playing at a game of cards, it is not necessary to state with whom the defendant played.[1] The true view would seem to be, that the name should be mentioned by way of identifying the particular offence, and making the charge specific, instead of leaving it general.[2] There are many analogies in the law, both in the civil department and in the criminal, in obedience to which the name should be given, except when some special matter appears to justify the omission.

§ 895. **Continued.** — At the same time, the nature of the particular offence may be such that there is no need to state the names of third persons.[3] Thus, as we have already seen,[4] it has been held to be unnecessary, under the Alabama statute against permitting gaming-tables to be exhibited on one's premises, to allege the name of the person by whom such a table was exhibited.[5] This case lies near the border line dividing what is permissible from what is not, and not all courts hold even a question like this in the same way.

§ 896. **Name of Game.** — When the indictment gives the name of the person with whom the game was played, together with locality and date, there seems to be a sufficient identification of the transaction, provided such further words are

whom the defendant gamed, or whether with a white person or a negro, was bad. Said Benning, J.: "There is a statute which prohibits playing and betting at cards with negroes, as well as a statute which prohibits playing and betting at cards with white persons; and the punishment under the former statute may be much more severe than it can be under the latter." Davis *v.* The State, 22 Ga. 101, 102. See, also, Moffat *v.* The State, 6 Eng. 169.

[1] Green *v.* People, 21 Ill. 125. And see, as more or less to the like effect, Coggins *v.* The State, 7 Port. 263; Romp *v.* The State, 3 Green, Iowa, 276.

[2] Ante, § 373, 602.

[3] See ante, § 889, 890, 892.

[4] Ante, § 892.

[5] Clark *v.* The State, 19 Ala. 552. In Indiana, an indictment charged, that M., on, &c., at, &c., 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, &c. 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 set forth, during the time and for the purpose alleged. The gambling need not be proved by direct evidence; it may be inferred from circumstances. McAlpin *v.* The State, 3 Ind. 567. See also Bowe *v.* The State, 25 Ind. 415; Hamilton *v.* The State, 25 Ind. 426; Commonwealth *v.* Branham, 3 Bush, 1; Commonwealth *v.* Fraize, 5 Bush, 325; The State *v.* Lewis, 12 Wis. 434; Frisbie *v.* The State, 1 Oregon, 264.

added as bring the case within all the terms of the statute. Thus, if the indictment specifies, that it was at a "certain game of cards," "in the county of Leon, at a certain gaming-table," naming the person with whom the game was played, but not particularizing the kind of game of cards, it will be sufficient, in a case where all the terms of the statute are thereby covered.[1]

§ 897. **Name of Gaming Device.** — A statute in Texas made it punishable "if any person shall bet at any gaming-table, or bank, such as are in the six preceding articles mentioned;" and, faro having been mentioned in those articles, an indictment was held to be good which alleged, that the defendant "did bet at a gaming bank commonly called a faro bank." The statute, which the court was bound to know judicially, having specified "faro" as a game, it would take judicial cognizance that a faro bank is kept for the purpose of gaming.[2] But where, in Kentucky, a statute prohibited certain games, by name, then prohibited generally, "tables, machines, and

[1] Groner *v.* The State, 6 Fla. 39. To the like effect see The State *v.* Maxwell, 5 Blackf. 230; The State *v.* Ross, 7 Blackf. 322; Johnston *v.* The State, 7 Sm. & M. 58; Dean *v.* The State, Mart. & Yerg. 127; The State *v.* Grace, 21 Ark. 227. According to an Indiana case, the name of the game need not be mentioned; but there should be some description of it, as that it was with cards, dice, &c. Webster *v.* The State, 8 Blackf. 400. An indictment for unlawfully playing at cards is supported by proof of betting at a game of faro. Gibboney *v.* Commonwealth, 14 Grat. 582. It was held in North Carolina, that an indictment for playing at cards with a slave, under the statute of 1830, need not specify the kind of game played. The statute was as follows: "It shall not be lawful for any white person, free negro, or mulatto, to play at any game of cards, dice, ninepins, or any game of chance or hazard, whether for money, liquor, or any kind of property, or not, with any slave or slaves; and any white person so offending shall be guilty of a misdemeanor," &c. And the following indictment was held to be good: "The jurors for the State upon their oaths present, that Moses Ritchie and Alexander Hill, both late of said county, and both white men, on the first day of March, in the year of our Lord one thousand eight hundred and thirty-four, with force and arms, in said county, unlawfully did play at a game of cards with two slaves, to wit, John, the property of one Peter Clingman, and Juan; contrary to the statute in such case made and provided, and against the peace and dignity of the State." The State *v.* Ritchie, 2 Dev. & Bat. 29. In Virginia, an indictment charged the defendant with unlawful playing with cards, to wit, at the game of "all fours," of "loo," and of "whist." And it was held, that, to convict the defendant, he must be shown to have played at some one of the games specified in the indictment. Windsor *v.* Commonwealth, 4 Leigh, 680.

[2] The State *v.* Burton, 25 Texas, 420; S. P. Commonwealth *v.* Monarch, 6 Bush, 301; The State *v.* Lewis, 12 Wis. 434.

contrivances ordinarily used in betting;" it was held, that an indictment for keeping a keno table, not averring that a keno table is "a contrivance ordinarily used in betting," was bad on demurrer. The game of keno not being specifically named in the statute, the court cannot take judicial notice of its character.[1]

§ 898. **The Money or other Thing of Value played for.** — If by the terms of the statute, the gaming, to be indictable, must be for money, or for some other thing of value, the indictment must cover in allegation this part of the statute as well as the rest. The question is, how minute the allegation must be. And the doctrine already stated seems to be the general one, namely, that no particular sum need be mentioned.[2] But in Indiana it was held, that the amount lost or won must be set down in the indictment; because, in this State, under the statute law, this amount determines the fine and the jurisdiction of the tribunal.[3] And under this condition of the statute law every court would so hold.[4]

§ 899. **Money, continued — The Sum.** — Though, according to the general rule, as just said, an indictment need not mention the sum, yet it may if the pleader chooses. And proof of a different sum will sustain the allegation.[5]

§ 900. **Valuable Thing, continued.** — In these cases, it must be observed, the indictment does state that "money" was played for, where such is the statutory word. But suppose the term in the statute is less definite, namely, "valuable thing;" in this case, the indictment will not be sufficient if it simply employs the same term; it must go further, and say what the particular valuable thing was.[6]

[1] Commonwealth *v.* Monarch, 6 Bush, 298. See The State *v.* Kelly, 24 Texas, 182.

[2] Moffat *v.* The State, 6 Eng. 169; Commonwealth *v.* Tiernan, 4 Grat. 545; The State *v.* Ward, 9 Texas, 370.

[3] Long *v.* The State, 13 Ind. 566.

[4] Ante, § 370.

[5] Medlock *v.* The State, 18 Ark. 363; Parsons *v.* The State, 2 Ind. 499; Commonwealth *v.* Garland, 3 Met. Ky. 478.

[6] Ante, § 889; Anthony *v.* The State, 4 Humph. 83. In this case, the evidence was that "cash notes" were bet. And Green, J. said: "The presentment alleges, that the parties bet 'money, bank-notes, change tickets, and other valuable things.' This evidence is plainly inadmissible to support the allegation as to the wager of 'money, bank-notes, or change tickets'; for the 'cash notes' constitute neither of them. Nor would it be admitted to support the charge, that 'other valuable things' were bet. This charge is

§ 901. **Money, continued — The Evidence.** — And the proof as to the thing played for must correspond with the allegation. Thus, if the defendant is charged with having won five dollars, this charge is not made good by showing that he won a promissory note for five dollars; because, in legal contemplation, the charge is of winning money, but a promissory note is not money.[1] So, if it is alleged in terms that money was bet, the allegation is not sustained when the proof is of the betting of any other property.[2] If money was seen lying on the table where the defendant and others were playing at cards, the jury may infer from this evidence that it was bet on the game.[3]

§ 902. **Place of Gaming — "Public Place" — "House where People resort," &c.** — Many of the statutes, as already observed,[4] specify some particular place at which the game must be carried on, to be within their terms; as, for instance, at a "public place," at a "house where people resort," and the like. When an indictment is drawn upon such a statute, it is not sufficient if it simply alleges that the offence was committed within the county; but, in addition, it must specify the particular statutory place, in the statutory terms.[5] Where the words of the statute were, "outhouse where people resort," and the specific allegation was, that the game was played "in a certain outhouse to which divers people did then and there resort," it was held to be sufficient.[6] The name of the owner of the place at which the gaming is carried on need not be mentioned;[7] and, if it is mentioned, it is mere surplusage, which need not be proved.[8] And if the indictment pursues the words of the statute, it, where the statutory word is a specific one, need not go further and set out a description of the room in which the playing took place.[9] Thus, where the words of the

too vague; for, although these words are used in the statute, so as to make it criminal to gamble for any 'valuable thing,' the 'valuable thing' so bet must be set forth and described in the indictment or presentment." p. 85.

[1] Tate *v.* The State, 5 Blackf. 174; ante, § 346, 874.

[2] Hale *v.* The State, 8 Texas, 171.

[3] Rice *v.* The State, 10 Texas, 545.

[4] Ante, § 878.

[5] The State *v.* Langford, 3 Ire. 354; Shihagan *v.* The State, 9 Texas, 430; Hord *v.* Commonwealth, 4 Leigh, 674.

[6] The State *v.* Norton, 19 Texas, 102.

[7] The State *v.* Atkyns, 1 Ala. 180.

[8] Wilson *v.* The State, 5 Texas, 21; Prior *v.* The State, 4 Texas, 383.

[9] People *v.* Saviers, 14 Cal. 29. And see The State *v.* Atkyns, supra.

indictment were, "in a certain house for retailing spirituous liquors, then and there situate, did then and there," &c., they were held to be sufficient.[1] So it is sufficient to charge, that the unlawful gaming was at the house of a person named, being "a house of entertainment," where these are the words of the statute.[2]

§ 903. **Continued — General Term — "Public Place."** — We saw, when contemplating the statutory offence of malicious mischief done to animals, that the indictment must employ a term designating the particular species of animal injured. If, for example, a statute makes punishable the malicious killing of "cattle," it is not sufficient to charge the defendant with having maliciously killed "certain cattle;" but the allegation must be a "hog," a "gelding," or whatever else the particular animal may be, and it need not add that the "hog," for instance, is "cattle." But if the statute uses the specific word, then the same word is enough in the indictment.[3] A like doctrine prevails in respect of the offence now under consideration. Thus, while the statutory word is sufficient in the indictment, as stated in the last section, where it is specific, yet, where the statute was, "if any person shall play at any game with cards at any house, &c., tavern, inn, or any other *public house*, or in any street, highway, or other *public place*, or in any outhouse where people resort, he shall," &c., it was held to be insufficient simply to allege that the place of playing was a "public house." "The charge," said Lindsay, J. "is too vague and indefinite, and does not sufficiently put the defendant upon notice to enable him to prepare for his defence. This is a principle of administrative justice which should not be departed from. A warning should always be given before the blow is stricken. It may readily be imagined that a gentleman may have played cards at a number of private places which come not within the denunciation of the statute; and yet, when simply indicted for playing cards at a 'public place,' he could not know from the charge which particular place he had to defend himself against, by showing that it

[1] Sublett *v.* The State, 9 Texas, 53. And see Rodgers *v.* The State, 26 Ala. 76.

[2] Linkous *v.* Commonwealth, 9 Leigh, 608.

[3] Ante, § 438, 440–443.

was not a 'public place.' He might fortify himself against one by his proofs, and still the State might array its testimony to show the offence was committed at another." [1]

§ 904. **Continued.** — The reader will observe, that the mere words "public house" or "public place" are more vague than "house of entertainment," "storehouse where people resort," and the like, which have been adjudged sufficient. In Alabama, even where the words of the statute were "at a public place," and the indictment simply used the statutory expression, without any thing added by way of particular description, it was held to be adequate. But, in this State, a particular statutory provision made the indictment good, and Colman, J. said: "Without the aid of the statute it is probable the averment would be insufficient." [2] Where, in Texas, 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 sufficiently definite and minute.[3] But, though the more definite description is given, the statutory words must perhaps be employed also. Thus, in Virginia, a presentment for "unlawfully playing cards at the grocery of D. & C.," is defective in substance, by reason of not alleging the grocery to be a "public place," or a "place of public resort." [4]

§ 905. **Continued.** — Where the words of the statute were, "if any person shall play at any tavern, inn, storehouse for retailing spirituous liquors," &c., an indictment was held to be ill which alleged, that the defendant, on a day mentioned, "in the county aforesaid, did play at cards in a storehouse where spirituous liquors are retailed." It did not appear, as it ought, from this allegation, that the storehouse was a place where spirituous liquors were retailed at the time when the playing occurred.[5] But where, in Texas, the indictment was

[1] The State *v.* Jurgins, 31 Texas, 588, 589; The State *v.* Fuller, 31 Texas, 559. And see Commonwealth *v.* Perrigo, 3 Met. Ky. 5; Bosshard *v.* The State, 25 Texas, Supp. 207.

[2] Roquemore *v.* The State, 19 Ala. 528; Flake *v.* The State, 19 Ala. 551. See, also, Burnett *v.* The State, 30 Ala. 19.

[3] The State *v.* Lopez, 18 Texas, 33.

[4] Roberts *v.* Commonwealth, 10 Leigh, 686. And see, as to this question, ante, § 897, 903.

[5] The State *v.* Colman, 3 Ala. 14.

in the following form, it was held to be sufficient in this respect: "That Peter Royal, late of, &c., in a certain house for retailing spirituous liquors, in the town of Huntsville, and county of Walker, known as Harvey Randolph's grocery, on, &c., did play at a certain game with cards, upon which money was then and there bet, contrary," &c.[1]

§ 906. **Continued.** — The statute quoted in the last section is, more at large, as follows: "If any person shall play at any tavern, inn, storehouse for retailing spirituous liquors, or house or place where spirituous liquors are retailed or given away, or any public house or highway, or any other public place, or any outhouse where people resort, with cards or dice," &c. And when an indictment, drawn upon this statute, alleged that the playing was "at a public place," proof of playing in a public highway was held not to support the allegation. The indictment, to meet such a state of proofs, should use the statutory word "highway."[2] Perhaps this would not be so held in all the States. The general question has been discussed in other parts of this volume.[3]

§ 907. **Continued — Law or Fact.** — According to well-established principles of our jurisprudence, the facts in these cases are for the jury and the law is for the court; if, therefore, all the facts concerning a place should be agreed, it would be a question of law whether or not the place is a public one within the statute. Still, as ordinarily the facts are not agreed, it becomes a question for the jury whether, under suitable instructions from the court as to the law, the place proved is public or not. Some Texas cases allow certainly so much to the jury, and perhaps more.[4]

§ 908. **Following Statutory Terms.** — The general principles

[1] Royal *v.* The State, 9 Texas, 449. And see Coggins *v.* The State, 7 Port. 263; Reeves *v.* The State, 9 Texas, 447; Wortham *v.* Commonwealth, 5 Rand, 669.

[2] Bush *v.* The State, 18 Ala. 415.

[3] Ante, § 247, 248, 289, 441.

[4] Thus, whether a jail-house is a public house or not, as alleged in the indictment, is a question of fact, not of law, and it was error to quash the indictment, instead of submitting the question to the jury, with instructions as to the statutory meaning of the term. The State *v.* Alvey, 26 Texas, 155. Whether a room attached to and constituting a part of a house kept for the purpose of retailing spirituous liquors is, in contemplation of law, one of the prohibited places, is a question for the jury. Cherry *v.* The State, 30 Texas, 439.

relating to this subject have already been discussed.[1] Where the word of the statute was "gaming," and the indictment used the word "gambling," it was held not to be ill.[2] Where the statute made it a misdemeanor to exhibit "any faro-bank," &c., an indictment was sustained which charged the defendant with exhibiting "a gambling-table commonly called faro."[3] Where the statutory words were, "playing at a game with cards," and the words of the indictment were, "played at cards," these were held to be sufficient. But this decision was based upon a provision which authorized a form of indictment different from the common-law form.[4] A considerate pleader will not avail himself of any license given him under these decisions. It is so easy, when he draws an indictment, to lay the statute before him, and follow the statutory words, that there is no need, in these cases, to leave it for the court to decide how wide a departure from right there can be without being wrong.[5]

§ 909. **Alleging Matter beyond Statutory Words.** — This general question is discussed in the work on Criminal Procedure[6] and somewhat in the present volume.[7] Generally, in these cases, it is sufficient simply to follow the statute.[8] In Virginia, there was a statute in the following words: "A free person, who shall keep or exhibit 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; or who shall be a partner, or concerned in interest, in keeping or exhibiting such table or bank; shall," &c. And the court observed: "Where the offence charged is the exhibition of any of the gaming-tables enumerated, nothing more need be averred, for the statute

[1] Crim. Proced. 2d ed. I. § 608–622; ante, § 378–383, 386, 415–417, 505, 506, 557, 693.

[2] The State *v.* Nelson, 19 Misso. 393.

[3] Brown *v.* The State, 5 Eng. 607.

[4] Holland *v.* The State, 3 Port. 292. An indictment charged, that the defendant "did play at a game with cards upon which money was then and there bet a certain public house," &c. And it was held, that the court could not supply any word between "bet" and "a certain public house," therefore the indictment was bad. The State *v.* Huston, 12 Texas, 245.

[5] Ante, § 386.

[6] Crim. Proced. 2d ed. I. § 623–630.

[7] Ante, § 381, 386, 387, 406, 413.

[8] People *v.* Beatty, 14 Cal. 566; Spratt *v.* The State, 8 Misso. 247; The State *v.* Ward, 9 Texas, 370; Crain *v.* The State, 14 Texas, 634; Reeves *v.* The State, 9 Texas, 447.

makes exhibiting of any of the gaming-tables named a penal offence; and therefore the offence 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 offence 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 offence 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,[1] 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 make the act unlawful when it does not appear to be so by the description itself."[2]

§ 910. **Variance.** — There are several cases in which the question of variance, between the allegation and the proofs, was raised and decided. Thus, an indictment alleged, that the defendant, by playing at cards, &c., won from A, B, and C, a certain article, &c. The evidence was, that the winning was by the defendant and another, as partners, from A and C, as partners. And the variance was held to be fatal.[3] And generally, where an indictment for gaming charges that the defendant won or lost with several persons whom it names, proof of winning or losing with part of those persons is not sufficient.[4] Likewise the allegation that A alone lost at a game of cards is not supported by proof that A and others lost jointly.[5] In one case it was charged, in one of the counts, that the defendant and four other persons did "bet together and against each other" at a game of cards; and in the other count, that the defendant and the other persons "did bet together," &c. The proof was, that the four other persons

[1] Roberts *v.* Commonwealth, 10 Leigh, 686; Bishop *v.* Commonwealth, 13 Grat. 785.

[2] Huff *v.* Commonwealth, 14 Grat. 648, 650, 651. See, also, Bryan *v.* The State, 26 Ala. 65.

[3] Wilcox *v.* The State, 7 Blackf. 456.

[4] Iseley *v.* The State, 8 Blackf. 403.

[5] Jackson *v.* The State, 4 Ind. 560.

mentioned in the indictment played the game of cards, that the defendant stood by and bet with one of them, that three of the players bet together, and that the fourth player did not bet at all. And it was held, that the evidence was not sufficient to sustain a verdict of guilty against the defendant; for, though the charge in the indictment was made with unnecessary complication, it must be proved as there set down.[1]

§ 911. **Continued.** — Where a presentment for gaming set out the offence as committed at the booth of Peter Spinner, and it appeared in evidence that the criminal act was done at the booth of one Clark, and Spinner had no right, interest, or agency in this booth; the variance was held to be fatal.[2]

§ 912. **Joinder of Defendants.** — This subject, as a general one relating to criminal pleading, and specifically as respects gaming, was considered in the work on Criminal Procedure.[3] It was held, in Alabama, that two or more persons may be indicted jointly under the statute against gaming, and a part may be convicted and the others acquitted. It is not necessary for the defendants to be charged with committing the acts *separaliter;* because this form of the charge "is proper only where a number of persons are included in the same indictment for keeping different disorderly houses."[4] So, in Virginia, several offences may be jointly charged against different persons in the same indictment, namely, against one for exhibiting, another for playing at, and a third for suffering faro to be played in his house.[5] If the indictment is against two persons, and it is joint in its form, then, if it appears in evidence that one of the defendants played on a particular occasion with certain third persons, and the other defendant played on a particular other occasion with certain other third persons, the defendants never having participated in one joint act of guilt, there cannot be a conviction of the two.[6]

[1] Hany *v.* The State, 4 Eng. 193. And see Jester *v.* The State, 14 Ark. 552.

[2] Commonwealth *v.* Butts, 2 Va. Cas. 18.

[3] Crim. Proced. 2d ed. I. § 475, and accompanying sections.

[4] Covy *v.* The State, 4 Port. 186.

[5] Commonwealth *v.* McGuire, 1 Va. Cas. 119.

[6] Elliott *v.* The State, 26 Ala. 78. According to a Texas case, an indictment against three persons for card playing, which does not allege that they played with each other, or clearly show that they were indicted for separate

§ 913. **Peculiar Statutory Provisions affecting Indictment and Procedure generally.** — When we are examining the various questions which concern the procedure for gaming, we should bear in mind that, in many of our States, there are statutory provisions modifying the common-law rules as respects this particular offence, and rendering it difficult to follow the lights which our common-law jurisprudence has given us. Thus, in Tennessee, it was provided by the act of 1824, c. 5, as follows: "In every case which may arise under any of the laws of this State, made for the prevention, discouraging, and suppressing of gaming, the court shall interpret the said laws as remedial, and not as penal statutes, and 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 indictment, drawn more immediately upon a statute which is not given in the report, was held to be good: "That A, late of, &c., on, &c., at, &c., 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." [1]

§ 914. **Continued.** — In an earlier case than the one just mentioned, the following was held to be sufficient: That the defendant, on, &c., at, &c., "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," &c.[2] And Turley, J. in delivering the opinion which sustained the indictment given in the last section, said, that, according to this case, "a bill of indictment for gaming need not specify the particular game of cards which was played, such as whist, loo, euchre, brag, poker, &c.; but it is good if it describe it as an unlawful game and match of cards, and it is not necessary to charge what money, or what amount, was

offences, is, perhaps, defective, and, on proper exception, ought to be quashed. Parker *v.* The State, 26 Texas, 204.

[1] The State *v.* McBride, 8 Humph. 66.

[2] Dean *v.* The State, Mart. & Yerg. 127.

bet upon the game." Then he added: "The statute provides, that the person with whom the defendant bet or played need not be set forth or described. . . . There remains only one other apparent defect in this bill [of indictment] to be remedied, and that is, that it is not averred that the game was executed. In the case of Dobkins *v.* The State,[1] it is said by Judge Reese, who delivered the opinion of the court: 'This court, acting in pursuance of the remedial principles prescribed by the act of 1824, c. 5, § 5, for the suppression of gaming, has held, that the words, did gamble, and did game, contain and express, *ex vi termini*, the conjoint facts, that a bet or wager was laid, and that the act to which it related was executed.' . . . This, then, removes the objection to this bill of indictment, that it is not averred that the unlawful game at cards, upon which the betting is charged, was executed or played; for the bill does charge, that the defendant did unlawfully game by wagering and betting; and by intendment of law the game was played." [2]

§ 915. **Continued.** — In consequence of legislation like this, there have grown up in many, and it seems in most, of our States, anomalous judicial doctrines, whose true source does not always appear in the reports where they are recorded. The reader must take this matter into the account in considering and estimating the various discussions which appear throughout the present chapter. At the same time, it has been the endeavor of the author to distinguish what is sound in general doctrine from what rests on special provision; but, in executing this endeavor, it is quite possible he may have erred at some points.

§ 916. **Statutes of Limitations as to Gaming.** — In many of the States, the provisions of the statute are such that the criminal proceeding for gaming must follow close upon the offence committed, or not at all.[3] Relating to this matter, some points have arisen. Thus, in South Carolina, a prosecution, though barred as to the fine, is not barred as to the

[1] Dobkins *v.* The State, 2 Humph. 424.

[2] The State *v.* McBride, 8 Humph. 66, 67, 68.

[3] As to statutes of limitations in criminal cases in general, see ante, § 257 et seq.

imprisonment, if not commenced within six months. In this condition of the law, an indictment charged the offence as committed within six months, and the jury found the following verdict: "We find the defendant guilty on the first count (to wit, for gaming), and we further find, that the said unlawful playing took place more than six months before the commencement of this prosecution." Thereupon it was held, that judgment might be rendered against the defendant on this indictment and finding.[1] If a conviction for the gaming as committed within the six months is sought by the prosecuting officer, he must present such affirmative evidence as to satisfy the jury upon this question of time; and the burden of proof does not devolve on the prisoner to show that more than the six months has elapsed.[2] In a case in Arkansas, where the offence of dealing faro was indictable only within a year from the time of its commission, and the indictment was found at the March term, 1839; and the evidence was, that the defendant, some time within a year previous to January, 1839, sat at a table commonly called a faro-table, dealing or drawing cards from a box, and using pieces of bone for carrying on the game; that no money was used, nor did the witness know whether he was playing for money or not; a conviction, on this evidence, it was held, should not be disturbed. As to the time of the commission of the offence, Dickinson, J. said: "The whole of the evidence was before the jury, and was such as to satisfy their minds that it was within the time prescribed by the statute. Such being the fact, we do not think the verdict, for that reason, ought to be disturbed."[3]

§ 917. **Other points.** — The books present some other points[4]

[1] The State *v.* Dent, 1 Rich. 469.

[2] The State *v.* Waters, 1 Strob. 59.

[3] Stevens *v.* The State, 3 Pike, 66, 70.

[4] To authorize a conviction under an indictment for gaming, on proof that the defendant played a game of euchre with dominos, it must be referred to the jury to decide: 1. Whether that game, when played with dominos, is substantially the same as when played with cards; and, 2. Whether dominos had become, at the time of the defendant's playing, a device or substitute for cards in playing euchre, or were in fact so used in that particular game in which the defendant participated. A witness for the State cannot be asked, on cross-examination, "whether or not dominos were a device or substitute for cards in the game at which the defendant played." Harris *v.* The State, 31 Ala. 362. An indictment for gaming was drawn in two counts; the first for money won, and the second for money lost, on a bet made at a game of cards played by the defendant and others. But it

of perhaps inferior interest. The reader will see them in the note, but a continuation of this discussion in the text seems not to be desirable. In matter of practice it has been held, that, if there is a recognizance or bond for the defendant's appearance at court, in which he undertakes to answer there to a charge of "gaming" simply, this is not a valid obligation; because "gaming is not of itself alone an indictable offence."[1] And the same is true of a recognizance to answer to a charge of "playing at a game of cards."[2] But it has been held, that a recognizance to appear and answer to an indictment for keeping a gaming-table is good.[3]

IV. *Special Views as to betting on Games.*

§ 918. **General View.** — Under the last sub-title, various points were considered relating to betting on games. Indeed,

did not show, whether the bet was made with the persons playing, or with some third person; therefore it was held to be bad for uncertainty. The State *v.* Stallings, 3 Ind. 531. A presentment charging, that the defendant "did unlawfully gamble by playing at a game of cards, and then and there unlawfully did bet and wager on the sides and hands of those that then and there did play, contrary to the form of the statute," &c., is not objectionable for duplicity. Commonwealth *v.* Tiernan, 4 Grat. 545. But an indictment under the South Carolina act of 1816, if it charges the defendant with gaming, and keeping a public place or house used as a place for gaming, is double and therefore ill; for it sets out two distinct offences. The State *v.* Howe, 1 Rich. 260. It is not necessary in an indictment under the Arkansas act of January, 1852, for playing cards on Sunday, to allege that the game was played for amusement, or that the defendant betted on the game. Stockden *v.* The State, 18 Ark. 186. It is not material of what part of the charge the defendant is acquitted, if the part of which he is found guilty constitutes a specific indictable offence. Thus, on the trial of an indictment under the Indiana statute of 1816, charging the defendant, in the same count, with playing at cards in a tavern and betting, the jury found him guilty of the playing but not of the betting; and this was held by the court to be sufficient. Durham *v.* The State, 1 Blackf. 33. Where a statute against gaming left the amount of the fine to the discretion of the jury, it was held, that the court could not lawfully, without the prisoner's consent, dispense with the jury, and itself determine the fine. Ervine *v.* Commonwealth, 5 Dana, 216. Evidence is not admissible to show, that the act of gaming described in the indictment is not the same act of which proof was given before the grand jury. Crain *v.* The State, 14 Texas, 634. The law properly requires, that gaming implements shall be destroyed after conviction; this is a punishment, not an unlawful deprivation of property. By implication, the right of the police to hold the property until the trial is also given. Willis *v.* Warren, 1 Hilton, 590.

[1] Commonwealth *v.* West, 1 Dana, 165; The State *v.* Cotton, 6 Texas, 425.

[2] Cotton *v.* The State, 7 Texas, 547. And see McDonough *v.* The State, 19 Texas, 293; Bailes *v.* The State, 20 Texas, 498.

[3] Whitfield *v.* The State, 4 Pike, 171.

the offences of gaming and of betting on games are hardly distinguishable either on principle or on the language of the statutes; yet the division serves here the purpose of convenience.

§ 919. **Arkansas Statute and Form of Indictment.** — In Arkansas, the first section of the statute makes it a misdemeanor for any person to "set up, keep, or exhibit any gaming-table or gambling device, commonly called A B C, E O, roulette, rouge et noir, or any faro-bank," &c. And by the third section it is an offence for any person to bet "on any of the games prohibited by the first section." Thereupon the following form of indictment, drawn upon the third section, was held to be good: —

"That A, &c., on, &c., at, &c., did bet ten checks of the representative value of five dollars, upon a certain gambling device commonly called a faro-bank, contrary to the form of the statute," &c.

Said English, C. J.: "This language implies, we think, with sufficient certainty, that the faro-bank was in motion, and that the betting was upon the game produced by it." [1]

§ 920. **Thing bet.** — In Tennessee it has been held, that an indictment which charges the defendant with having bet "goods, wares, and merchandise, being valuable things," is not sufficiently certain as to the things bet. Reese, J. observed: "It has been justly said here, on behalf of the State, that this court and other courts in modern times, in cases of misdemeanor, have considerably relaxed the rigid adherence to exact and extreme technical accuracy and precision, in the

[1] Warren *v.* The State, 18 Ark. 195, 198. And see Drew *v.* The State, 5 Eng. 82; Graham *v.* The State, 1 Pike, 171. Counts for exhibiting a faro bank, and for betting on the game, may be properly joined in the same indictment. It is not necessary to allege *causa lucri*. The State *v.* Holland, 22 Ark. 242. In this case the following two counts were held to be good: —

First count. "That A, &c., on, &c., at, &c., then and there being, did then and there unlawfully exhibit a certain unlawful gambling device commonly called a faro bank, contrary," &c.

Second count. "That, &c., did then and there unlawfully bet twenty-five cents in money on a certain unlawful game played with cards, commonly called faro, which was then and there played, contrary," &c.

In Texas, an indictment charging that the accused "did bet at and upon a gaming-table," without describing the gaming-table as kept for the purpose of gaming, or specifying faro, monte, rondo, or any other game named in the statute, is insufficient. Booth *v.* The State, 26 Texas, 203.

charge and in the proof, which marked the earlier administration of the criminal laws. But a just and reasonable certainty, in the charge and in the proof, has not been and ought not to be abolished. The object of an indictment or declaration is to notify the defendant of the substantial charge or claim against him; and this object is not obtained unless the allegations point out the specific nature of the charge or claim in terms of reasonable certainty."[1] The reader has observed, that the form which was approved in Arkansas, as quoted in the last section, is, in this part of the allegation, more precise and definite.[2]

§ 921. **Continued.** — In Texas, it comes from the construction of a statute, that an indictment for betting at faro need not charge what was bet, neither need this be proved at the trial. The statute is: "It shall be sufficient for the indictment to charge, that the person or persons betting upon, or concerned in betting upon, such gaming-table or bank, did bet or was or were concerned in betting upon such gaming-table or bank."[3] So, likewise, the allegation that the defendant "did bet at a certain gaming-bank, then and there exhibited and kept, called monte," is held to be sufficient in this State.[4] Also the averment that the defendant bet money "at a certain gambling device, called rondeau," is sufficient.[5]

§ 922. **Describing Game.** — Then, to return to Arkansas, if the indictment is for betting on any of the games named in the first section of the gaming act, in its description of the game it need only use the language of the act. But, where the charge is for betting at a "gaming-table, or gambling device, or bank of the like or similar kind, or of any other description, although not named," the indictment should aver, in addition to the name, that it was a gaming-table or bank similar to one of the games named in the act; or else, that it

[1] The State *v.* Kilgore, 6 Humph. 44, 45. See Bagley *v.* The State, 1 Humph. 486.

[2] Consult ante, § 903.

[3] Harrison *v.* The State, 15 Texas, 239.

[4] McKissick *v.* The State, 2 Texas, 356.

[5] The State *v.* Mann, 13 Texas, 61. See, also, Estes *v.* The State, 10 Texas, 300; The State *v.* Prewitt, 10 Texas, 310; Ramey *v.* The State, 14 Texas, 409; Cohen *v.* The State, 17 Texas, 142.

was a device "adopted, devised, and designed for the purpose of playing a game of chance, and at which money or property may be won or lost." Therefore the averment, that the defendant betted "upon and against a certain gambling device, commonly called the blind tiger," was held to be insufficient.[1]

§ 923. **Person bet with.** — It has also been held, in Arkansas, not to be necessary to allege that the defendant bet with any particular individual.[2] Yet, where the indictment is drawn upon the eighth section of the gaming act, — "if any person shall be guilty of betting any money, &c., he shall, on conviction," &c., — the name of the person who played the game must be alleged, if known, and proved as thus laid. This comes from the necessity of identifying the particular transaction.[3] But the rule was in 1855 changed by statute, so that it became unnecessary to set out the name of the players.[4]

§ 924. **Place of Playing — Of Betting.** — In Missouri, the indictment for betting at a prohibited game need not allege, that the playing was in the county where the prosecution is carried on. It must aver that the betting was there, but it is not material to the constitution of the offence, that the game should be played in the same county.[5]

§ 925. **Nature of Game, &c.** — If the betting is at a faro-bank, the particular nature of the game need not be set out, or the name of the person with whom the bet was made. Said Pettibone, J.: "The general rules of pleading in civil and criminal cases are the same. In a civil case, every thing which is necessary to constitute a right of action must be laid in the declaration, with time and place. So, in a criminal case, every thing which is of the essence or substance of the offence must be charged in the indictment." And, tested by this general rule, the indictment drawn as thus mentioned was deemed to be good.[6]

§ 926. **Good Indictment in Missouri.** — In Missouri, also,

[1] The State *v.* Grider, 18 Ark. 297. See ante, § 919, note.

[2] Drew *v.* The State, 5 Eng. 82. See post, § 924.

[3] Parrott *v.* The State, 5 Eng. 574; Barkman *v.* The State, 13 Ark. 703.

[4] Orr *v.* The State, 18 Ark. 540.

[5] The State *v.* Kyle, 10 Misso. 389.

[6] The State *v.* Ames, 1 Misso. 524.

under the act concerning crimes and their punishments, an indictment charging that one F. "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, &c., for the purpose of playing games of chance for money and property," is held to be good.[1]

V. *As to Horse-racing and the like.*

§ 927. **Indiana — Necessary Averment — Form of Indictment.** — A statute in Indiana makes indictable "any person who shall knowingly suffer his horse, mare, or gelding to be run in what is commonly called a horse-race, along a public highway in this State."[2] And it is held, that an indictment upon this statute need not set out the *termini* of the highway.[3] Bicknell furnishes the following form of the indictment: —

"That A. B. on, &c., at said county, unlawfully and knowingly suffered his horse to be then and there run in a certain race, commonly called a horse-race, in and along a certain public highway then and there situate, leading from New Albany to Mooresville, in said county, contrary," &c.[4]

§ 928. **Proof of Highway.** — In matter of proof, evidence that the road, upon which the racing was done, is a road leading from one town to another in the county, is sufficient *prima facie* evidence to sustain the averment in the indictment that it was upon a public highway.[5]

§ 929. **Betting on Horse-race.** — In Tennessee, an indictment alleging that the defendant "unlawfully did bet twenty dollars upon a horse-race, and . . . that said horse-race was not run upon a track or path kept for the purpose of horse-racing," was held to be insufficient; because, to constitute the offence, the race must be run, and it does not appear from this allegation that any race was run.[6]

[1] The State *v.* Flack, 24 Misso. 378.

[2] Watson *v.* The State, 3 Ind. 123.

[3] The State *v.* Armstrong, 3 Ind. 139; The State *v.* Burgett, 1 Ind. 479; The State *v.* Brown, 1 Ind. 532. And see Myers *v.* The State, 1 Ind. 251.

[4] Bicknell Crim. Pr. 430.

[5] Watson *v.* The State, 3 Ind. 123.

[6] Dobkins *v.* The State, 2 Humph. 424. Yet, in an earlier case, an indictment in nearly the same terms was held to be adequate. The State *v.* Posey, 1 Humph. 384.

§ 930. **Betting on Shooting-match.** — In this State, also, the presentment for betting on a shooting-match must, in order to show the act to be unlawful within the provisions of the statutes, charge that the shooting was within two hundred yards of a public road of the first or second class.[1]

CHAPTER XL.

BETTING ON ELECTIONS.

931, 932. Introduction.
933–937. Law of the Offence.
938–949. The Procedure.

§ 931. **General View.** — So many evils grow out of wagers laid on the results of elections, that statutes have been made in most of the States to correct them. These wagers are a species of gaming, therefore this subject might have been properly enough treated of in connection with the general one of gaming, in the last two chapters. Its elucidation, however, in a separate chapter will be more convenient for the reader.

§ 932. **How divided.** — We shall consider, I. The Law of the Offence; II. The Procedure.

I. *The Law of the Offence.*

§ 933. **Civil Jurisprudence — Recovering Bet — Policy of Law.** — Aside from any statutory provision, betting on an election is contrary to the policy of the law, and, as a general doctrine, where there is no statute governing the matter, the stake cannot be recovered in an action at law, even in a suit against the stakeholder.[2] Moreover there are, in some of the States, statutes intended to enforce this doctrine.[3]

[1] The State *v.* Bess, 5 Cold. 55.

[2] Ball *v.* Gilbert, 12 Met. 397; Worthington *v.* Black, 13 Ind. 344; Murdock *v.* Kilbourn, 6 Wis. 468. 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; Commonwealth *v.* Moore, 2 Dana, 402. And see Conner *v.* Ragland, 15 B. Monr. 634.

§ 934. **Criminal — Statutes — Kentucky — Alabama — Indiana.** — The statutes of the various States are not quite uniform in their terms; but, in substance, they are so nearly so as to render a general exposition of them helpful. Thus, the statute of Kentucky provides for the punishment of any person who "shall wager or bet any sum of money, or other thing, upon the election of any of the officers" mentioned in a previous section, "within six months next before the election."[1] And the language of the Alabama enactment is similar; namely, "Every person who shall hereafter make any bet or wager of money or other thing of value, upon any election in this State," &c.[2] The Indiana enactment is as follows: "Any person who shall bet or wager any money or other valuable property on the result of any election in this or any other State, shall, upon conviction thereof, forfeit and pay to the State of Indiana, for the benefit of the common-school fund, any sum not less than the amount so bet or wagered, nor more than twice said amount."[3]

§ 935. **Result over — Presidential Election — Another State.** — The foregoing Alabama provision has been held not to be applicable to a case of betting after the result is over.[4] But in Mississippi it is held, that betting upon the uncertain result of an election, whether before or after the time when the votes are in fact cast, is within the statute.[5] These statutes are not construed to interfere with betting on elections out of the State; or to extend to unauthorized elections within the State;[6] and even, in Illinois, the act was held not to apply to a wager on the vote of Kentucky for President of the United States.[7] Yet here again the Mississippi court held the statute to be violated by a betting, in this State, upon the result of an election held in another State.[8] And where the wager was upon the entire result of the presidential election, the Tennes-

[1] Commonwealth *v.* Kirk, 4 B. Monr. 1.

[2] Givens *v.* Rogers, 11 Ala. 543. For the Ohio law, see Veach *v.* Elliott, 1 Ohio State, 139.

[3] Bicknell Crim. Pr. 425, referring to Laws, 1857, p. 35; 2 G. & H. 465, note f.

[4] The State *v.* Mahan, 2 Ala. 340.

[5] Miller *v.* The State, 33 Missis. 356.

[6] Huckerson *v.* Benson, 8 Misso. 8.

[7] Morgan *v.* Pettit, 3 Scam. 529. But a bet on the vote of Illinois, in a presidential election, is within the statute. McClurken *v.* Detrich, 33 Ill. 349.

[8] Miller *v.* The State, 33 Missis. 356.

see court held it to be within the enactment, which had the words "any election or elections in this State." "The presidential election," said Reese, J. "is an election in this State, within the words of the statute; and the fact that the result depends, not upon the exclusive action of this State, but upon the joint action of many States, does not take the case out of the words of the statute. The offence is also within the meaning and object of the statute, which was to preserve the freedom and purity of elections, and exclude from them the operation of motives not founded on, but adverse to, the public good." [1]

§ 936. **"Game" — Betting on Game.** — A statute in Indiana provided, that "every person who shall, by playing or betting at or upon any game or wager, either lose or win any article of value, shall be fined not exceeding fifty dollars;" and it was held, that an election bet comes within the provision.[2] Still it was held, that an election is not a "game," within the statute which permits the loser to recover back the money "if any person by betting on any game, or betting on the hands or sides of such as play at any game, shall lose," &c. And the observation was made, that "a wager is not a game, a game is not a wager." [3]

§ 937. **What is a Betting.** — We have seen,[4] that a bet implies risk[5] in both parties; and so, where one sold another goods at a fair valuation, to be paid for when a particular candidate should be elected, the transaction was held not to be a wager. In such a case, the purchaser could in no event sustain a loss.[6] But where the price agreed upon for the goods is above their value, the buyer may suffer loss; namely, the difference between their agreed and actual worth; and the transaction is a wager.[7] And there are other cases which hold generally, that a promise to pay for goods, or a note made payable, if a

[1] Quarles *v.* The State, 5 Humph. 561; ante, § 205. And see Williams *v.* The State, 12 Sm. & M. 58. See further on the matter of this section, Commonwealth *v.* Kennedy, 15 B. Monr. 531.

[2] Hizer *v.* The State, 12 Ind. 330.

[3] Woodcock *v.* McQueen, 11 Ind. 14.

[4] Ante, § 871.

[5] The contingency is determined when the vote is cast, though the official count and returns have not been made. Hizer *v.* The State, 12 Ind. 330.

[6] Quarles *v.* The State, 5 Humph. 561.

[7] Givens *v.* Rogers, 11 Ala. 543; Parsons *v.* The State, 2 Ind. 499.

particular candidate for office is elected, cannot be the foundation of an action at law, being a wager contract.[1] A bet that a particular candidate will receive a number of votes mentioned,[2] or will beat another candidate,[3] and a bet upon the general result of the election,[4] are equally within the statutes. And if the parties agree that the one who fails in his estimate shall make the other a present of a coat, the case is in law a bet, equally as if it was such in words.[5]

II. *The Procedure.*

§ 938. **Winning or losing by Bet — Form of Indictment.** — The Indiana statute against winning or losing by a bet has already been given.[6] Upon this statute, the following form of the indictment was adjudged good: —

"That A, &c., on, &c., at, &c., unlawfully did win and take from one B, one hat, of the value of three dollars, by then and there unlawfully betting and wagering with the said B for the said hat, upon [a certain wager, to wit,[7]] the result of a certain election had and held on the, &c., in the State of Indiana, for the election of Governor of the State, contrary," &c.[8]

§ 939. **Betting — Form, &c.** — A statute of Mississippi made punishable every person who "shall wager or bet, or who shall promote or encourage the wagering or betting of any money or other valuable thing upon any cock-fight, or duel, or upon the result of any election of any kind soever." And the following form of the indictment, in a case in which judgment was arrested for the illegal constitution of the grand jury, appears to have been deemed good: —

"That A, &c., on, &c., at, &c., bet a fifty-dollar bank-note against a horse, with one B, upon the result of a certain election, to be held on, &c., in the State of Kentucky, for presidential electors," &c.[9]

[1] Craig *v.* Andrews, 7 Iowa, 17; Sipe *v.* Finarty, 6 Iowa, 394; Nudd *v.* Burnett, 14 Ind. 25.

[2] Commonwealth *v.* Kirk, 4 B. Monr. 1.

[3] Commonwealth *v.* Pash, 9 Dana, 31.

[4] The State *v.* Cross, 2 Humph. 301.

[5] Cain *v.* The State, 13 Sm. & M. 456.

[6] Ante, § 936.

[7] These words are clearly superfluous; and Bicknell, who adopts this form in other respects, omits them. Bicknell Crim. Pr. 427.

[8] Hizer *v.* The State, 12 Ind. 330.

[9] Miller *v.* The State, 33 Missis. 356. And see Williams *v.* The State, 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.

§ 940. **Continued.** — In Pennsylvania, the following form has been held to be sufficient: —

"That A, &c., on, &c., at, &c., did lay a wager and bet of fifty dollars, with a certain Jacob Clark,[1] that a certain Joseph Ritner would be elected Governor of the Commonwealth of Pennsylvania, at an election to be held in said Commonwealth, under the constitution and laws of said Commonwealth, on, &c.; the said Joseph Ritner then and there being a candidate nominated for public office, to wit, for the office of Governor of said Commonwealth; contrary to the act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania." [2]

§ 941. *Particulars as to the Form of the Indictment:* —

The Election. — Of the form given in the last section, Sergeant, J. observed: "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 be held at that time; and that the Commonwealth would be bound in this charge to prove both these facts." [3] It is believed that the reader may derive some help on this subject from consulting the forms, and observations on them, to be found under the title "Election Frauds and Obstructions." [4]

§ 942. **Expanding Allegation beyond Statutory Words — Candidate — Kentucky.** — The language of the Kentucky statute is as follows: "If any person or persons shall wager or bet any sum of money, or any thing of value, upon any election under the constitution and laws of this Commonwealth, or under the Constitution and laws of the United States, he or they so offending shall," &c. And, upon the construction of this provision, and the allegations necessary in the indictment, Marshall, C. J. observed: "It is not a penal offence, 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

[1] I have here abridged this form by omitting a few clearly unimportant words.

[2] Sherban *v.* Commonwealth, 8 Watts, 212.

[3] Sherban *v.* Commonwealth, 8 Watts, 212, 213.

[4] Ante, § 828 et seq.

to be voted for, or is expected to be a candidate for it. It is not a statutory offence 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 offence to bet either that he will or that he will not be elected." Therefore it was held, that the indictment must be expanded beyond the words of the statute,[1] to include the matter thus indicated; or, to express the point differently, an indictment is not sufficient if it simply sets out a bet, that, at an approaching election, which it specifies, a particular person who is 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.[2] And this doctrine, upon the theory of which the first two of the foregoing approved precedents are *not* drawn, is, at least, assumed, if not adjudged, in some of the other States.

§ 943. **Continued.** — To the writer it seems, that this is a strictness of construction and practice which the true policy of the law does not demand. If, before the political parties had held any preliminary meetings, one person should bet with another that a particular individual named would not be elected to an office mentioned, the evil which was meant to be prevented by the statute would be done; and the offence, thus committed, ought not to be deemed in matter of law to be taken away, should the former person, stimulated by his interest in the bet, spread so many falsehoods about the individual on whose failure he had pledged his money, as to preclude his even being talked of afterward for a candidate. Such a case, coming, therefore, within the policy of the law, as well as within its words, would not require expansion in the allegation beyond the statutory terms.

§ 944. **Naming Person with whom Wager is made.** — It is not sufficient, according to what is probably the current of decision, for the indictment merely to allege that the defendant bet so and so; but it must mention the name of the person, if known, with whom the bet was made, or state the name to be

[1] Crim. Proced. 2d ed. I. § 623–630; ante, § 378–381, 386, 387, 406, 447.

[2] Commonwealth *v.* Shouse, 16 B. Monr. 325.

unknown.[1] But, in Missouri, an indictment in the following form was held to be good, though the form is not one which should be exactly copied in practice: "That A, &c., and B, &c., on, &c., at, &c., with force and arms did then and there unlawfully bet and wager a sum of money, to wit, one hundred dollars, on the result of an election which was held on the first Monday in August, in the year, &c., between one John S. Phelps and Waldo P. Johnson, who were then running as candidates to represent the sixth congressional district in the State of Missouri, in the Congress of the United States of America; said election being then and there authorized by the Constitution of the United States of America, and by the laws of the State of Missouri; contrary," &c. Said Ryland, J.: "This indictment is substantially good. The sum here bet is mentioned; the defendants, though not charged expressly with betting with each other, yet must be so understood to have bet; there is no averment that they bet with any other person or persons, and the plain import of the charge is, as alleged in this indictment, that they bet with each other. The venue to the authority by which the election was held is not necessary, is useless; and it cannot have the effect of rendering the indictment uncertain or repugnant because two different times have previously been stated in the indictment."[2]

§ 945. **Sum or Value.** — In one of the foregoing forms,[3] it is alleged that the defendant "bet a fifty-dollar bank-note against a horse," and the value of the bank-note is only thus inferentially mentioned, while that of the horse is in no way given. In the other forms, the value of the thing is set down. Is the allegation of value necessary? In an indictment on one of the before mentioned Indiana statutes,[4] it is; because it is an element in the punishment to be

[1] Lewellen *v.* The State, 18 Texas, 538; The State *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." The State *v.* Trotter, 5 Yerg. 184. See The State *v.* Smith, Meigs, 99; post, § 1037.

[2] The State *v.* Smith, 24 Misso. 356, 357.

[3] Ante, § 939.

[4] Ante, § 934.

inflicted.[1] Moreover, value may in some circumstances be a necessary part of the description of the thing bet; and there, on this ground, it must be set out. But, on principle, it is not important to be alleged in other cases.[2]

§ 946. **Summary of Requisites.** — The indictment, therefore, to be good, must state when the election was to be held.[3] But it need not add, that the law required it to be held on the day thus named.[4] The indictment must also mention what was to be the purpose of the election; that is, whether for President of the United States, for Governor of the State, and the like.[5] Where, in Tennessee, this branch of the allegation was, that "there was an election held in the State of Tennessee, for President and Vice-President of the United States of America," it was adjudged to be sufficient; though, in exactness of language, the election was for electors of President and Vice-President. Said Caruthers, J.: "It is true that the election, in form, is for electors under the Constitution; but it is, in substance, for President and Vice-President."[6] Yet, in Mississippi, where the indictment charged a 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. It was observed, that the election mentioned in the indictment, and the one mentioned in the proof, are two distinct elections, held at different times and places.[7]

§ 947. *The Evidence:* —

Result of Election — Parol. — It was decided in Mississippi, that, on the trial of an indictment for betting upon the result of a presidential election, the result of the election may be proved by parol. For, among other reasons, said Thacher, J.: "Such a matter of great public interest is universally known throughout the land, and can, therefore, be proved or disproved with absolute certainty by parol proof."[8] Probably,

[1] Ante, § 370, 371, 427, 444, 457.

[2] And see post, § 949.

[3] Lewellen *v.* The State, 18 Texas, 538.

[4] The State *v.* Banfield, 22 Misso. 461.

[5] Bellair *v.* The State, 6 Blackf. 104.

[6] Porter *v.* The State, 5 Sneed, 358, 359.

[7] Gamble *v.* The State, 35 Missis. 222.

[8] Williams *v.* The State, 12 Sm. & M. 58, 63. And see, as to Indiana, Hizer *v.* The State, 12 Ind. 330.

in most of the States, it is immaterial, to the constitution of the offence itself, what the result is; therefore there is no need for it to be either alleged or proved in any way.

§ 948. **As to the Time of the Bet.** — In Mississippi likewise, if the indictment charges a betting on an election, and it appears from the dates to have been made before the election was held, this will be supported by proof that the bet was made after the election took place, yet before the result was known.[1]

§ 949. **Sum or Value.** — We have seen when this must be alleged, and when it need not be.[2] If the statute does not make it material to the constitution of the offence whether a larger or a smaller sum is bet, a variance between the allegation and the proof, as to the sum, is immaterial.[3]

CHAPTER XLI.

LOTTERIES.

950. Introduction.
951-960. Law of the Offence.
961-966. The Procedure.

§ 950. **How the Chapter divided.** — We shall consider, I. The Law of the Offence; II. The Procedure.

I. *The Law of the Offence.*

§ 951. **General View.** — Lotteries are, as we shall see, a species of gaming. They were formerly permitted by the law, and even encouraged under special circumstances when they were established to promote some ulterior object of a useful kind. But a more enlightened public sentiment has at length prevailed, or prevailed in part; and it is now seen, that they are an evil both by the wholesale and retail, while the other sorts of gaming are merely evils by the retail. They are now

[1] Miller *v.* The State, 33 Missis. 356.
[2] Ante, § 945.
[3] Commonwealth *v.* McAtee, 8 Dana, 28.

utterly done away with in most of our States, as far as legislation can accomplish this object; while, in a few of them, they are occasionally tolerated under restrictions, when established to promote what is assumed to be some good object.

§ 952. **What is a Lottery — Meaning of the Term.** — The term lottery is said to have no technical signification in the law; but, to ascertain its meaning, we are to consult the common usage of the language.[1] But this comes merely from the fact that the word is recent in penal legislation; and, in respect of every word, there has been some period in the law in which it had no technical legal signification, but, for its meaning, the courts were to look to common usage. Still it is also true of the word "lottery," as of any other, that, as fast as it is construed by the courts, so fast and so far it acquires a technical meaning. Many judicial constructions have been given of this word; and, though it is not yet possible to frame a definition which is both precise and certainly accurate at all points, there are materials existing out of which an attempt, with a result approximating accuracy, can be made. A lottery, therefore, may be defined to be a scheme by which, on one's paying money, or some other thing of value, he obtains the contingent right to have something of greater value, if an appeal to chance, by lot or otherwise under the direction of the managers of the scheme, should decide in his favor. This definition is an attempted, though possibly not a real, improvement upon an earlier one by the author, as follows: a game wherein a person, paying money or other thing of value, becomes entitled to money or to some other valuable thing, on contingencies to be determined by "lot" cast by the managers of the game. It implies some division of property by chance.[2] These

[1] Dunn *v.* People, 40 Ill. 465; United States *v.* Olney, 1 Abb. U. S. 275; and other cases cited to this section.

[2] Swain *v.* Bussell, 10 Ind. 438. In New York and Illinois, it has been laid down in substance, that a lottery is a scheme for the distribution of prizes by chance. Rolfe *v.* Delmar, 7 Rob. N. Y. 80; Dunn *v.* People, 40 Ill. 465. In United States *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 either in money or other articles."

Webster's Dictionary. — "A disposition of prizes by lot or chance."

Bouvier's Law Dictionary. — "A

definitions, though differing slightly, and though neither is to be certainly relied on as the result of adjudication at every point, are in effect and in the main sustained by judicial decision.[1] Let us proceed to look at a few points.

§ 953. **Prize greater than Money paid.** — According to one of the foregoing two forms of the definition, there would seem to be no need that the person purchasing the chance should, by the scheme, be under any circumstances entitled to draw out more than he puts in; while, according to the other form, this is an essential element. Perhaps it will never be decided which of these two views of the law is correct; because, if in no contingency could one draw out more than he invests, no one would practically patronize a lottery. All lotteries, therefore, provide for this chance. Referring, then, to the common usage of the language, it would seem that this element is essential in a lottery scheme.

§ 954. **By whom Lot to be cast.** — From the foregoing two definitions, it would seem to result, that, unless the lot is in some way to be cast or ascertained by the managers of the scheme, it is not a lottery. Yet, according to definitions quoted in a note to the same section, this would not seem to

scheme for the distribution of prizes by chance."

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 goes on to say: "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." p. 278, 279. Again: "If persons *already* owning family plate, pictures, or other property, not susceptible of division, or even equal division, chose 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." p. 281.

[1] Almshouse *v.* Art Union, 3 Seld. 228; People *v.* Art Union, 3 Seld. 240, 13 Barb. 577; People *v.* Payne, 3 Denio, 88; The State *v.* Pinchback, 2 Mill, 128; Wooden *v.* Shotwell, 3 Zab. 465; Commonwealth *v.* Chubb, 5 Rand. 715; and the other cases cited to this section. See Commonwealth *v.* Garland, 5 Rand. 652.

be an essential element. The question does not appear to be decided in the law; but, if the course of reasoning adopted in the last section is sound, it would seem to point to the result indicated by the two definitions in the text. In those schemes which were called lotteries before the statutes were enacted, the managers of the lottery performed a function more or less analogous to casting the lot. Still, if, to evade a statute against lotteries, the managers should devise some other way of playing this part of the game, doubtless their scheme would be held to be a lottery.

§ 955. **Some Adjudged Points.** — It has been considered unnecessary to a lottery, that there should be any blanks;[1] but there must be some property disposed of by lot.[2] The American Art Union is held to be a lottery.[3] So is what is called a "gift sale" of books,[4] and so is a "prize concert."[5] This is one species of gaming.[6]

§ 956. **Continued.** — It is thus seen, that, for a particular gambling device to be a lottery, it need not pass under that name; indeed those devices which, since the existence of statutes making the establishment of lotteries penal, most frequently claim the attention of the courts as being lotteries, are, by those who get them up, called by some other name. Thus, the sale of envelopes containing, besides printed songs and recipes, a card, descriptive of some article which the purchaser of the envelope may, at his option, buy for a sum of money named, is a violation of the law against the sale of lottery tickets.[7] And a scheme for the disposal of town lots, by

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

[2] People *v.* Payne, 3 Denio, 88.

[3] Almshouse *v.* Art Union, and other cases, supra.

[4] The State *v.* Carke, 33 N. H. 329.

[5] Commonwealth *v.* Thacher, 97 Mass. 583.

[6] Thus, in Tennessee, the court laid down the doctrine, that a "gift enterprise," in which a tradesman sets his wares at market value; and, by way of inducement to purchase, gives each purchaser a ticket whereby he is entitled to win, if he may, certain articles, the result to be determined by chance; is gaming, and all persons aiding or abetting in the transaction are liable to indictment therefor. Such a scheme is, in the language of Caruthers, J. "that species of gaming called a lottery." And he added: "A lottery is a game of hazard, in which small sums are ventured for the chance of obtaining greater. ... . Gaming is an agreement between two or more, to risk money on a *contest* or *chance* of any kind, where one must be *loser* and the other *gainer*. Some games depend altogether upon skill, others upon chance, and others are of a mixed nature." Bell *v.* The State, 5 Sneed, 507, 509.

[7] Dunn *v.* People, 40 Ill. 465. Law-

the terms of which a number of lots are sold, and others are reserved to be distributed by lot among the purchasers of the first portion, so that the chance of obtaining one of the reserved or prize lots forms a part of the inducement on which each purchaser pays the price agreed for the lot sold to him, has been held to be a "lottery" within the operation of a law of Congress imposing a tax on lotteries, for purposes of revenue.[1] Where a gift exhibition was conducted as follows, it was adjudged to be a lottery. Each person at the door of the show got a ticket with a number upon it. At the close of the exhibition, one of the proprietors called at will any number, and the person holding the corresponding ticket presented himself, when, if the exhibitor liked his appearance, or thought he would advertise the show well for him, he presented him with one of the articles advertised as gifts. It was also one of the terms of the project that, at the option of the proprietors, the distribution of presents should be dispensed with. Counsel urged, on behalf of the defendants, that their keeping the disposal of the things so completely under their control, and disposing of them finally only as gifts, prevented the scheme from being a lottery. But the court held otherwise. "This ingredient of chance," said Beasley, C. J. "is obviously the evil principle against which all prohibitory laws are aimed." Here all was chance; as, whether a man's number would be called, whether the exhibitor would fancy his appearance, and

rence, J. in delivering the opinion of the court, said: "It is true, as urged by counsel, that each envelope contained, besides the card, a number of songs and recipes, and t at the card or ticket, representing an article of merchandise to be bought for one dollar, confers simply a right to buy which the holder can exercise or not at his option, and, if he buys, he does so with his eyes open, and with the opportunity of knowing the value of what he purchases. This is true; but the element of chance lies, 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." p. 468.

[1] United States *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." p. 280.

whether he would be in the mood to make any distribution of prizes.[1]

§ 957. **Whether Constitutional — Tax without Conviction for Crime — Seizure of Materials for Lottery.** — The question of the constitutionality of statutes restrictive of lotteries has been agitated in various forms, yet not so as to develop many general principles.[2] An act passed in Virginia, Feb. 25, 1834, regulating and substantially abolishing lotteries, was held to be constitutional.[3] In Missouri there are decisions both for and against the power to prohibit lotteries, under the circumstances therein mentioned.[4] In South Carolina, an enactment provided, "That a tax of ten thousand dollars be, and the same is, hereby imposed upon every person or persons who shall after the passing of this act open or keep open any office for the sale of any lottery tickets, or who shall sell within this State any lottery tickets, in any other lotteries than those which are authorized by the laws of this State. And it shall be the duty of the tax collectors in the district where such lottery offices are opened, in default of the person or persons keeping such offices to return the same and pay the tax imposed by this law, to issue execution as in other cases of defaulters." But the court held, that this tax could not constitutionally be collected, until the liability of the party was determined by the verdict of a jury.[5] The Massachusetts statute,[6] authorizing magistrates to issue warrants for the seizure of lottery tickets, or materials for a lottery, unlawfully had in possession, is constitutional.[7]

[1] The State *v.* Shorts, 3 Vroom, 398, 401. An English case holds it to be a lottery where the programme of an entertainment states, 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," under the following circumstances. The public were admitted on purchasing tickets, which were not numbered. The seats of the audience were numbered. At the close of the entertainment the proprietor called out a number on a seat, and delivered one of the articles to the person occupying that seat; and in the same way distributed all the other articles among the audience. Morris *v.* Blackman, 2 Hurl. & Colt. 912.

[2] See ante, § 856.

[3] Phalen *v.* Commonwealth, 1 Rob. Va. 713.

[4] The State *v.* Sterling, 8 Misso. 697; The State *v.* Hawthorne, 9 Misso. 385.

[5] The State *v.* Allen, 2 McCord, 55.

[6] R. S. c. 142.

[7] Commonwealth *v.* Dana, 2 Met. 329. And see post, § 959, note.

§ 958. **Advertising — Having Tickets for Sale, &c.** — There are statutes against advertising lotteries,[1] and against having for sale or selling lottery tickets,[2] and the like;[3] but a mere reference to the adjudications under them will answer instead of an extended examination.

§ 959. **Lotteries in other States.** — We have also seen,[4] that, where a statute prohibits the sale of lottery tickets in "any lottery not authorized by law," the prohibition extends to all lotteries not authorized in the particular locality; it being no defence to the party selling, that the lottery is authorized by the laws of some other State or country. Upon the same

[1] Ante, § 207; Commonwealth *v.* Clapp, 5 Pick. 41; Commonwealth *v.* Hooper, 5 Pick. 42; People *v.* Charles, 3 Denio, 212, 610; The State *v.* Sykes, 28 Conn. 225; Charles *v.* People, 1 Comst. 180. In Connecticut, a statute makes it a criminal offence to publish, within this State, any written or printed proposals to sell or procure lottery-tickets (see post, § 959.) The defendant published the following as an advertisement in a newspaper issued by him: "Maryland State Lottery, R. F. & Co. Managers. Caution notice. Persons living at a distance should be cautious of whom they order lottery-tickets. The country is flooded with bogus lotteries. The Kentucky State Lottery, under our management, is the only lottery in the United States which is legally decided by the Maryland drawings. Purchase in the Maryland State lotteries; then you are sure of being right. In ordering in them you are sure of fair drawings. If you order from any licensed vendor in Baltimore, do not receive any but managers' tickets and managers' printed certificates of packages. The latter have our lithographed signature. R. F. & Co., Managers of Maryland State Lotteries." An information charging the defendant with a violation of the statute by the above publication, set out the publication, but did not aid it by any averments of its meaning; and, on demurrer, it was held, that, giving to its language only its natural and ordinary import, it was not a proposal to sell or procure lottery-tickets within the statute. Said Sandford, J.: "The statute is a penal one; and, in order to subject the accused to its penalties, he must be shown to have offended against both its spirit and its letter." The State *v.* Sykes, supra, p. 228.

[2] Ante, § 205; The State *v.* Scribner, 2 Gill & J. 246; Commonwealth *v.* Chubb, 5 Rand. 715; Commonwealth *v.* Dana, 2 Met. 329; People *v.* Payne, 3 Denio, 88; Phalen *v.* Commonwealth, 1 Rob. Va. 713; People *v.* Warner, 4 Barb. 314; People *v.* Sturdevant, 23 Wend. 418; Salomon *v.* The State, 27 Ala. 26. The statutes of Pennsylvania, for the suppression of lotteries, do not forbid a citizen of Pennsylvania to purchase a lottery-ticket in Maryland, where lotteries are authorized by law; and one for whom an agent has purchased a ticket in Maryland, in pursuance of an agreement made in Pennsylvania, may maintain an action in Pennsylvania against such agent for the money drawn upon such ticket. McNight *v.* Biesecker, 1 Harris, Pa. 328.

[3] Freleigh *v.* The State, 8 Misso. 606; Commonwealth *v.* Chubb, 5 Rand. 715; The State *v.* Pinchback, 2 Mill, 128; The State *v.* Mace, 5 Md. 337; Commonwealth *v.* Lottery Tickets, 5 Cush. 369; Morton *v.* Fletcher, 2 A. K. Mar. 137.

[4] Ante, § 205.

principle, it has been held to be a misdemeanor, in New York, under the Revised Statutes, to publish there an account of a lottery to be drawn in another State or territory, though such lottery be allowed by the law of the place where it is to be drawn.[1] And the Connecticut statute making it a criminal offence to publish, within the State, any written or printed proposals to sell or procure lottery tickets, is construed to refer to the tickets of foreign as well as domestic lotteries; and to those of lotteries legally established, as well as to those which are not; and to tickets of such lotteries offered for sale in other States, as well as within the State of Connecticut, — the statute forbidding the publishing, within the State, of proposals to sell or procure any lottery tickets whatever. Moreover, the statute is constitutional.[2]

§ 960. **Disposal of Property — Municipal Corporation.** — A charter granted to a municipal corporation must be construed in harmony with the other laws. Thus, if it authorizes the corporation 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, if lotteries are prohibited by the general law.[3]

II. *The Procedure.*

§ 961. **Indictment — General View.** — The statutes for the suppression of lotteries are in various forms of provision, rendering necessary a great variety in the forms of the indictment. Indeed, into every case many considerations relating to the form of the indictment enter, and these are so diverse that from the form in one case we can hardly derive even hints as to the form in a case of a different nature. At the same time, the indictment is not often difficult for one to draw who is familiar with the general rules of criminal pleading.

§ 962. **Indiana Statute and Form.** — A statute in Indiana is as follows: "If any person shall sell a lottery ticket or tickets, or share in any lottery scheme or gift enterprise, or act as agent

[1] Charles *v.* People, 1 Comst. 180.

[2] The State *v.* Sykes, 28 Conn. 225. And see ante, § 958, note. An employment to sell tickets in a foreign lottery is illegal, and no action can arise out of it. Rolfe *v.* Delmar, 7 Rob. N. Y. 80. See also Commonwealth *v.* Harris, 13 Allen, 534.

[3] The State *v.* Krebs, 64 N. C. 604.

for any lottery scheme or gift enterprise, or aid or abet any person or persons to engage in the same, or shall transmit money by mail or express, or otherwise transmit the same, to any lottery scheme or gift enterprise for the division of property to be determined by chance, or shall make or draw any lottery scheme or gift enterprise for a division of property not authorized by law, such person, on conviction, shall," &c. And the following is a form of the indictment for selling lottery tickets, &c. : —

"That A. B., on, &c., at, &c., unlawfully sold to C. D. for a certain sum of money, to wit, for the sum of one dollar then and there paid by the said C. D. to the said A. B., one share and ticket in a certain gift enterprise and lottery scheme for the division of personal property and money by chance and lot in manner following [here describe particularly all the property to be divided and the plan of distribution], which said gift enterprise and lottery scheme was commonly called [here give the name], and which said ticket and share was of the following tenor, to wit [here give an exact copy of the ticket, &c.], contrary," &c.[1]

This form will be suggestive ; but the reader should not place too much reliance on it, in considering indictments drawn on differing statutes in other States, and under other circumstances.

§ 963. **Having Tickets in Possession with Intent — Within the State.** — If the indictment is for having in possession lottery tickets, with the intent to sell or offer for sale the tickets contrary to the provisions of a statute, the allegation need not go beyond the statutory words and charge that the selling or offering was intended to be within the State.[2]

§ 964. **Setting on Foot Lottery — Name — Description.** — Where the indictment is for setting on foot a lottery, contrary to the provisions of the statute, it is not necessary, according to a New York case, to set out the tickets sold, or the names of the purchasers, if these are unknown to the grand jury, and alleged to be so in the indictment. But it was further held, that, in the absence of such an allegation, the count should contain a particular description of the lottery. The

[1] Bicknell Crim. Pr. 431, 432 ; referring, for the statute, to Laws, 1859, p. 128 ; 2 G. & H. 468, § 32. See, in connection with this, Commonwealth *v.* Thacher, 97 Mass. 583 ; Commonwealth *v.* Harris, 13 Allen, 534 ; The State *v.* Shorts, 3 Vroom, 398 ; Dunn *v.* People, 40 Ill. 465. And see post, § 965.

[2] Commonwealth *v.* Dana, 2 Met. 329. For a like point, see Commonwealth *v.* Clapp, 5 Pick. 41. And see, as to following the statute, The State *v.* Kennon, 21 Misso. 262.

mere averment that the name of the lottery is unknown to the grand jury is not adequate in excuse.[1]

§ 965. **Selling Lottery Ticket — How describe, &c.** — In New Hampshire an indictment averred, that 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. And it was held, that, as there was no lottery authorized by the legislature, the indictment was sufficient. "The rule is," said the court, "that the charge must contain such a description of the crime that the respondent may know for what crime he is to answer, that the jury may appear to be warranted in their conclusion of guilty or not guilty upon the premises delivered to them, and that the court may see such a definite crime that they may apply the punishment which the law prescribes."[2] But this is a rule applicable to all sorts of indictments, and it has no special reference to the class now under consideration.

§ 966. **General Views — (Points, in the Note).** — Let us, therefore, instead of burdening the text with these mere points, place them in a note.[3] And, in practice, the reader should

People *v.* Taylor, 3 Denio, 91, 99. A statute in Massachusetts made punishable "every person who shall set up or promote any lottery, not authorized by law, for money, or shall dispose of any property of value, real or personal, by way of lottery; and every person who shall, 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." And an indictment which charged 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," was held to be sufficient; though it did not allege, that the lottery so permitted to be set up was a lottery not authorized by law, for money, and did not state the name of the lottery, 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. Commonwealth *v.* Horton, 2 Gray, 69.

[2] The State *v.* Follet, 6 N. H. 53. See ante, § 962.

[3] In Indiana, an information for selling tickets for a lottery to be drawn in March, is not sustained by proof of the sale of tickets for a lottery to be drawn in April. To support the information, the tickets sold must be produced, if possible. Whitney *v.* The State, 10 Ind. 404. In Pennsylvania, the indictment for selling lottery tickets not authorized by statute should set out the name of the lottery, and the number of tickets. Commonwealth *v.* Gillespie, 7 S. & R. 469. The sale of lottery tickets being totally prohibited in New York, it is not necessary to aver that the lottery, for selling a ticket

trust more to his general knowledge of the rules of criminal pleading and of evidence, than to what he finds adjudged in particular cases on statutes unlike his own.

CHAPTER XLII.

DRUNKENNESS.[1]

967. Introduction.
968–973. Law of the Offence.
974–981. The Procedure.

§ 967. **How the Chapter divided.** — We shall consider, I. The Law of the Offence; II. The Procedure.

I. *The Law of the Offence.*

§ 968. **At Common Law — General Doctrine — Private Drunkenness — Public and Notorious.** — We saw, in another connection,[2] that mere intoxication is not indictable at the common law. But a person drunk in public may be deemed a sort of public nuisance; and so the legal doctrine seems to be, that

in which a party is indicted, was not expressly authorized by law. People *v.* Sturdevant, 23 Wend. 418. An indictment for publishing an account of an illegal lottery, which set forth *in hæc verba* the lottery scheme, and showed that the prizes consisted of sums of money, was held to be good, although it was not otherwise averred that the lottery was set on foot for the purpose of disposing of money, land, &c. Charles *v.* People, 1 Comst. 180. And see People *v.* Warner, 4 Barb. 314; Commonwealth *v.* Hooper, 5 Pick. 42. In Georgia, a violation of the lottery law of Dec. 23, 1853, cannot be punished by indictment. Swan *v.* The State, 29 Ga. 616. In Massachusetts, an indictment is sufficient if it describes the subject of the offence as "a lottery for money," without setting forth the number or amount of the several prizes into which the scheme is divided. A count charging that the defendants did "set up and promote" the lottery, is not bad for duplicity; and it will be good against those who were simply participants in the scheme. Commonwealth *v.* Harris, 13 Allen, 534. Moreover, in this State, lottery tickets, which, on a warrant illegally issued, have been seized under the provisions of the statute, and brought into court or before a magistrate to be used as evidence, are not liable to be burnt or destroyed by force of the statutory direction. Commonwealth *v.* Lottery Tickets, 5 Cush. 369.

[1] For the doctrines concerning the liability of persons for crimes committed when intoxicated, see Crim. Law, 5th ed. I. § 397 et seq.

[2] Crim. Law, 5th ed. I. § 399.

one going about as a common drunkard commits thereby an indictable common-law offence, — a doctrine, however, not firmly established.[1] The Tennessee court even held, that a single act of drunkenness, public and notorious, comes within the principle;[2] while the North Carolina court decided, that, in the case of a mere single act, there must also be some annoyance to the public.[3]

§ 969. **Juryman Drunk — Justice of Peace — Other Officer.** — Also it has been held, that 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."[4] The same proposition doubtless applies to other officers, on the general ground of a misbehavior in respect of their office.[5] And in Virginia it was adjudged, that drunkenness, by a justice of the peace, while in the discharge of his official functions, is a misbehavior which will furnish cause for amercing him and removing him from office.[6]

§ 970. **Statutes — "Common Drunkard" — "Habitual Drunkard."** — In some of the States there are statutes against being a "common drunkard" or "habitual drunkard." What is such a drunkard is a question which cannot, said a Pennsylvania judge, be determined by "any fixed rule." He added: "Occasional acts of drunkenness do not make an habitual drunkard."[7] And it has been laid down, that an habitual drunkard is one who is in the habit of getting drunk, or is commonly or frequently so, but not necessarily always or universally drunk.[8] Perhaps the doctrine which governs the

[1] The State *v.* Waller, 3 Murph. 229; and the cases cited in the notes next following.

[2] Smith *v.* The State, 1 Humph. 396. But a statute of this State 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 offence." And this statute is held to protect the person in the single instance, though his drunkenness is public and notorious. Hutchison *v.* The State, 5 Humph. 142.

[3] The State *v.* Deberry, 5 Ire. 371; s. p. The State *v.* Waller, 3 Murph. 229.

[4] Pennsylvania *v.* Keffer, Addison, 290.

[5] See Crim. Law, 5th ed. I. § 459 et seq.

[6] Commonwealth *v.* Alexander, 4 Hen. & M. 522, 1 Va. Cas. 156; Commonwealth *v.* Mann, 1 Va. Cas. 308.

[7] Ludwick *v.* Commonwealth, 6 Harris, Pa. 172.

[8] The State *v.* Pratt, 34 Vt. 323.

offence of barratry may be in some measure applicable here; namely, that barratry is a quarrel, not in one or two cases only, but in many, and the proofs must show at least three instances of offending.[1] Still, in Massachusetts, where a statute makes it punishable to be a "common drunkard," an allegation that the defendant was drunk, by the voluntary use of intoxicating liquor, "on divers days and times, not less than three times, within six months last past," whereby (the allegation proceeded) he became a "common drunkard," was held to be insufficient; because the facts thus stated are not in law an adequate foundation for the conclusion. Three times a man might be drunk within six months without being a common drunkard. And Thomas, J. delivering the opinion of the court, added: "The exact degree of intemperance which constitutes a drunkard, it may not be easy to define. But speaking in general terms, and with the accuracy of which the matter is susceptible, he is a drunkard whose habit is to get drunk, 'whose ebriety has become habitual.' To convict a man of the offence of being a common drunkard, it is, at the least, necessary to show that he is an habitual drunkard. Indeed the terms 'drunkard' and 'habitual drunkard' mean the same thing."[2]

§ 971. **"Common Drunkard," continued — Public or not.** — It is not necessary, to constitute a common drunkard under the statute, that the inebriated person should disturb the public:[3] neither, for a person to be guilty of "the crime of drunkenness," need his inebriation be public, but it is sufficient if the party is intoxicated in another person's room in the house in which he resides.[4] Still there are in some of our States statutes against public intoxication.[5]

§ 972. **Continued.** — Moreover, the term "common drunkard" implies a drunkenness from the use of intoxicating liquor; an

[1] Crim. Law, 5th ed. II. § 65.

[2] Commonwealth *v.* Whitney, 5 Gray, 85, 86.

[3] Commonwealth *v.* Conley, 1 Allen, 6, 7. Said Chapman, J. in this case: "The statute does not make a disturbance of the peace a constituent part of the offence, nor does it distinguish between the different effects of drunkenness."

[4] Commonwealth *v.* Miller, 8 Gray, 484.

[5] Hill *v.* People, 20 N. Y. 363; ante, § 968.

inebriety, or something like it, produced by chloroform[1] or opium[2] does not come within the meaning of the term.

§ 973. **Drunk in Street.** — In New Hampshire it has been held, under a statute providing a punishment for any person found drunk in any street, alley, or other public place, that those only are within its provisions who are found drunk, in one of these enumerated localities, within the compact part of a city or village; and that a person, so found, on a common highway in the country, does not violate the statute.[3]

II. *The Procedure.*

§ 974. *Common-law Nuisance of Public Drunkenness:* — **Tennessee Form of Indictment.** — The common-law offence of becoming a nuisance by acts of drunkenness[4] may sometimes be made the subject of an indictment; though generally the indictment will be drawn upon a statute. The following is a common-law form, which was adjudged to be good in Tennessee: —

"That R. T. on, &c., at, &c., and on divers other days before that time, was openly and notoriously drunk, to the disturbance of the public peace, to the great injury of the public morals of the good citizens of the State, and to the evil example, &c., and against the peace and dignity of the State."[5]

§ 975. **Continued.** — In a later Tennessee case, the court held, that a presentment which charged the defendant with being, on a day named, unlawfully, openly, publicly, and notoriously drunk, was insufficient. Said Green, J.: "The difficulty of so describing a single act of drunkenness as to put the party upon his defence, and satisfy him of the facts that are to be proved against him, is such, that, notwithstanding we hold a single act of public and notorious drunkenness to be indictable, we think it always safest to charge the offence as in The State *v.* Tipton," being the case from which the above form is taken.[6]

§ 976. **Further of Common-law Forms.** — It is not quite certain that the indictment thus given would be held, in all the

[1] Commonwealth *v.* Whitney, 11 Cush. 477.
[2] 1 Bishop Mar. & Div. § 813.
[3] The State *v.* Stevens, 36 N. H. 59.
[4] Ante, § 968.
[5] Tipton *v.* The State, 2 Yerg. 542.
[6] Smith *v.* The State, 1 Humph. 396.

States, to be sufficient at the common law. Practically, however, the question will not often arise; for, in most of the States, there are statutes covering this general ground, and the indictment will generally be drawn upon them.

§ 977. *Under Statutes:* —

Massachusetts Statute and Form. — A statute in Massachusetts made it an offence to be a "common drunkard." And a complaint before a justice of the peace, for this offence, drawn in the following form, was held to be sufficient: —

"That A, &c., on, &c., at F, &c., was and is a common drunkard, having been on divers days and times within six months now last past, at said F, drunk and intoxicated, by the voluntary and excessive use of spirituous and intoxicating liquors; against the peace of the Commonwealth, and the form of the statute in such case made and provided." [1]

§ 978. **Continued — Adequate Form.** — The form given in the last section has been employed in subsequent Massachusetts cases. But it is believed that the latter part of the allegation is mere surplusage, — at least, that it is not required, — and that the following brief form is practically better, and is equally good in law: —

That A, &c., on, &c., at, &c., was a common drunkard, against the peace of the Commonwealth, and contrary to the form of the statute in such case made and provided.[2]

The words "common drunkard" cover the terms of the statute in full. And they are like "common scold," "common

[1] Commonwealth *v.* Boon, 2 Gray, 74, Merrick, J. observing: "It is undoubtedly indispensable that nuisances should be alleged, in complaints and indictments, to be to the great damage and common nuisance of all the citizens of the Commonwealth. 1 Chit. Crim. Law, 245, 246; Commonwealth *v.* Smith, 6 Cush. 80. Such an allegation, however, was unnecessary in the complaint against the defendant, because the accusation set forth in it was not of that character. It is alleged, not only that on divers days and times she had been drunk and intoxicated by the voluntary and excessive use of spirituous and intoxicating liquors, but that on a day certain she was a common drunkard. The being a common drunkard is expressly made an offence by the statute. And the words by which the offence is created and defined are fully descriptive of it. They are therefore technical; and, because they are so, a party may well be charged in the general words of the statute." p. 75. In another case, a complaint was held to be inadequate which alleged, that the defendant, "on divers days and times, not less than three times, within six months last past, was drunk by the voluntary use of intoxicating liquor, and so, on the day of making this complaint, is a common drunkard." Commonwealth *v.* Whitney, 5 Gray, 85.

[2] See Commonwealth *v.* Whitney, 5 Gray, 85; Commonwealth *v.* Foley, 99 Mass. 499.

barrator," [1] "assault," [2] and some others which, at the common law, are held to be sufficient in allegation without descending to the particulars, because of the complicated nature of the act, and of the impossibility of finding terms to bring the charge fully and exactly within the constructive meaning of the law.

§ 979. **Whether Offence to be alleged as continuing.** — Something has already been said on this subject in these pages, in discussions of other offences of a continuing nature.[3] Where, in a Massachusetts case, the form of the complaint was, that, on a day named, the defendant "was and is" a common drunkard, "having been at divers days and times since" that day "drunk and intoxicated by the voluntary and excessive use of intoxicating liquors," it was held that drunkenness only on a single day was charged. Plainly this was correct; for only a single day was stated with the requisite certainty.[4] But it was further held, that, on this form of the allegation, the evidence of drunkenness should have been confined to a single day.[5] The adjudication, upon the latter point, is plainly enough in accord with a peculiar doctrine of the Massachusetts court relating to this class of questions,[6] but it cannot be sustained on general principles as held by courts elsewhere. As this offence is in its nature continuing from day to day, a particular act, so to speak, of being a common drunkard, may in law be constituted out of a series of minor acts, which minor acts may be committed on different days. There being no impossibility of law that all may really occur on one day, the allegation of a single day is sufficient; and, time not being of the essence of the offence, one of the minor and constituent acts may be proved as of one day and another as of another day, and so on. This is the general, the sound, and the just doctrine;[7] though, as already intimated, there are in Massachusetts peculiarities of adjudication not according with it.

§ 980. **Conform to Statute — "Violation of Decency" —**

[1] Crim. Proced. 2d ed. I. § 494, 531; II. § 99, 100, 199, 200.

[2] Ante, § 511–514.

[3] Ante, § 703, 722, and particularly 751 and note.

[4] Crim. Proced. 2d ed. I. § 388.

[5] Commonwealth *v.* Foley, 99 Mass. 499.

[6] Crim. Proced. 2d ed. I. § 408.

[7] Ib. I. § 393, 397 and note, 400–404; ante, § 751, note.

"**Found.**" — It was held in Rhode Island, that, where a statute makes "the being intoxicated under such circumstances as to amount to a violation of decency" a punishable offence, a complaint is sufficient which charges the defendant with having been indecently drunk, contrary to the provisions of the statute.[1] Still the complaint must conform reasonably to the words of the statute. Thus, in Connecticut, the statute having provided, that, "if any person shall be *found* intoxicated," &c.; a complaint was adjudged inadequate which alleged, that, on a specified day, the defendant "was drunk and intoxicated, whereby he was disabled and deprived of his reason;" not saying he was "found" drunk.[2]

§ 981. **Second Offence — Former Conviction.** — In Massachusetts, an allegation of a former conviction of drunkenness, introduced as a part of a complaint under the statute making a second drunkenness more highly punishable than the first, wherein it was set out that the defendant, at a time and before a court named, "was duly and legally convicted of the crime of drunkenness committed at" a specified time and place, &c., was held to be sufficient; and a copy of the record of the former conviction could be introduced as evidence.[3]

CHAPTER XLIII.

SELLING INTOXICATING LIQUOR — THE LAW.

982, 983. Introduction.
984–988. History of this Legislation.
989–998. Constitutionality of it.
999–1006. The License.
1007–1011. Meanings of some Statutory Words.
1012–1032. Expositions of Main Provisions.

§ 982. **General View — Course of the Discussion.** — The statutory offence of selling intoxicating liquors unauthorized by law is not new in the countries in which the jurisprudence

[1] Alexander *v.* Card, 3 R. I. 145.
[2] The State *v.* Bromley, 25 Conn. 6.
[3] Commonwealth *v.* Miller, 8 Gray, 484.

of the common law prevails; but, of late years, it has assumed in our States, some new forms, and put on enlarged proportions. In this chapter and the next, we shall consider the general question of the unlawful sale, with the manner of proceeding against the offender; then, in the chapter immediately following, the offence of keeping the liquor with the intent unlawfully to sell it, together with the procedure, including the proceeding against the liquor itself for its forfeiture; afterward, in still another chapter, we shall bring under review the statutory and judicial doctrines relating to liquor nuisances.

§ 983. **How the Chapter divided.** — In the present chapter, we shall consider, I. The History of this Legislation; II. Its Constitutionality; III. The License; IV. Meanings of some Statutory Words; V. Expositions of the Main Provisions.

I. *The History of this Legislation.*

§ 984. **How at the Common Law — Inn — Ale-house — Disorderly House.** — At the common law, no indictment lies for keeping an inn or an ale-house, unless disorderly conduct is allowed there, even though it is a common tippling-house.[1] The common-law doctrine concerning disorderly houses, including houses wherein liquor is sold, was stated in the work on the Criminal Law.[2] The simple sale, therefore, of intoxicating liquor, whether in large quantities or small, is not a common-law offence.

§ 985. **Under Statutes — Old English — American.** — But many statutes, more or less prohibitory of the sale of intoxicating drinks, have been passed, beginning at a very early period of English legislation, and extending down to the time of the settlement of this country, thence to the present day, from which the American legislation has been chiefly drawn. Indeed, by these English enactments, even by the old ones,

[1] Crim. Law, 5th ed. I. § 505; 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; Overseers *v.* Warner, 3 Hill, N. Y. 150; Rex *v.* Faulkner, 1 Saund. 249, 2 Keb. 506, pl. 79; Commonwealth *v.* McDonough, 13 Allen, 581.

[2] Crim. Law, 5th ed. I. § 1106 et seq., 1113.

nearly every form of provision which has been employed in this country was anticipated.[1]

§ 986. **General Scope of Statutes.** — Under other sub-titles will be brought to view the principal provisions out of which judicial discussion has grown. But we may here observe, that the following objects have been sought to be obtained by legislation; namely, the prevention of sales of intoxicating liquor, except in quantities mentioned in the statutes, so large as to preclude its purchase for the purpose of mere tippling. And, under this head, specific sales have been made penal; while, at the same time, the being a common seller has been made penal also. Another object, sometimes aimed at, is to punish the purchaser of the liquor in these small quantities; but most of the enactments restrain only the sale, not extending to the purchase.[2] Another object has been to prevent all sales in any quantities, by persons not specially authorized. And whether the selling has been entirely prohibited to unauthorized venders, or has been so restricted as to exclude the vending of small quantities by them, there has been, in all provisions of law on the subject, a reserve of the right to vend generally, or for particular purposes, in persons either licensed to sell on their own account, or appointed to make sales on the account of some town or other like corporation.

§ 987. **Difficult of Enforcement.** — Whoever takes the trouble to read the old English statutes on this subject learns, from recitations of facts therein made, that the enforcement of this class of laws was always difficult. And all who understand the doings of offenders and of courts at the present time know, that the same fact exists now. The question of the constitutionality of the enactments has been put forward, in this country, as an obstruction in their way; the question of their expediency has also been urged against them; and the question of their intrinsic rightfulness has entered largely into the controversy. "And," observed Tarbell, J. in the Mississippi court, after quoting these observations of the author,

[1] For the leading enactments of the early times, see Stats. 12 Edw. 2, c. 6; 11 Hen. 7, c. 2; 5 & 6 Edw. 6, c. 25; 1 Jac. 1, c. 9; 4 Jac. 1, c. 4; 4 Jac. 1, c. 5; 7 Jac. 1, c. 10; 21 Jac. 1, c. 7; 1 Car. 1, c. 4; 3 Car. 1, c. 3.

[2] Crim. Law, 5th ed. I. § 658 and note.

"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 in intoxicating liquor."[1] The consequence of all this has been, that, at some points, though not as a general fact, the courts sitting under pressure have departed from the true line of adjudication indicated by established principle. The departure has not been in every instance, or even perhaps most frequently, in favor of the defendant; for, when judges are unduly pressed, being themselves anxious to do their exact duty, it but accords with all observations of human nature, that, at times, they should resist the pressure by an *uprightness which leans* the other way.

§ 988. **Maine Law.** — One of the most noted and most ably resisted forms of the statutory inhibition is familiarly known as "The Maine Law." The history of this Maine law is the following: In the summer of 1847, some gentlemen residing in Massachusetts drafted a petition to the legislature of the latter State, one of the prayers of which was, in the words of the petition, that the legislature should "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 render it imperative upon the courts to punish, by imprisonment, all who sell after a second conviction;" and another prayer was, for the legislature "to 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, having been numerously signed by persons approving of the proposed measure, was presented to the legislature at its session in the winter of 1848. It was referred, in the House of Representatives, to a special committee having

[1] Riley *v.* The State, 43 Missis. 397, 420, 2 Morris State Cas. 1632, 1654.

charge of this general subject; and the committee reported a bill agreeing, substantially, with the prayer of the petition. It provided, among other things, for the appointment of agents in the several towns and cities to sell "alcohol, pure, mixed, and combined, to be used in the arts and for medicinal and sacramental purposes;" and forbade, under penalties, all other sales, and made penal also the keeping of the liquor with the intent to sell it contrary to law. It likewise made penal the letting or using of buildings for the unlawful sale of the liquor. And it directed that all liquor kept for sale contrary to the provisions of law should be forfeited, on proceedings had against the offender. The destruction feature, mentioned in the petition as an addition to the forfeiture, was not introduced.[1] But the measure, though warmly supported, and passing the lower House, failed to become a law. Afterward, in 1851, the legislature of Maine adopted it, with the destruction clause; incumbered, however, by some peculiarities relating to the procedure, intended to avoid those delays to which all real justice is necessarily subject. Some other States, including Massachusetts herself at a later period, followed in the path thus marked out. Therefore the popular notion, that this form of legislation is a new invention, and the idea, that in its late development it originated with a citizen of Maine, are both erroneous. Differences of opinion will for a long time exist, whether the general prohibition is wise or not; but, assuming it to be wise, the forbidding of the keeping of the liquor with the intent to sell it, and the forfeiture of the liquor thus ille-

[1] I have before me the "Report" of the committee, with the bill, which 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 to the bill. 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, &c. [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. Whatever credit or disgrace attends the devising of this peculiar form of legislation belongs, so far as it attaches to any person in modern times, not to any inhabitant of Maine, but of Massachusetts.

gally kept, are legislative methods of reaching the end greatly in advance of what in modern times had been attempted before. The misfortune attending this particular instance consisted in some ill-judged points connected with the judicial procedure, as the measure was adopted in Maine under the manipulation of persons by whom it was not originated.

II. *The Constitutionality of this Legislation.*

§ 989. **General View.** — The question of the constitutionality of the statutes to be discussed in this chapter has been more frequently agitated than any other constitutional question presented to our tribunals. It arises under the constitutions both of the several States and of the United States. On general principles, and aside from the particular terms of a provision which it may be claimed this legislation violates, or the particular nature of the provision itself, the question is a plain one, and the doctrine on which this sort of legislation proceeds has already been stated in the present volume.[1] It is, that every man is bound so to employ both his physical volitions and his property as not to injure others. And in the nature of things it is one of the functions of legislation, without which legislative authority cannot exist, to determine what acts, whether of the person or the property, do injure or tend to the injury of others, and to forbid them under penal sanctions, such as imprisonment, fine, or forfeiture. And whether the legislation is wise, or intrinsically just, or not, it is within the powers inherent in legislative authority, therefore it cannot be resisted.

§ 990. **United States Constitution.** — There is not much pretence that this sort of legislation, by the States, violates the Constitution of the United States, except as to the powers of the general government to regulate commerce, and the power of national taxation. And it has been rather conceded by the courts than held, that, if Congress imposes a duty on the importation of foreign liquors, it is not competent for a State to interfere with the liquors in the original packages, and in the hands of the original importers. But the States,

[1] Ante, § 553–556, 564, 565.

it is decided, are not, within this doctrine, in any way deprived of the power to regulate the manufacture of liquors, or the sale of liquors of domestic manufacture, or of imported liquors in the hands of second holders, or after the original packages are broken.[1] But, as to the former doctrine, on principle, while, beyond doubt, any obstruction by the legislature of a State to the passing of dutiable goods from a port of entry within the State to another part of the Union would be a vio-

[1] As to the question under the Constitution of the United States, see Thurlow *v.* Massachusetts, 5 How. U. S. 504; Fletcher *v.* Rhode Island, 5 How. U. S. 504; Peirce *v.* New Hampshire, 5 How. U. S. 504; Ingersoll *v.* Skinner, 1 Denio, 540; Commonwealth *v.* Blackington, 24 Pick. 352; City Council *v.* Ahrens, 4 Strob. 241; Commonwealth *v.* Kimball, 24 Pick. 359; Smith *v.* People, 1 Parker, 583; People *v.* Quant, 2 Parker, 410; Wynhammer *v.* People, 20 Barb. 567; Bradford *v.* Stevens, 10 Gray, 379. In a recent Maine case, Davis, J. stated the matter as follows: "Upon this point, the line of division between the power of the Federal Government and that of the State has been settled. Under the power granted by the Constitution to regulate commerce with other nations, Congress may authorize a person to import intoxicating liquors, and to sell the same in the original packages. But here the power of Congress ceases, and the jurisdiction of the State begins. Brown *v.* Maryland, 12 Wheat. 262. No one but the importer himself has the right to sell, except as allowed by the laws of the State; and he can sell only in the original packages. The power of the State is plenary to regulate or prohibit all sales, except such as are thus made by the importer himself. Those who purchase from him have no such right to sell. The License Cases, 5 How. U. S. 504." The State *v.* Robinson, 49 Maine, 285, 287; The State *v.* Shapleigh, 27 Misso. 344. Cooley says: "The majority of the court [in the License Cases] expressed the opinion — which, however, was *obiter* in those cases — that the introduction of imported liquors into a State, and their sale in the original packages as imported, could not be forbidden, because to do so would be to forbid what Congress, in its regulation of commerce, and in the levy of imposts, had permitted; but it was conceded by all, that, when the original package was broken up for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import, or a part of foreign commerce, and thereby became subject to the laws of the State, and might be taxed for State purposes, and the sale regulated by the State like any other property. It was also decided in these cases, that the power of Congress to regulate commerce between the States did not exclude regulations by the States, except so far as they might come in conflict with those established by Congress; and that, consequently, as Congress had not undertaken to regulate commerce in liquors between the States, a law of New Hampshire could not be held void which punished the sale, in that State, of gin purchased in Boston, and sold in New Hampshire, notwithstanding the sale was in the cask in which it was imported, but by one not licensed by the selectmen." Cooley Const. Lim. 2d ed. 582. As to the latter point, the Alabama court held, that a State tax of fifty cents per gallon on liquors introduced into the State from other States is void only as to liquors imported from foreign countries, in the hands of the importers and in the original packages. Hinson *v.* Lott, 40 Ala. 123.

lation of the national Constitution, there seems no reason why the doctrine should go further. A duty imposed on the importation of an article is rather an impediment to its importation as an article of commerce than a license to bring it into the country and vend it, in its nature, in its purpose, and in its actual effect.

§ 991. **Continued.** — After the enactment, by Congress, of an internal revenue law, taxing particular kinds of business, it was urged upon the courts, that, because the national government has taxed the business of selling intoxicating liquor in the States, requiring those who are engaged in it to pay a license for it into the national treasury, therefore the States have no constitutional power to regulate or prohibit the business of selling, and the national license is a protection to the seller as against State laws. But the acts of Congress expressly reserve to the States their former rights relating to this subject, consequently this objection has been overruled; leaving the question still open as to what would be the effect of the national legislation if it did not contain this exception in favor of State power.[1] But here again, on principle, and, in accord with some judicial intimations, a tax is not a license; and a power in Congress to tax a business in which the citizens of a State employ themselves under the protection of State laws, is not a power to authorize such citizens to defy State law, and carry on the business after it is prohibited.

§ 992. **Under State Constitutions.** — Various State statutes restricting the sale of intoxicating liquors have been pronounced unconstitutional, either by reason of provisions as to the procedure deemed to be in violation of constitutional rights,[2]

[1] McGuire *v.* Commonwealth, 3 Wal. 387; License Tax Cases, 5 Wal. 462; Pervear *v.* Commonwealth, 5 Wal. 475; Commonwealth *v.* Holbrook, 10 Allen, 200; Commonwealth *v.* Keenan, 11 Allen, 262; The State *v.* Carney, 20 Iowa, 82; The State *v.* Stultz, 20 Iowa, 488; The State *v.* Baughman, 20 Iowa, 497; Commonwealth *v.* O'Donnell, 8 Allen, 548; The State *v.* McCleary, 17 Iowa, 44; Block *v.* Jacksonville, 36 Ill. 301; Commonwealth *v.* Thorniley, 6 Allen, 445; Commonwealth *v.* Casey, 12 Allen, 214.

[2] Fisher *v.* McGirr, 1 Gray, 1; People *v.* Toynbee, 2 Parker, 329, 2 Parker, 490, 3 Kernan, 378; People *v.* Wynehamer, 2 Parker, 377, 2 Parker, 421, 3 Kernan, 378; Greene *v.* James, 2 Curt. C. C. 187; The State *v.* Snow, 3 R. I. 64; Hibbard *v.* People, 4 Mich. 125. See People *v.* Fisher, 2 Parker, 402; In re Powers, 25 Vt. 261; Lincoln *v.* Smith, 27 Vt. 328; The State

or as having been ineffectually enacted,[1] or for some other like reason; but, with respect to the main matter, it is abundantly and uniformly held that such enactments do not violate our State constitutions as ordinarily drawn.[2]

§ 993. **Confiscation of the Liquor.** — The question of the right to confiscate the liquor kept for purposes of unlawful sale, seems not to have been always properly apprehended: but the authorities are clearly in favor of the right.[3] Some misapprehension of true distinctions has, perhaps, obscured

v. Prescott, 27 Vt. 194; The State *v.* Robinson, 19 Texas, 478.

[1] Parker *v.* Commonwealth, 6 Barr, 507. In the following cases the statute was sustained against objections of this sort: Parkinson *v.* The State, 14 Md. 184; The State *v.* Thompson, 2 Kansas, 432. See ante, § 36.

[2] Lodano *v.* The State, 25 Ala. 64; Bancroft *v.* Dumas, 21 Vt. 456; Pierce *v.* The State, 13 N. H. 536, 571; The State *v.* Smith, 22 Vt. 74; The State *v.* Moore, 14 N. H. 451; Lunt's Case, 6 Greenl. 412; Austin *v.* The State, 10 Misso. 591; Dorman *v.* The State, 34 Ala. 216; Commonwealth *v.* Kendall, 12 Cush. 414; Commonwealth *v.* Burding, 12 Cush. 506; Our House *v.* The State, 4 Greene, Iowa, 172; Zumhoff *v.* The State, 4 Greene, Iowa, 526; Mason *v.* Lancaster, 4 Bush, 406; Falmouth *v.* Watson, 5 Bush, 660; Napier *v.* Hodges, 31 Texas, 287; The State *v.* Leary, 20 Misso. 498; The State *v.* Gurney, 37 Maine, 156; Jones *v.* People, 14 Ill. 196; The State *v.* Clark, 8 Fost. N. H. 176; Heisembrittle *v.* City Council, 2 McMullan, 233; People *v.* Hawley, 3 Mich. 330; Brown *v.* The State, 12 Wheat. 419; Bode *v.* The State, 7 Gill, 326; Smith *v.* Adrian, 1 Mich. 495; The State *v.* Muse, 4 Dev. & Bat. 319; Miller *v.* The State, 3 Ohio State, 475; City Council *v.* Ahrens, 4 Strob. 241; Commonwealth *v.* Kimball, 24 Pick. 359; Fisher *v.* McGirr, 1 Gray, 1; Smith *v.* People, 1 Parker, 583; People *v.* Quant, 2 Parker, 410; Langley *v.* Ergensinger, 3 Mich. 314; People *v.* Hawley, 3 Mich. 330; The State *v.* Snow, 3 R. I. 64; The State *v.* Peckham, 3 R. I. 289; Commonwealth *v.* Clapp, 5 Gray, 97; Commonwealth *v.* Hitchings, 5 Gray, 482; Commonwealth *v.* Pomeroy, 5 Gray, 486, note; Keller *v.* The State, 11 Md. 525; People *v.* Gallagher, 4 Mich. 244; The State *v.* Brennan's Liquors, 25 Conn. 278; The State *v.* Wheeler, 25 Conn. 290; Perdue *v.* Ellis, 18 Ga. 586; Bepley *v.* The State, 4 Ind. 264; Germania *v.* The State, 7 Md. 1; Gutzweller *v.* People, 14 Ill. 142. And see, for illustrative points, Washington *v.* The State, 8 Eng. 752; Mabry *v.* Tarver, 1 Humph. 94; People *v.* Jenkins, 1 Hill, N. Y. 469; People *v.* Roe, 1 Hill, N. Y. 470; The State *v.* Bock, 9 Texas, 369. But see People *v.* Toynbee, and People *v.* Wynehamer, infra. In Indiana there have been many decisions on this subject, to some extent contradictory of one another, as see Beebe *v.* The State, 6 Ind. 501; O'Daily *v.* The State, 9 Ind. 494; Crossinger *v.* The State, 9 Ind. 557; The State *v.* Adamson, 14 Ind. 296; Thomasson *v.* The State, 15 Ind. 449; Holmes *v.* Welch, 12 Ind. 555; Coulson *v.* Cass, 12 Ind. 558; Meshmeier *v.* The State, 11 Ind. 482; Cassel *v.* Scott, 17 Ind. 514; Lauer *v.* The State, 22 Ind. 461; Reams *v.* The State, 23 Ind. 111.

[3] Fisher *v.* McGirr, 1 Gray, 1; The State *v.* Snow, 3 R. I. 64. But see People *v.* Toynbee, 2 Parker, 329, 2 Parker, 490, 1 Kernan, 378; People *v.* Wynehamer, 2 Parker, 377, 2 Parker, 421, 3 Kernan, 378; Miller *v.* The State, 3 Ohio State, 475.

a little the decisions in some New York cases.[1] One can hardly see how this right could ever be doubted in any State in which fines may be imposed; because the forfeiture is only a fine, being levied upon a specific article, instead of the estate at large of the offender. And the earliest of the old English enactments on this exact subject provides for this forfeiture;[2] consequently the levying of the penalty on the specific article is one of the modes of fine known in that fountain of laws from which our jurisprudence is drawn.

§ 994. **Continued — Destruction of them.** — In some States, the experiment has been tried of directing, that the forfeited liquor be destroyed. And although such destruction violates a cardinal principle of political and social economy, which forbids the needless waste of any thing capable of being turned to a useful account, still, as individuals are permitted to do what they will with their own, no reason appears why States cannot exercise the same liberty. This doctrine, indeed, is sufficiently established.[3] The forfeiture vests the property in the State; then the State destroys it.[4]

§ 995. **Summary of the Doctrine.** — The doctrine governing this whole subject may be summed up thus: The State, in the enactment of its laws, must exercise its judgment concerning what acts tend to corrupt the public morals, impoverish the

[1] People *v.* Toynbee, and People *v.* Wynehamer, supra.

[2] Stat. 12 Edw. 2, c. 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.

[3] See Fisher *v.* McGirr, 1 Gray, 1. The State *v.* Brennan's Liquors, 25 Conn. 278.

[4] The common law has also precedents for this procedure. Thus, Pulton, speaking of the forfeiture in cases of 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 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 despite 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 practise the like." Pulton de Pace, ed. of 1615, 220 *b*.

community, disturb the public repose, injure the other public interests, or even impair the comfort of individual members, over whom its protecting watch and care are required. And the power to judge of this question is necessarily reposed alone in the legislature, from whose decision no appeal can be taken, directly or indirectly, to any other department of the government. When, therefore, the legislature, with this exclusive authority, has exercised its right of judging concerning this legislative question, by the enactment of prohibitions like those discussed in this chapter, all other departments of the government are bound by the decision, which no court has a jurisdiction to review. And the question of the wisdom of the enactment is decided definitively by the enactment itself. An express constitutional inhibition of this kind of legislation would, of course, bind the legislature; but such inhibition is not to be gathered from those expressions of individual rights which are usually found in our State constitutions. That is, the power, being in its nature legislative, can be excepted out of a general grant of such power, found in express words, or in their equivalent of implication, in all our State constitutions, in no way but by express words, or necessary implication. The idea, sometimes carried into this discussion, that the legislature cannot control the use of property, while it can control the movements of its owner, needs no refutation; because clearly the thing owned is not superior to its intelligent master.[1]

[1] In Jones *v.* People, 14 Ill. 196, Trumbull, J. summed up the matter as follows: "We shall not go into an elaborate argument to prove, that the legislature possesses the authority to regulate its own internal traffic according to its own judgment, and upon its own views of the interests and well-being of its citizens. The power of the several States to regulate or even prohibit the retail of spirituous liquors within their limits, is expressly sanctioned by the Supreme Court of the United States, in the License Cases, 5 Howard, 504, and there is nothing in the Constitution of Illinois to prevent the exercise of this power. By virtue of its police power, every State must have the 'right to enact such laws as may be necessary for the restraint and punishment of crime, and for the preservation of the public peace, health, and morals of its citizens.' It is upon this principle that the sale of lottery tickets, and of cards, and other instruments for gaming, is prohibited; and who ever questioned the constitutionality or validity of such laws? A government that did not possess the power to protect itself against such and similar evils, would scarcely be worth preserving." In the Missouri court, Napton, J. observed: "The State legislatures have the power, unless there be

§ 996. **Prohibiting Distillation of Grain.** — And within the principle on which rest the statutes restricting the sale of intoxicating liquors, it has been held, in Alabama, that a prohibition of the distillation of grain, except on license from the governor, does not conflict with 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. "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. **Under Municipal By-laws — Local Statutes.** — The general power of municipal corporations to enact by-laws was considered in the early part of this volume.[2] Under authority expressly conferred by the legislature, by-laws are sometimes enacted restricting the sale of intoxicating liquor; and in the absence of special reasons, they are held to be constitutional.[3] But the by-law, to be good, must follow the legislative authority. Thus, if a statute gives to a town the power to prohibit tippling houses or dram-shops, a by-law which forbids the sale of intoxicating drinks in any quantities, and for all purposes except medicinal and mechanical, is void for not pursuing the power. Moreover, as the jurisdiction of a municipal corporation does not extend beyond its own local bounds, a by-law is ill which forbids the sale of beer within three miles of the corporate limits.[4] But these provisions are so diverse, that instead of discussing them further, we shall do best simply to refer to some of the adjudications.[5] Sometimes a statute

something in their own constitutions to prohibit it, of entirely abolishing, or placing under restrictions, any trade or profession which they may think expedient. Can there be any doubt, that the legislature of Missouri might declare the practice of the law or medicine an unlawful calling, if they thought fit so to do; or that the professors of these sciences should have certain qualifications of age, length of residence, moral character, &c., which in their wisdom might seem proper?" Austin *v.* The State, 10 Misso. 591, 593.

[1] Ingram *v.* The State, 39 Ala. 247, 249.

[2] Ante, § 18–26.

[3] Falmouth *v.* Watson, 5 Bush, 660; Mason *v.* Lancaster, 4 Bush, 406; Cuthbert *v.* Conly, 32 Ga. 211; Bloomington *v.* Strehle, 47 Ill. 72.

[4] Strauss *v.* Pontiac, 40 Ill. 301.

[5] Camp *v.* The State, 27 Ala. 53; Byers *v.* Olney, 16 Ill. 35; Goddard *v.* Jacksonville, 15 Ill. 588; The State *v.* Clark, 8 Fost. N. H. 176; Heisembrittle *v.* City Council, 2 McMullan, 233; The State *v.* Columbia, 6 Rich. 404; Aberdeen *v.* Saunderson, 8 Sm. & M. 663; Bogart *v.* New Albany, 1 Smith, Ind. 38; Clintonville *v.* Keeting, 4 Denio, 341; City Council *v.* Ahrens, 4

of the State regulates the matter in the particular municipal locality.[1]

§ 998. **Michigan.** — The Constitution of Michigan provides, that "the legislature shall not pass any act authorizing the grant of license for the sale of ardent spirits, or other intoxicating liquors." And, in considering a recent statute, the court observed: "The legislature were prohibited from enacting any law which should authorize the traffic by the 'grant of a license' (which is a permission or authority to do that thing); but it cannot be doubted that it was competent to regulate and even prohibit it by law. This law [the one under consideration] does not authorize any municipal authorities to grant a license for such traffic. It assumes the traffic is hazardous to the morals and to the best interests of society, and therefore only grants immunities from fines which are denounced against offenders, upon the condition of providing adequate security for compensation to those who may suffer from an unbridled and iniquitous exercise of the right."[2]

III. *The License.*

§ 999. **General Doctrine — Corruptly refusing — Appeal.** — None of the statutes absolutely prohibit the sale under all circumstances and for all purposes. But the circumstances and purposes permissible differ greatly in the different States, and in the same State at different times. As a doctrine pretty general in this country, the license may be granted or withheld by the licensing power at its discretion.[3] There is a

Strob. 241; Morris *v.* Rome, 10 Ga. 532; The State *v.* Hogan, 10 Fost. N. H. 268; Markle *v.* Akron, 14 Ohio, 586; Louisville *v.* Kean, 18 B. Monr. 9; The State *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.* The State, 20 Ill. 430; Pekin *v.* Smelzel, 21 Ill. 464; Megowan *v.* Commonwealth, 2 Met. Ky. 3; Mayor *v.* Hussey, 21 Ga. 80; Brooklyn *v.* Toynbee, 31 Barb. 282; Thompson *v.* Mt. Vernon, 11 Ohio State, 688.

[1] Indianapolis *v.* Fairchild, 1 Ind. 315, Smith, Ind. 122; Chevalier *v.* Commonwealth, 8 B. Monr. 379; Hill *v.* Commissioners, 22 Ga. 203; Ambrose *v.* The State, 6 Ind. 351; McRae *v.* Wessell, 6 Ire. 153; McCuen *v.* The State, 19 Ark. 630; Levy *v.* The State, 6 Ind. 281. See also Crim. Law, 5th ed. I. § 1068.

[2] Langley *v.* Ergensinger, 3 Mich. 314, opinion by Wing, J.

[3] Ex parte Yeager, 11 Grat. 655; 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; People *v.* Morton, 7 Barb. 477; Attorney-General *v.* Justices, 5 Ire. 315; Reg. *v.* Harris, 2 Ld. Raym. 1302;

State or two wherein, by reason of the peculiar language of the statute, the officer must act whenever the grounds of action are furnished to him.[1] Also there are States in which an appeal may be taken from the decision of the licensing power.[2] But generally there is no appeal, though, by force of the common law applicable under all circumstances, ministerial officers corruptly refusing or granting licenses may be indicted therefor,[3] as in other cases of corruption.[4]

§ 1000. **What is a License — When deemed to be granted.** — The license must be in due legal form;[5] and a certificate that one is licensed, is not a license;[6] neither is a parol license sufficient, where the statute requires it to be in writing.[7] But on points like these the statutes of the particular State should be consulted. Thus, by construction of the Indiana enactments, when the order for issuing the license has been made, and the license fee has been paid, and the person licensed has filed his bond, he is thereby protected as to subsequent sales, though the formal issuing of the instrument of license has been neglected.[8] And undoubtedly, if the power which gives the license omits to make up a proper record, or omits all record, of its proceeding, the omission, reprehensible though it is, does not impair the license.[9]

Rex *v.* Austin, 8 Mod. 309; Louisville *v.* Kean, 18 B. Monr. 9; Raleigh *v.* Kane, 2 Jones, N. C. 288; The State *v.* Holt County Court, 39 Misso. 521.

[1] The State *v.* The Justices, 15 Ga. 408; Dougherty *v.* Commonwealth, 14 B. Monr. 239. See People *v.* Perry, 13 Barb. 206; Sights *v.* Yarnalls, 12 Grat. 292; Reg. *v.* Sylvester, 2 B. & S. 322.

[2] Ex parte Dunn, 14 Ind. 122; Drapert *v.* The State, 14 Ind. 123.

[3] People *v.* Norton, 7 Barb. 477; Rex *v.* Holland, 1 T. R. 692. And see Attorney-General *v.* Justices, 5 Ire. 315.

[4] Crim. Law, 5th ed. I. § 459 et seq.; II. § 971 et seq.

[5] See The State *v.* Shaw, 32 Maine, 570; Pope *v.* The State, 2 Swan, Tenn. 611.

[6] Commonwealth *v.* Spring, 19 Pick. 396.

[7] Lawrence *v.* Gracy, 11 Johns. 179; The State *v.* Moore, 14 N. H. 451.

[8] Houser *v.* The State, 18 Ind. 106. So in Arkansas, although, when a person is granted a license, and has paid for it, it is not proper to begin retailing before the clerk has issued the license, a jury is justified in finding the agent of such person not guilty of a criminal violation of the statute by so selling. The State *v.* White, 23 Ark. 275. In Texas, a license will take effect from the time when the applicant produces to the clerk of the county court the county treasurer's receipt for the tax imposed by law in such case, and not from the time when the county court acted upon the application. Brown *v.* The State, 27 Texas, 335.

[9] Foster *v.* Dow, 29 Maine, 442

§ 1001. **Relating back — Subsequent Legislation — Unduly granted — Informally.** — A license cannot relate back, so as to legalize an illegal sale already made.[1] This doctrine comes from the fact, that the licensing power does not possess also the power of pardon. A person who has a license is bound by any subsequent legislation on the subject; to which, therefore, he must conform.[2] If a license is unduly granted, — that is, granted contrary to law, — it does not protect the holder.[3] If, however, it is merely informally granted, the result is otherwise.[4]

§ 1002. **Unduly issued, continued — (Other Points, in Note).** — Under a statute of Maine, which authorized the establishment, by towns, of agencies for the sale of intoxicating liquor, and which provided further, "that no agent shall have any interest in such liquor, or in the profits of the sales thereof," the court held such an agent, appointed with the understanding that he should own the liquor and have the profits for his compensation, to be unprotected by this license in respect of his sales; because the transaction was contrary to the statute, and because there can, in the nature of things, be no agent whose duty it is to do business on his own account.[5] Other points may be seen in the cases cited below.[6]

[1] The State *v.* Hughes, 24 Misso. 147; Edwards *v.* The State, 22 Ark. 253. In a South Carolina case the doctrine was laid down, that a license to retail spirituous liquors, from a day past, is a release of penalties incurred subsequently to the date of the license; the court observing: "The city council must be regarded as having waived or released their right of action for the penalty, as it was competent for them to do." Charleston *v.* Corleis, 2 Bailey, 186. In a later South Carolina case it was held, that a license by the city council of Charleston, after suit commenced for a penalty, is no release of the penalty (City Ord. 224), although it takes effect from a day before, and covers the offence. But there was a special provision in the ordinance making this so. And Whitner, J. observed: "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.

[2] The State *v.* Fairfield, 37 Maine, 517; Hirn *v.* The State, 1 Ohio State, 15; The State *v.* Holmes, 38 N. H. 225. See Foster *v.* Dow, 29 Maine, 442; Hannibal *v.* Guyott, 18 Misso. 515; The State *v.* Andrews, 26 Misso. 171; The State *v.* Andrews, 28 Misso. 14, 19.

[3] The State *v.* Moore, 1 Jones, N. C. 276; House *v.* The State, 41 Missis. 737; Thompson *v.* Harvey, 4 Hurl. & N. 254. And see Ex parte Cox, 19 Ark. 688.

[4] Commonwealth *v.* Graves, 18 B. Monr. 33; Goff *v.* Fowler, 3 Pick. 300. But see Crutz *v.* The State, 4 Ind. 385. And see Nathan *v.* Bloomington, 46 Ill. 347.

[5] The State *v.* Putnam, 38 Maine, 296.

[6] Sights *v.* Yarnells, 12 Grat 292;

§ 1003. **Effect of License — As to Places and Persons, &c.** — The individual licensed 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.[1] If he does otherwise, the license affords him no protection.[2] And it usually authorizes merely the selling in one place.[3]

§ 1004. **Continued — Assignment — Sales by Clerk or Agent — Partner.** — The sale may be made by the licensee either personally or by his agent,[4] and it is even held that the licensee may carry on the business by agent;[5] but the license cannot be assigned, so as to give to the assignee any authority under it.[6] Therefore, according to the better doctrine, if the licensee takes in a partner, this partner cannot sell under the license; because the effect of the partnership is to authorize the several partners to exercise an independent discretion concerning the business, a partner differing herein from a mere agent or servant or clerk. The license, in its very nature, is a special trust to the particular person, reposed in him on account of

Aulanier *v.* Governor, 1 Texas, 653; Hannibal *v.* Guyott, 18 Misso. 515; The State *v.* Estabrook, 6 Ala. 653; Commonwealth *v.* Luck, 2 B. Monr. 296; Woods *v.* Pratt, 5 Blackf. 377; The State *v.* Wynne, 1 Hawks, 451; The State *v.* Kennedy, 1 Ala. 31; Commonwealth *v.* Voorhies, 12 B. Monr. 361; Parsley *v.* Hutchins, 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.* Commissioners, 14 Ga. 354; Commonwealth *v.* Kamp, 14 B. Monr. 385; The State *v.* Gerhardt, 3 Jones, N. C. 178; The State *v.* Cloud, 6 Ala. 628.

[1] Adams *v.* Hackett, 7 Fost. N. H. 289; Commonwealth *v.* Markoe, 17 Pick. 465; Benson *v.* Moore, 15 Wend. 260; The State *v.* Fredericks, 16 Misso. 382; Lambert *v.* The State, 8 Misso. 492; Disbrow *v.* Saunders, 1 Denio, 149; Page *v.* The State, 11 Ala. 849; Commonwealth *v.* Hall, 8 Grat. 588; The State *v.* Prettyman, 3 Harring. Del. 570; The State *v.* Woodward, 34 Maine, 293; The State *v.* Ambs, 20 Misso. 214; Independence *v.* Noland, 21 Misso. 394; Curd *v.* Commonwealth, 14 B. Monr. 386. See Mabry *v.* Bullock, 7 Dana, 337.

[2] The State *v.* Perkins, 6 Fost. N. H. 9; Commonwealth *v.* Thayer, 8 Met. 523; Commonwealth *v.* Jordan, 18 Pick. 228; The State *v.* Keen, 34 Maine, 500; The State *v.* Putnam, 38 Maine, 296; The State *v.* Parks, 29 Vt. 70. And see Reg. *v.* Knapp, 2 Ellis & B. 447, 22 Eng. L. & Eq. 157.

[3] The State *v.* Walker, 16 Maine, 241; The State *v.* Prettyman, 3 Harring. Del. 570.

[4] See post, § 1024.

[5] Thompson *v.* The State, 37 Ala. 151; The State *v.* McNeely, Winston, No. 1, 234.

[6] Alger *v.* Weston, 14 Johns. 231; Lewis *v.* United States, 1 Morris, 199; Commonwealth *v.* Bryan, 9 Dana, 310; Godfrey *v.* The State, 5 Blackf. 151.

some real or supposed individual fitness.[1] There are, however, some Kentucky cases which seem to go far toward the doctrine, that one partner may sell under a license to another;[2] there is also a case in which the further opinion appears to have been entertained, that any licensed man may protect any other man selling under his license, if the first has a general superintendence of the business, conducted in the licensed place, though the second purchases and sells the liquor on his own account.[3] But, even here, the business must be controlled by the licensee himself.[4] A license to two men as partners will authorize one of them to sell after the other has retired from the business.[5]

§ 1005. **Conviction not a License — Forfeiture of License.** — If one sells without a license, a conviction for such unlawful selling will not authorize a further selling without license.[6] Under some of the statutes, a licensed person, by committing an offence against the terms of his license, forfeits it, on conviction, as one of the penalties. In like manner, he may forfeit his bond.[7] In some States, the court has power to suspend a license; and in Kentucky it was held, that such a suspension, without summoning the party to appear and show cause against it, is void.[8]

[1] Long *v.* The State, 27 Ala. 32, in which case the court, by Rice, J. observed: "We concede that a *license* may be granted to a partnership, upon a compliance with the law by its members. No greater amount would have to be paid for such license than for a license to a single individual. Yet, before it could lawfully be granted, it would be necessary that *each member* of the firm should produce the prescribed recommendation, and take and subscribe the prescribed affidavit. We also concede, that, when a license has been granted to an individual, he may exercise the privilege it confers by his clerk or agent; for the acts of his clerk or agent are, in law, his acts, and nothing more. The clerk or agent is entirely under the control and superintendence of the principal. But one partner is not the mere clerk, or mere agent, of his copartner, nor entirely under his control or superintendence. Each partner has rights and powers, and is subject to responsibilities, which do not attach nor appertain to a mere clerk or agent." p. 36.

[2] Barns *v.* Commonwealth, 2 Dana, 388; Gray *v.* Commonwealth, 9 Dana, 300. See Maine *v.* Davis, 23 Maine, 403; Commonwealth *v.* Hall, 8 Grat. 588.

[3] Duncan *v.* Commonwealth, 2 B. Monr. 281.

[4] Commonwealth *v.* Branamon, 8 B. Monr. 374.

[5] The State *v.* Gerhardt, 3 Jones, N. C. 178.

[6] The State *v.* McBride, 4 McCord, 332.

[7] Lightner *v.* Commonwealth, 7 Casey, Pa. 341.

[8] Plummer *v.* Commonwealth, 1 Bush, 26.

§ 1006. **License being refused.** — If the licensing power refuses a license to a particular person,[1] or refuses to license any person,[2] still no man is authorized on this account to sell, whether the refusal is right or wrong.[3] In like manner, if there is no officer to receive applications for license, this circumstance does not justify sales by unlicensed individuals.[4]

IV. *Meanings of some Statutory Words.*

§ 1007. **General View — "Intoxicating Liquor" — "Spirituous."** — It is not best to expand greatly the discussion under this sub-title, and only general hints, or a bare citation of authorities, can be given as to some of the words. Liquor, to be "intoxicating," need not be spirituous. Thus, ale is not "spirituous liquor;"[5] but strong beer and ale have been held to be "intoxicating."[6] Of course, gin is intoxicating, though it is also "spirituous."[7] Some of the New York judges considered the word "*beer*" alone to imply, that it be intoxicating.[8] In some of the States, the meaning of this class of words is defined by statutes.[9] According to an Indiana decision, the court does not judicially know that wine is not intoxicating, therefore it will not question the power of the legislature to declare it to be so.[10]

§ 1008. **"Strong Liquor."** — The New York court has divided on the meaning of these words. Thus, a statute of this State having made punishable any person who "shall sell any *strong* or spirituous liquors or wines, in quantities less than five gallons at a time, without," &c., the majority of the court

[1] City Council *v.* Hollenback, 3 Strob. 355; Indianapolis *v.* Fairchild, 1 Ind. 315; The State *v.* Downer, 21 Wis. 274.

[2] The State *v.* Jamison, 23 Misso. 330; Commonwealth *v.* Blackington, 24 Pick. 352; Garner *v.* The State, 8 Blackf. 568; New York *v.* Mason, 4 E. D. Smith, 142.

[3] Commonwealth *v.* Blackington, 24 Pick. 352.

[4] Lord *v.* Jones, 24 Maine, 439.

[5] Walker *v.* Prescott, 44 N. H. 511.

[6] People *v.* Hawley, 3 Mich. 330; Markle *v.* Akron, 14 Ohio, 586, 591.

[7] Commonwealth *v.* Peckham, 2 Gray, 514. In Commonwealth *v.* Herrick, 6 Cush. 465, Shaw, C. J. observed: "The word 'intoxicating' includes a larger class of cases than 'spirituous.' They bear the relation to each other of genus and species; all spirituous liquors are intoxicating; but all intoxicating liquors are not spirituous."

[8] People *v.* Wheelock, 3 Parker, 9.

[9] The State *v.* Lemp, 16 Misso. 389; The State *v.* Wittmar, 12 Misso. 407; Commonwealth *v.* Giles, 1 Gray, 466; Commonwealth *v.* Timothy, 8 Gray, 480.

[10] Jackson *v.* The State, 19 Ind. 312.

held, that strong beer is "strong liquor" within the inhibition. Said Welles, J.: "It seems to me that but one safe and sensible line of distinction can be drawn between the different kinds of liquor containing alcohol, in order to determine upon which of them the statute was intended to operate; and that is, between those which are capable of causing intoxication, and those containing so small a percentage of alcohol that the human stomach cannot contain sufficient of the liquor to produce that effect; as is said to be the case with respect to spruce beer, ginger beer, lager beer, and some others." [1] And in other cases a like division on this question appears; though it is agreed that small beer is not strong liquor.[2]

§ 1009. "**Spirituous Liquor.**" — These words do not include wine and other fermented liquor; for they imply that the beverage is composed in part or fully of alcohol, extracted by distillation.[3] A statute of Delaware prohibits the sale, without license, of "any wine, rum, brandy, gin, whiskey, or any spirituous liquor, by any measure less than a quart, or any punch or other mixed liquor by any measure whatever," and the majority of the court held, that peppermint cordial, made of whiskey sweetened and scented, comes properly under the words spirituous liquor.[4] And liquor obtained by running the beer through the still once is "spirituous liquor." [5]

§ 1010. "**Liquor.**" — A statute in North Carolina provided, that "no keeper of an inn, tavern, or ordinary, or retailer of liquors by the small measure, shall sell to any person on a credit liquors to a greater amount than ten dollars," &c.; and it was held that champagne wine is included under the word "liquors." [6]

§ 1011. **Other Words.** — We have in these statutes various other words, which have been passed upon by the courts; but they do not require specific elucidation here. Some of them

[1] Tompkins County *v.* Taylor, 21 N. Y. 173, 178.

[2] Nevin *v.* Ladue, 3 Denio, 43; s. c. 3 Denio, 437; People *v.* Crilley, 20 Barb. 246.

[3] Caswell *v.* The State, 2 Humph. 402; The State *v.* Moore, 5 Blackf. 118. See Smith *v.* The State, 19 Conn. 493.

[4] The State *v.* Bennet, 3 Harring. Del. 565. See post, § 1020 note. See, as to an analogous question, Smith *v.* The State, 19 Conn. 493.

[5] The State *v.* Summey, Winston, No. 2, 108.

[6] Kizer *v.* Randleman, 5 Jones, N. C. 428.

are explained in the earlier part of this volume. They are "*distiller*," [1] "*manufacturer*," [2] "*merchant*," [3] "*plantation*," [4] "*refreshment saloon*," [5] "*premises*," [6] "*furnishing*," [7] "*public house*," [8] "*dwelling-house*," [9] "*store*," "*shop*." [10] Statutes formerly existed against selling to "*slaves*" [11] and "*negroes*," [12] and do now against selling to "*minors* and *servants*," [13] and "*common drunkards;*" [14] but these do not claim any special exposition. Some other words will be explained under our next sub-title; and, of still others, explanations may be found in other parts of this volume by consulting the Index.

V. *Expositions of the Main Provisions.*

§ 1012. **General View — Scope of the Discussion.** — The words of the statutes, and even the scope of their provisions, are so diverse, that all which can be done to advantage under this sub-title will be to bring under review some leading doctrines and leading provisions, and close with a citation of various cases adjudged in the different States.

§ 1013. **The "Sale."** — A sale is not constituted by a mere agreement to sell: [15] there must be a delivery of the liquor.[16] But the payment need not be actually made; for a sale on credit is within the prohibition of selling, though the law would not enforce the payment.[17] And if the particular drink is adul-

[1] Ante, § 273.

[2] Commonwealth *v.* Bralley, 3 Gray, 456.

[3] Commonwealth *v.* McGeorge, 9 B. Monr. 3; Cole *v.* Commonwealth, 8 Dana, 31.

[4] Ante, § 300; Sanderlin *v.* The State, 2 Humph. 315.

[5] The State *v.* Hogan, 10 Fost. N. H. 268.

[6] Ante, § 291, note; Downman *v.* The State, 14 Ala. 242; Swan *v.* The State, 11 Ala. 594.

[7] The State *v.* Freeman, 27 Vt. 520.

[8] Brown *v.* The State, 27 Ala. 47. And see ante, § 297–299.

[9] Ante, § 277 et seq.; Commonwealth *v.* Estabrook, 10 Pick. 293.

[10] Ante, § 294, 295; Barth *v.* The State, 18 Conn. 432.

[11] Bond *v.* The State, 13 Sm. & M. 265; Commonwealth *v.* Hatton, 15 B. Monr. 537; The State *v.* Bradshaw, 2 Swan, Tenn. 627; Powell *v.* The State, 27 Ala. 51; Boltze *v.* The State, 24 Ala. 89; Johnson *v.* Commonwealth, 12 Grat. 714; The State *v.* McNair, 1 Jones, N. C. 180.

[12] The State *v.* Sonnerkalb, 2 Nott & McCord, 280.

[13] The State *v.* Fairfield, 37 Maine, 517.

[14] Barnes *v.* The State, 19 Conn. 398; Miller *v.* The State, 3 Ohio State, 475; Smith *v.* The State, 19 Conn. 493. And see Maxwell *v.* The State, 27 Ala. 660.

[15] Banchor *v.* Warren, 33 N. H. 183.

[16] Pulse *v.* The State, 5 Humph. 108.

[17] Emerson *v.* Noble, 32 Maine, 380; Commonwealth *v.* Burns, 8 Gray, 482. A delivery and receipt of intoxicating

terated, or mixed with other ingredients, known or unknown, and sold under another name, still the act is a sale of the drink.[1] The courts will not suffer a defendant to escape the charge of selling, by resorting to any artifice, where, in fact, a sale is made.[2] And if the vender receives money from the purchaser, apparently for some other article, and actually delivers the other article, parting with his property therein, yet delivers also the forbidden liquor, he sells the liquor.[3] So where the selling of less than a quart of liquor at a time was forbidden; and the purchaser contracted for a quart, but had it delivered in pints at two different times, the transaction was held to comprise two sales of a pint each.[4] But in this case, the quart attempted to be sold in the first instance was not then separated from the vender's unsold liquor, neither was it delivered to the purchaser: if these things had been done, and if, also, the jury had not found any intention to violate the statute, the case would have shown simply a sale of a quart. But it seems to have been considered, that, even then, if the transaction was but colorable, and the intent was different from what appeared, the sale would be indictable under

liquors, as payment for a service performed, is a sale, within the meaning of the statutes prohibiting the unlawful sale of such liquors. Mason *v.* Lothrop, 7 Gray, 354. And see Commonwealth *v.* Rumrill, 1 Gray, 388.

[1] Commonwealth *v.* Bathrick, 6 Cush. 247; The State *v.* Stanton, 37 Conn. 421, 423. See Russell *v.* Sloan, 33 Vt. 656.

[2] "The court said, the law prohibited the sale of any kind of spirituous liquor by the small; or of any mixed liquor whatever. The law pointed at the fact, and did not regard the mode or manner of sale. No device of striped pig, or other contrivance which ingenuity has resorted to in order to circumvent the law, will avail, if the main fact be proved; if, in fact, the transaction amount to a purchase and sale of liquor. In Kent county 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 to 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." The State *v.* Redden, 5 Harring. Del. 505.

[3] Commonwealth *v.* Thayer, 8 Met. 525. And see New Gloucester *v.* Bridgham, 28 Maine, 60. It is a question of fact for the jury, whether the giving away of liquor by a grocer, with a view to increase his custom for groceries, is a mere device to evade the liquor law, and within § 9. Kober *v.* The State, 10 Ohio State, 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.* People, 20 Ill. 348. And see The State *v.* Hopkins, 4 Jones, N. C. 305; The State *v.* Wright, 4 Jones, N. C. 308.

[4] Murphy *v.* The State, 1 Ind. 366, Smith, Ind. 261; The State *v.* Kirkham, 1 Ire. 384; s. p. Thomas *v.* The State, 37 Missis. 353.

the prohibition of the statute.[1] The giving away of liquor is not a selling of it.[2] Neither is it a sale for a physician to administer liquor to a patient as a medicine.[3]

§ 1014. **Continued — Barter.** — Among the various devices which may be resorted to by persons seeking to evade these statutes, is that of bartering away, instead of selling, the intoxicating liquor. A sale, in point of strict law, is not constituted by a mere barter exchange of one thing for another, where there is no money value set upon either of the articles. Thus, in Alabama, a statute having provided that, if any person, "being a negro-trader, broker, or agent for the sale of slaves, *sells*, offers, or exposes for *sale*, any slave, without first obtaining a license therefor, he is guilty of a misdemeanor," &c., the court, in a civil suit growing out of a transaction of the general kind pointed to by the statute, held, that a negro-trader did not violate the statute if he, without license, simply gave another person one hundred dollars in money and two negroes in exchange for two negroes received from this person, there being no money value set upon any of the negroes. If the negroes which were paid in conjunction with the one hundred dollars, or the negroes received, had been estimated at a money value, the transaction would have been deemed to be within the statute.[4] How far this doctrine is applicable in these liquor cases may be a question; because, assuming the doctrine to be correct, as applied by the Alabama court to the exchange of the slaves, it is yet apparent that in practice there must be, expressed or understood, a price for which in reality the glass of liquor is parted with. And as a point of fact, a jury of sensible men could scarcely be persuaded that a man who was dealing out liquor to customers, to be drank by them, meant to make, in each instance, a particular barter-trade, distinguishable from each other instance, and without any reference to any previously considered price for the liquor. And in Massachusetts it has been adjudged, that, if a distiller exchanges intoxicating liquor for grain from which

[1] The State *v.* Kirkham, supra; The State *v.* Bell, 2 Jones, N. C. 337. And see The State *v.* Simmons, 46 N. C. 622.

[2] Allen *v.* The State, 14 Texas, 633.

[3] Schaffner *v.* The State, 8 Ohio State, 642. And see post, § 1019.

[4] Gunter *v.* Leckey, 30 Ala. 591.

to distil such liquor, he sells the liquor. For, said the learned judge, "if there can be any doubt on the question whether an exchange can be deemed a sale at common law, it is quite clear that no such doubt can exist under the provisions of law upon which the indictment in the present case is founded. By Stat. 1855, c. 215, § 15, it is enacted, that, if any person 'shall, directly or indirectly, on any pretence or by any device, sell, or in consideration of the purchase of any other property give to any person any spirituous or intoxicating liquor,' he shall be subject to the penalties in that section provided. The intention of the legislature by this provision 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." [1]

§ 1015. **Continued — Mortgage.** — A mortgage is a sale, though upon condition. Therefore it has been held in Maine, that the mortgage of an apothecary's stock, consisting in part of intoxicating liquors, is a sale of the liquors within the prohibitory laws; and, as such, is invalid.[2]

§ 1016. **"Deal in the Selling" — "Retail" — "Offer to Sell" — "Business."** — Where the words of the statute were "shall *deal in the selling*, &c., in quantities of one pint or more, and less than twenty gallons," the court held a single sale to be within the prohibition.[3] So the word "retail" requires but one act of selling.[4] But a butcher, who sells spirits in a single instance, is not engaged in the "business or employment" of retailing liquor.[5] A sale is not necessarily an offer to sell.[6]

[1] Commonwealth *v.* Clark, 14 Gray, 367, 372, opinion by Bigelow, J.

[2] Hay *v.* Parker, 55 Maine, 355.

[3] The State *v.* Paddock, 24 Vt. 312; The State *v.* Glasgow, Dudley, S. C. 40; The State *v.* Bugbee, 22 Vt. 32; The State *v.* Chandler, 15 Vt. 425; ante, § 210. 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* whether this view can be maintained.

[4] The State *v.* Cassety, 1 Rich. 90; The State *v.* Mooty, 3 Hill, S. C. 187. As to what is wholesaling, and what retailing, see Grosuth *v.* Butterfield, 2 Wis. 237; Harris *v.* Livingston, 28 Ala. 577.

[5] Moore *v.* The State, 16 Ala. 411.

[6] "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.

§ 1017. "**Presume to be Seller.**" — Where the words of the statute were, "No person shall 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," — the court held the offence to be committed by a single act of unauthorized selling.[1] But under this enactment, a sale of twenty-eight gallons in all, of different kinds of liquor, where the quantity of each kind is less than twenty-eight gallons, is held not to be prohibited. "If," said Shaw, C. J. "it is purchased at one time by one contract, it is as much one sale, when composed of several different kinds of spirits, as if an equal quantity of one species had been taken. It is equally in its character a wholesale dealing with a customer, who buys to sell again." [2]

§ 1018. "**Common Seller.**" — The English statute of 5 & 6 Edw. 6, c. 25, § 4, provided, among other things, for the punishment of those who should without license "use commonly selling of" the forbidden drinks; and later enactments employed the same words. In this country, some of the statutes make a distinct offence of being a "common seller," without license. And, to establish the offence of being a common seller, three specific acts of sale must be shown, perhaps in connection with other evidence.[3] The sales need not be to three distinct persons;[4] if all are to one, the effect is the same.[5] They may be all in one day[6] or evening;[7] or on different days.[8] These three sales do not themselves constitute

[1] Commonwealth *v.* Dean, 21 Pick. 334; R. S. c. 47, § 3.

[2] Browne *v.* Hilton, 23 Pick. 319.

[3] Commonwealth *v.* Tubbs, 1 Cush. 2; Commonwealth *v.* Odin, 23 Pick. 275; The State *v.* Day, 37 Maine, 244. By a more recent statute in Massachusetts, three acts of sale are declared sufficient to constitute the offence of being a common seller. Commonwealth *v.* Kirk, 7 Gray, 496; Commonwealth *v.* Barker, 14 Gray, 412; Commonwealth *v.* Hogan, 97 Mass. 120. See Commonwealth *v.* Mahony, 14 Gray, 46; Commonwealth *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. Commonwealth *v.* Graves, 97 Mass. 114. As to Maine, see The State *v.* O'Conner, 49 Maine, 594.

[4] Commonwealth *v.* Tubbs, supra.

[5] Commonwealth *v.* Odin, 23 Pick. 275, 278.

[6] Commonwealth *v.* Perley, 2 Cush. 559.

[7] Commonwealth *v.* Rumrill, 1 Gray, 388.

[8] The State *v.* Day, 37 Maine, 244.

the offence, of which they are rather the evidence;[1] but, though other evidence may be introduced, this cannot be dispensed with.[2] "No statute, and no rule of common law," said a learned judge, "has precisely determined what shall constitute a person a common seller."[3] In matter of evidence additional to the proof of the three specific sales, the defendant may be shown to have a place fitted up for selling, and to be on the premises ready to sell; while still other surrounding facts of the like import are admissible.[4]

§ 1019. **Necessary Medicinal Use.** — There are some statutes which, in one form of words or another, except from their penalties sales by particular persons, as by druggists, when made for medicinal use.[5] Now, undoubtedly, if there is, in a particular State, a statute of this sort, or if in any way there is a specific provision made for the sale of the forbidden liquor as a medicine, no exception of the thing which the statutory law has thus expressly excepted, can be engrafted upon a prohibitory clause by construction, so as to allow a sale for medicinal use by a person not expressly authorized to sell for such use. But, if there is no such exceptive provision, then, in reason, since all things bend to considerations of human life and human health, even to the extent which authorizes one to take the life of another to save his own, the legislature must be presumed not to have intended to overturn this primary law of life and health, but to have left the necessity of saving life and of curing the sick to operate as an implied exception to the general terms of the statute. Or, we may presume, that the law-makers had in mind the distinction between medicine and drink; and, when they forbade the sale of a particular kind of "drink" or "liquor," they did not intend to prohibit the sale of *medicine* necessary to save life and restore the sick to health, even though the medicine should happen to be composed of the same ingredients as the drink. Now, though the Georgia court has very properly held that whiskey is not a

[1] The State *v.* Maher, 35 Maine, 225; The State *v.* Coombs, 32 Maine, 529. See post, § 1027.

[2] Commonwealth *v.* Tubbs, 1 Cush. 2.

[3] Shaw, C. J. in Commonwealth *v.* Odlin, 23 Pick. 275, 278.

[4] Commonwealth *v.* Tubbs, supra.

[5] Haynie *v.* The State, 32 Missis. 400; Henwood *v.* The State, 41 Missis. 579; The State *v.* Mitchell, 28 Misso. 562; The State *v.* Wells, 28 Misso. 565.

"*drug*," [1] most people, and, among them, those whose views lead them to promote temperance laws, deem it to be, under some circumstances, a *medicine*. Indeed, it is because intoxicating liquor is regarded as a medicine or a mechanical agent, and not a drink, that laws restraining the sale of the "drink" are enacted.

§ 1020. **Continued.** — Coming now more directly to the question as one of judicial authority, we saw, in the earlier part of this volume,[2] that statutes of a criminal nature are to be so construed as not to subject to punishment any person who does not violate their spirit as well as their letter. And on this ground it is by some courts held, that, if one in good faith sells without license liquor to be used merely for a necessary medicinal purpose, he does not violate the statute, though his act is contrary to its letter.[3] Other courts maintain the contrary doctrine.[4] In Missouri, it has been laid down, in the words of Gamble, J. that, "if a physician upon his professional judgment that a sick person needs brandy, administers it to him 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." [5] The question is one of difficulty, especially when it presents itself under a mixed aspect of necessity and common business; but, on the whole, the true method seems to be to look at the spirit of the restraining provision, and, where a sale is under circumstances which remove it out of the mischief meant to be remedied by the enactment, to hold it not to be punishable. The doctrine has been laid down, that, if liquor is purchased for medicinal use, unknown to the seller, still, as it was not sold for such use,

[1] Gault *v.* The State, 34 Ga. 533.

[2] Ante, § 231, 232.

[3] Ante, § 238; Donnell *v.* The State, 2 Ind. 658; The State *v.* Adamson, 14 Ind. 236; Thomasson *v.* The State, 15 Ind. 449.

[4] Ante, § 238; The State *v.* Brown, 31 Maine, 522; Commonwealth *v.* Sloan, 4 Cush. 52; Commonwealth *v.* Kimball, 24 Pick. 366; The State *v.* Chandler, 15 Vt. 425; Gault *v.* The State, 34 Ga. 533. See People *v.* Safford, 5 Denio, 112.

[5] The State *v.* Larrimore, 19 Misso. 391. See also Commonwealth *v.* Kimball, 24 Pick. 366, 369; The State *v.* Hall, 39 Maine, 107; Struble *v.* Nodwift, 11 Ind. 64; ante, § 1013.

the sale is indictable.[1] And this distinction seems highly just. If the buyer merely said he wanted the liquor for a medicine, while he did not in fact, and the seller did not believe he did, this is no justification even under a statute expressly permitting the sale for medicinal use.[2] Probably, if, where the prohibition is general, the liquor forms an ingredient in a medicine, which is sold in good faith [3] as such, all the courts will hold the sale not to be within the prohibition; but the tribunal in Maine decided, that, if a physician sells the liquor and then the other medicinal ingredient, and the two are compounded by the purchaser in the presence of the seller, the sale of the liquor is nevertheless within the prohibition of the statute.[4]

§ 1021. **Selling to Minors, and the Like — Mistake of Fact — The Intent.** — If, according to just doctrine, as held by some courts,[5] and as it would be held by most on a careful consideration of the question, a statute forbids the sale to minors, and the seller, using due care, is deceived, and really believes that the person to whom he sells is of age, while the fact is otherwise, he does not commit the offence. For example, in Indiana "the statute," as the court observed, "prohibits the sale of liquor to a minor, and authorizes the sale to adults." Under this it is held, that, *primâ facie*, the knowledge of the seller

[1] Leppert *v.* The State, 7 Ind. 300.

[2] McGuire *v.* The State, 37 Missis. 369. But if, in such a case, the sale is in good faith, though some of the liquor is actually used for drink, the person selling is not punishable. The State *v.* Mitchell, 28 Misso. 562.

[3] See ante, § 1013.

[4] The State *v.* Hall, 39 Maine, 107. And see The State *v.* Chandler, 15 Vt. 425. In The State *v.* Bennet, 3 Harring. Del. 565, see ante, § 1009, the court observed: "It has been urged, that this construction will prohibit the sale of medicines, the basis of which is spirituous liquors, such as Godfrey's cordial, elixir, paregoric, &c. Not so. The question will always be, whether it is a sale of medicine, or of liquor. If an apothecary sell brandy, as such, it would be a violation of the law; if brandy made into laudanum or other medicines, it is not a violation of the law prohibiting the sale of spirituous liquor. It will never be difficult to distinguish." Opinion by Layton, J. According to a Vermont case, the statute does not apply to medicinal preparations in which alcohol is used in quantities capable of producing intoxication, such as bitters, tinctures, &c., which are in good faith made and sold for medicinal purposes. But, if intoxicating liquor is sold intended to be used as a beverage, though disguised to have the taste, flavor, or appearance of medicine, the act of selling is within the statutory prohibition. Russell *v.* Sloan, 33 Vt. 656.

[5] Farbach *v.* The State, 24 Ind. 77; Rineman *v.* The State, 24 Ind. 80, 85; Brown *v.* The State, 24 Ind. 113.

must be presumed to accord with the fact; yet he may show in his justification, that, the person being unknown to him, he looked like or represented himself to be an adult, or that the person's family or the community treated him as of age.[1] Of course, to make such a defence available, the defendant must have acted in good faith, and with due care and caution. And where this good faith and this due care do exist, and there is no fault or carelessness of any kind, and what is done is such as would be proper and just were the fact what it is thus honestly believed to be, there is no principle known to our criminal jurisprudence by which this morally innocent person can be condemned because of the existence of a fact which he did not know and could not ascertain. On the other hand, to condemn him would be to violate those principles which constitute the very foundation of our criminal jurisprudence. Honest error of fact is as universal an excuse for what would otherwise be a criminal act as insanity.[2] And it is a universal rule in the interpretation of criminal statutes, that, where an expression is general in terms, it must be taken with such limitations and exceptions as the principles of the unwritten law have established; to justify a different interpretation, the statute must be specific, and name the particular thing in respect of which there is to be a departure from this fundamental rule.[3] Thus, a statute forbidding or making penal a thing in general terms, does not justify the punishing of an insane person who commits the act, or a child under seven years old, or a sane person of mature years who does the forbidden thing under a compulsion which he cannot resist; or, as we have just seen, who does it from a pure mind under a mistake of facts which he cannot overcome. These are exceptions engrafted upon the statute by the common law; and, if the courts did not recognize this effect of the common law to modify the general terms, courts and statutes would alike be abated — and they ought to be — as public nuisances, by the uprising of the popular instinct.[4]

[1] The State *v.* Kalb, 14 Ind. 403.

[2] Crim. Law, 5th ed. I. § 301 et seq.

[3] Ante, § 7, 73, 82, 88, 119, 123, 131-144, 155, 156, 165, 196, 197, 231, 351-360, 362, 364, 596, 631, 632, 664, 665, 730, 805, 806, 820-825.

[4] See the places referred to in the preceding note for discussions of the whole subject.

§ 1022. **Continued.** — We have already traced the course of an extraordinary, exceptional departure from this doctrine by the Massachusetts court.[1] It began by an adjudication that a woman, acting under an honest mistake of facts, committed a statutory felony, when, if the facts had been what she believed them to be, her act would have been in every way legal and proper. Afterward, a man was held to be guilty of a felony under the like circumstances. From felony to misdemeanor the slide was easy; and so the like doctrine was applied to misdemeanors. It would be more just to send to prison, or impoverish by a fine, a person admitted to be insane; because an insane person could not so keenly feel the wrong, or be so indignant at the injustice inflicted, or do so much damage to the state if his instincts should impel him to appeal to the moral sentiment of mankind. And to deal thus with an insane person would be no wider a departure from the established principles of the criminal law, than it is to deal thus with a sane man or woman whose honest act is prompted by a mistake of facts of a sort not to be guarded against. Indeed, the violence done to the law is precisely the same in the one instance as in the other. But, as the author had occasion to observe in another connection,[2] not only are commercial courts, sitting in our large cities, with little or no real acquaintance with the criminal law, liable to misjudge in criminal cases, but their decisions are the most apt of all to be followed without examination by judges sitting in those parts of the country where criminal law is studied and known, who, if they were not misled, would see for themselves the true path. Accordingly in Wisconsin, where the criminal law appears to be generally well administered, the court, following the Massachusetts decisions and citing no other, has held, that, in the circumstances mentioned in the last section, the sale to a minor, who has the appearance of being of age and represents himself to be so, is equally an offence as though the seller were under no mistake of the facts.[3]

[1] Ante, § 356–358.

[2] Crim. Proced. 2d ed. II. § 604.

[3] The State *v.* Hartfiel, 24 Wis. 60. The case of Ulrich *v.* Commonwealth, 6 Bush, 400, appears also to be of the like sort, but it is too briefly reported to enable one to say with certainty. And see, as perhaps having some bear-

§ 1023. **Intent, continued.** — Where there is no mistake of fact, it is sufficient, in condemnation of a defendant, that he intended to do the specific thing which the law forbids; it being no excuse for him that he deemed it to be right.[1]

§ 1024. **Agent — Principal — Sales by Agent.** — It is not necessary, in order to constitute the offence of selling liquor contrary to these statutes, that the person making the sale should own the liquor, or should have from the owner authority to sell it.[2] Yet, on the other hand, if a person not owning

ing on this question, on the one side or the other, Stanley *v.* The State, 26 Ala. 26; Smith *v.* The State, 24 Texas, 547; Dickins *v.* The State, 30 Ga. 383; Miller *v.* The State, 5 Ohio State, 275; Emery *v.* Kempton, 2 Gray, 257; Commonwealth *v.* Goodman, 97 Mass. 117. In the above case of The State *v.* Hartfiel, the learned chief justice observed: "The authorities cited [that is, the Massachusetts cases] 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. . . . The act in question is a police regulation, and we have no doubt that the legislature intended to inflict the penalty, irrespective of the knowledge or motives of the person who has violated its provisions. Indeed, if this were not so, it is plain that the statute might be violated times without number, with no possibility of convicting offenders, and so it would become a dead letter on the statute book, and the evil aimed at by the legislature remain almost wholly untouched. To guard against such results, the legislature has, in effect, provided, that the saloon keeper, or other vendor of intoxicating liquors or drinks, must know the facts — must know that the person to whom he sells is a *qualified drinker*, within the meaning of the statute; and, if not, he acts at his peril in disobeying the requirements of the law." p. 61, 62. Now we have seen (ante, § 356–358), that the Massachusetts doctrine, which the Wisconsin court thus understood itself as copying, has nothing in particular to do with police regulations, but it extends to felonies. Doubtless it would not be held to extend to all felonies; for error is seldom or never consistent with itself. But the terming of a statute, by the court, a "police regulation," cannot change its nature. The objection that the statute could not be enforced if interpreted in accordance with the fundamental principles of our jurisprudence is plainly without foundation. England, for example, is a country in which the laws are made effective; yet this Massachusetts and Wisconsin doctrine was never heard of there. But in every community, and especially in our States, laws are best enforced when by a just interpretation they are made to commend themselves to the public conscience, so that the public approval will go step by step with the ministers of the law. And no blows are ever dealt against law and its obedience so deadly as those which fall from the judicial hand, when, by interpretation, men are condemned, whether to fine, imprisonment, or death, in cases where it is admitted their acts were well meant, and were lawful according to the facts as understood by them.

[1] The State *v.* Presnell, 12 Ire. 103. See also The State *v.* Cassety, 1 Rich. 90; Gilbert *v.* Hendricks, 2 Brev. 161.

[2] The State *v.* Wadsworth, 30 Conn. 55; Commonwealth *v.* Williams, 4 Allen, 587; The State *v.* Finan, 10 Iowa, 19.

it has the authority to sell it, — in other words, if he acts as clerk or servant to the owner, — this fact does not excuse him, but he is equally guilty as though he proceeded on his own motion and for his own profit; because no man can authorize another to violate the law.[1] Moreover, it being a doctrine of the law, that whatever a man does through an agent or servant or clerk, whether (in a case which is not felony) he is himself absent or present, may be understood in law as done by himself; therefore, where a sale is authorized by the owner and is made by an agent, the principal is indictable in the same manner as if his own hand performed the act.[2] In this way he may be holden criminally in the place where the act of sale or other act in violation of the law is performed, though his personal presence is even in another State or country.[3] The agent, as just observed, is also responsible personally, the same as if he violated the law on his own account, or for his own profit.[4] And a wife may be guilty by selling as the agent of her husband, in his absence.[5] In like manner, the unauthorized sale, by one partner, of liquor belonging to the firm, may, at the election of the power which prosecutes, be under some circumstances deemed a sale by all the individual partners.[6] In all these cases, if the person sought to be charged really did not give authority, in any way, direct or indirect, or participate in the profits of the transaction, or suffer his will to concur therein, the principles discussed in the last four sections, and in the work on the Criminal Law,

[1] The State *v.* Matthis, 1 Hill, S. C. 37; The State *v.* Wiggin, 20 N. H. 449; Winter *v.* The State, 30 Ala. 22.

[2] Crim. Law, 5th ed. I. § 564, 628–633, 673, 677; Commonwealth *v.* Park, 1 Gray, 553; Thompson *v.* The State, 5 Humph. 138; Commonwealth *v.* Major, 6 Dana, 293; Commonwealth *v.* Nichols, 10 Met. 259; Schmidt *v.* The State, 14 Misso. 137; The State *v.* Brown, 31 Maine, 520; The State *v.* Stewart, 31 Maine, 515; The State *v.* Dow, 21 Vt. 484; The State *v.* Caswell, 2 Humph. 399.

[3] Crim. Law, 5th ed. I. § 110–116.

[4] Crim. Law, 5th ed. I. § 355, 657, 658; Schmidt *v.* The State, 14 Misso. 137; Hays *v.* The State, 13 Misso. 246; The State *v.* Bryant, 14 Misso. 340; The State *v.* Bugbee, 22 Vt. 32; Commonwealth *v.* Hadley, 11 Met. 66; Roberts *v.* O'Conner, 33 Maine, 496; The State *v.* Caswell, 2 Humph. 399; The State *v.* Dow, 21 Vt. 484; French *v.* People, 3 Parker, 114.

[5] The State *v.* Haines, 35 N. H. 207; Geening *v.* The State, 1 McCord, 573.

[6] Smith *v.* Adrian, 1 Mich. 495; The State *v.* Neal, 7 Fost. N. H. 131; Whitton *v.* The State, 37 Missis. 379.

show, that he cannot be holden.[1] On the other hand, where the principal is protected by a license, it protects also the agent.[2]

§ 1025. **Husband and Wife.** — While, as just observed, a wife may be guilty where she sells as the agent of her husband, there are, on the other hand, circumstances in which the guilt will be the husband's alone; as, where she sells in his presence, and by his command, according to principles discussed elsewhere.[3] If he is absent, and the sale is without his consent, expressed or implied, she alone is criminally liable;[4] but if, he being absent, she sells by his direction, both are responsible, and, if the prosecuting power pleases, the two may be indicted jointly.[5] The recent statutes, which in most of our States have been enacted, securing to married women more ample rights of property than they had at the common law, do not affect the criminal responsibilities of the parties in these cases of liquor selling.[6] Therefore, if a married woman owns the liquors and the business independently of her husband, and he makes the sales,[7] or she makes them in his presence and by his direction,[8] he is indictable.

§ 1026. **The Punishment.** — The general question of the punishment in such cases, and the particular question whether the penalty for a joint sale should be imposed on the defendants severally or jointly, were sufficiently discussed in the work on the Criminal Law.[9] There are some points, con-

[1] Crim. Law, 5th ed. I. § 218–221, 628–634; Barnes *v.* The State, 19 Conn. 398; Commonwealth *v.* Nichols, 10 Met. 259; The State *v.* Borgman, 2 Nott & McCord, 34, note; The State *v.* Bohles, 1 Rice, 145, 147; Lauer *v.* The State, 14 Ind. 131.

[2] Pickens *v.* The State, 20 Ind. 116.

[3] Crim. Law, 5th ed. I. § 356 et seq.

[4] Pennybaker *v.* The State, 2 Blackf. 484; Commonwealth *v.* Murphy, 2 Gray, 510; The State *v.* Collins, 1 McCord, 355.

[5] Commonwealth *v.* Hamor, 8 Grat. 698; Commonwealth *v.* Tryon, 99 Mass. 442.

[6] Commonwealth *v.* Gannon, 97 Mass. 547; Commonwealth *v.* Welch, 97 Mass. 593.

[7] Commissioners of Excise *v.* Dougherty, 55 Barb. 332.

[8] Mulvey *v.* The State, 43 Ala. 316.

[9] Crim. Law, 5th ed. I. § 940, 958. And see Lincolnton *v.* McCarter, Busbee, 429; Black *v.* McGilvery, 38 Maine, 287; Tuttle *v.* Commonwealth, 2 Gray, 505; Estes *v.* The State, 2 Humph. 496; Ingersoll *v.* Skinner, 1 Denio, 540; Washburn *v.* McInroy, 7 Johns. 134; People *v.* Brown, 16 Wend. 561; Barth *v.* The State, 18 Conn. 432; Commonwealth *v.* Harris, 7 Grat. 600; Tracy *v.* Perry, 5 N. H. 504; Harris *v.* Commonwealth, 23 Pick. 280.

cerning the punishment, of a nature local to particular States, and so not requiring an explanation at large.[1]

§ 1027. **Divisions of the Act — Election — Former Prosecution.** — The questions suggested by these words were all discussed somewhat in the work on the Criminal Law. The party offending may be held for any crime which can be carved out of his conduct, at the election of the prosecutor.[2] But whether he can then be proceeded against under another clause of the statute also, may under some circumstances be a question of difficulty. We saw, in that work,[3] that, if one is convicted of being a common seller, the three acts of sale relied on cannot afterward, according to some views, be severally prosecuted as distinct sales, under a clause providing a penalty for each sale, while, according to other views, they may be; and they may be if there is an acquittal instead of a conviction.[4] So, in Rhode Island, it has been held, that to keep liquor for sale, and to sell it, are two separate offences; and a jeopardy for one of them is not a bar to a conviction for the other.[5] And one may be found guilty of the common nuisance of keeping a disorderly house, by selling liquor without a license, and convicted likewise of the several offences of making the specific sales,[6] or of being a common seller.[7] Where specific acts of selling are indictable, the conviction for one sale does not bar the prosecution for another, made prior to the one to which the conviction relates.[8] And, where a sale is made by a clerk, a conviction of the principal is no defence to a subsequent prosecution against the clerk for the same sale.[9] The courts, indeed, have gone

[1] Taunton *v.* Sproat, 2 Gray, 428; Crosby *v.* Snow, 16 Maine, 121; Miller *v.* The State, 3 Ohio State, 475; Johnson *v.* People, Breese, 276; Mertz's Case, 8 Watts & S. 374.

[2] Crim. Law, 5th ed. I. § 791; Miller *v.* The State, 3 Ohio State, 475. And see Henry *v.* Commonwealth, 9 B. Monr. 361; Frasier *v.* The State, 6 Misso. 195.

[3] Crim. Law, 5th ed. I. § 1054, 1065.

[4] The State *v.* Coombs, 32 Maine, 529; The State *v.* Maher, 35 Maine, 225; The State *v.* Johnson, 3 R. I. 94. See Wilson *v.* Commonwealth, 12 B. Monr. 2; People *v.* Safford, 5 Denio, 112.

[5] The State *v.* Head, 3 R. I. 135.

[6] The State *v.* Williams, 1 Vroom, 102.

[7] The State *v.* Inness, 53 Maine, 536.

[8] The State *v.* Ainsworth, 11 Vt. 91; The State *v.* Cassety, 1 Rich. 90. For other points, see People *v.* Stevens, 13 Wend. 341; Miller *v.* The State, 3 Ohio State, 475.

[9] The State *v.* Finan, 10 Iowa, 19.

a great way to sustain successive prosecutions in these cases for the same act; and, while a part of the decisions under this head are unquestionably right in principle, others are plainly wrong.

§ 1028. **Felony or Misdemeanor.** — There are probably no statutes which have undertaken to elevate this offence to a higher degree than misdemeanor.[1]

§ 1029. **Abetting the Offence.** — But we saw, in the work on the Criminal Law, that some of the usual consequences of misdemeanor are held not to attach to some offences known by this name, by reason of their peculiar nature or smallness of magnitude. And, among these offences, is this one of liquor selling. Thus, it is held by most courts, that the person who entices the seller by buying is not therefore jointly indictable with him.[2] But it is deemed not best to enter into the discussion here.

§ 1030. **Civil Consequences.** — There are some civil consequences growing out of the criminal inhibitions discussed in this chapter, and as incident to them. It is not best to examine these civil consequences minutely here. But since no court will extend its relief to a plaintiff who himself violated the law in the same transaction on which he founds his complaint against the defendant, it follows, that one who sells on credit intoxicating liquor contrary to a statute can maintain no suit for the recovery of the price of it. And the same rule applies to services rendered about the business of unlawful selling. Even if a promissory note has been given, this note cannot be collected at law.[3] This rule does not prevent the enforcement of any other distinct and unconnected contract between the parties, though made at the same time.[4] But a

[1] The Vermont court has expressly held this offence to be misdemeanor. The State *v.* Comings, 28 Vt. 508.

[2] Crim. Law, 5th ed. I. § 657, 658, 761; Commonwealth *v.* Willard, 22 Pick. 476; Hill *v.* Spear, 50 N. H. 254; Commonwealth *v.* Williams, 4 Allen, 587.

[3] 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, 6 Harris, Pa. 48; Adams *v.* Hackett, 7 Fost. N. H. 289; Lewis *v.* Welch, 14 N. H. 294. And see Maybry *v.* Bullock, 7 Dana, 337; New Gloucester *v.* Bridgham, 28 Maine, 60; Foster *v.* Thurston, 11 Cush. 322; Solomon *v.* Dreschler, 4 Minn. 278; Timson *v.* Moulton, 3 Cush. 269.

[4] Chase *v.* Burkholder, 6 Harris, Pa. 48. And see Buck *v.* Albee, 27 Vt. 190.

man who sold all his stock of goods at once to another was held not entitled to maintain an action against the other for any of the money to be paid, where a part of the articles sold consisted of intoxicating liquor.[1] Some nice questions arise where a part of the transaction is in a State in which it is lawful, and a part in a State in which it is unlawful; but a simple reference to some of the authorities will be sufficient on this head.[2] One who has sold spirituous liquors in violation of a statute cannot recover in replevin against a sheriff, and attaching creditors of the vendee, on the ground that, the sale being void, he is entitled to the possession.[3] If a sale has been made contrary to a statute, the subsequent repeal of the statute will not so operate retrospectively as to enable the vendor to recover the price.[4]

§ 1031. **Continued.** — In some of the States, the statute, in words, prohibits any recovery for the price of the liquor. Under this prohibition various questions have arisen, the discussion of which does not come within the purpose of the present volume; so the reader is merely referred to a few of the adjudications. Some of the adjudications, as cited in the note, are illustrative merely, having proceeded on those enactments which do not contain this express clause.[5]

§ 1032. **Points of Local Nature — Authorities cited.** — There

[1] Ladd *v.* Dillingham, 34 Maine, 316. Where the sale of liquors is unlawful, no recovery can be had for them, or for the casks in which they were contained, and which were purchased only for the purpose of facilitating the illegal transaction, or for the freight or cartage of the liquors from the shop of the vendor to the place of business of the vendee, in furtherance and completion of the sale; there being, in the facts of the case, but a single contract between the parties. Bliss *v.* Brainard, 41 N. H. 256.

[2] Hill *v.* Spear, 50 N. H. 253; Converse *v.* Foster, 32 Vt. 828; Carter *v.* Clark, 28 Conn. 512; Buckman *v.* Mussey, 31 Vt. 547; Harrison *v.* Nichols, 31 Vt. 709; Gaylord *v.* Soragen, 32 Vt. 110; Finch *v.* Mansfield, 97 Mass. 89.

[3] Marienthal *v.* Shafer, 6 Iowa, 223.

[4] Hathaway *v.* Moran, 44 Maine, 67.

[5] Carlton *v.* Bailey, 7 Fost. N. H. 230; Breck *v.* Adams, 3 Gray, 569; Sullivan *v.* Park, 33 Maine, 438; Towle *v.* Blake, 38 Maine, 528; Cochrane *v.* Clough, 38 Maine, 25; Emerson *v.* Noble, 32 Maine, 380; Webber *v.* Williams, 36 Maine, 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; Lord *v.* Chadbourne, 42 Maine, 429; Gray *v.* Kimball, 42 Maine, 299; Dearborn *v.* Hoit, 41 Maine, 120; Dunbar *v.* Mulry, 8 Gray, 163; Barnard *v.* Field, 46 Maine, 526; Foxcroft *v.* Crooker, 40 Maine, 308; Charlton *v.* Donnell, 100 Mass. 229; Aiken *v.* Blaisdell, 41 Vt. 655.

are some other points under these enactments; but they are chiefly so local to particular States that the only practical method is to refer to some decisions in which they are discussed, and thus leave the subject.[1]

[1] *Alabama.* Smith *v.* The State, 22 Ala. 54; Lodano *v.* The State, 25 Ala. 64; Holt *v.* School Commissioners, 29 Ala. 451.

Arkansas. Ramsey *v.* The State, 6 Eng. 35.

Illinois. Sullivan *v.* People, 15 Ill. 233; Bennett *v.* People, 16 Ill. 160; Zarresseller *v.* People, 17 Ill. 101.

Indiana. The State *v.* Turner, 5 Blackf. 253; Cable *v.* The State, 8 Blackf. 531; Place *v.* The State, 8 Blackf. 319; Sloan *v.* The State, 8 Blackf. 361; Cheezem *v.* The State, 2 Ind. 149; King *v.* The State, 2 Ind. 523; Thompson *v.* Bassett, 5 Ind. 535; Hanning *v.* The State, 6 Ind. 432; Brosee *v.* The State, 5 Ind. 75; Howard *v.* The State, 5 Ind. 183; Rust *v.* The State, 4 Ind. 528; Cassett *v.* The State, 9 Ind. 87; The State *v.* O'Conner, 4 Ind. 299; Rosenbaum *v.* The State, 4 Ind. 599; Leyner *v.* The State, 8 Ind. 490.

Iowa. Rogers *v.* Alexander, 2 Greene, Iowa, 443.

Kentucky. Lawson *v.* Commonwealth, 14 B. Monr. 225.

Maryland. Brown *v.* The State, 12 Wheat. 419; Bode *v.* The State, 7 Gill, 326.

Massachusetts. Commonwealth *v.* Odlin, 23 Pick. 275; Harris *v.* Commonwealth, 23 Pick. 280; Commonwealth *v.* Herrick, 6 Cush. 465; Commonwealth *v.* Bralley, 3 Gray, 456.

Maine. Foster *v.* Haines, 13 Maine, 307; The State *v.* Davis, 23 Maine, 403; The State *v.* Gurney, 33 Maine, 527; Parsons *v.* Bridgham, 34 Maine, 240; The State *v.* Tibbetts, 36 Maine, 553; Black *v.* McGilvery, 38 Maine, 287.

Maryland. Keller *v.* The State, 11 Md. 525.

Michigan. People *v.* Hart, 1 Mich. 467; Smith *v.* Adrian, 1 Mich. 495.

Mississippi. Brittain *v.* Bethany, 31 Missis. 331.

Missouri. Bledsoe *v.* The State, 10 Misso. 388.

New Hampshire. The State *v.* Perkins, 6 Fost. N. H. 9.

New York Wright *v.* Smith, 13 Barb. 414; Andrews *v.* Harrington, 19 Barb. 343; Wynehamer *v.* People, 2 Parker, 377, 20 Barb. 567; People *v.* Quant, 2 Parker, 410; Van Zant *v.* People, 2 Parker, 168; People *v.* Page, 3 Parker, 600.

North Carolina. The State *v.* Plunkett, 1 Ire. 115; Lincolnton *v.* McCarter, Busbee, 429; The State *v.* Hix, 3 Dev. 116.

Ohio. Hirn *v.* The State, 1 Ohio State, 15; Miller *v.* The State, 3 Ohio State, 475.

South Carolina. The State *v.* Mooty, 3 Hill, S. C. 187; The State *v.* Evans, 3 Hill, S. C. 190; The State *v.* Chamblyss, Cheves, 220; Commissioners *v.* Dennis, Cheves, 229.

Tennessee. Dyer *v.* The State, Meigs, 237; Campbell *v.* The State, 3 Humph. 9; The State *v.* Eskridge, 1 Swan, Tenn. 413.

Virginia. Clemmons *v.* Commonwealth, 6 Rand. 681.

CHAPTER XLIV.

SELLING INTOXICATING LIQUOR — THE PROCEDURE.

§ 1033. **General View — Scope of the Discussion.** — Having considered somewhat minutely the law of the offence in the last chapter, we shall do best, in treating of the procedure in the present, simply to present a few forms of the indictment, and a statement of some of the adjudged points. The statutes affecting the procedure are so various, and so much entangled with things of a local nature, that it will hardly compensate us to extend greatly, in the present connection, these general elucidations.

§ 1034. **Form of Indictment for Selling, &c.** — If a statute makes it punishable for an unlicensed person to sell a quantity, less than so much, of a particular kind of intoxicating liquor, the indictment may be drawn as follows: —

That A, late of, &c., on, &c., at, &c., not being then and there a person licensed to sell intoxicating liquor, did sell to one B a certain quantity less than [so much], to wit, one gill, of a certain kind of intoxicating liquor, to wit, whiskey; against the peace of the said State, and contrary to the form of the statute in such case made and provided.[1]

§ 1035. **Common Seller — Statute and Form.** — A statute in Massachusetts provided, that "no person shall be allowed to be a manufacturer of any spirituous or intoxicating liquors for sale, or a common seller thereof, without being duly appointed or authorized as aforesaid, on pain of forfeiting, on the first conviction, &c. And three several sales of spirituous or intoxicating liquors, either to different persons or to

[1] See also Commonwealth *v.* Eaton, 9 Pick. 165; Commonwealth *v.* Hart, 11 Cush. 130; Miller *v.* The State, 3 Ohio State, 475; Kern *v.* The State, 7 Ohio State, 411; Kliffield *v.* The State, 4 How. Missis. 304; The State *v.* Maicus, 20 Ark. 201; Commonwealth *v.* Odlin, 23 Pick. 275; The State *v.* Williamson, 19 Misso. 384; Commonwealth *v.* Wilcox, 1 Cush. 503; The State *v.* Lane, 33 Maine, 536; Commonwealth *v.* White, 18 B. Monr. 492; Commonwealth *v.* Macuboy, 3 Dana, 70; McCuen *v.* The State, 19 Ark. 630; Burch *v.* Republic, 1 Texas, 608; The State *v.* Cox, 29 Misso. 4.5.

the same person, shall be sufficient to constitute a violation of this section; and delivery in or from any store, shop, warehouse, steamboat, or other vessel, or any vehicle of any kind, or any building or place other than a dwelling-house, shall be deemed *prima facie* evidence of a sale; and a delivery in or from a dwelling-house, with payment or promise of payment, either express or implied, on, before, or after such delivery, shall be held to constitute a sale within the meaning of this act, &c., &c., provided, that nothing in this act shall be construed to prevent the manufacture or sale of cider for other purposes than that of a beverage; or the sale and use of the fruit of the vine for the commemoration of the Lord's Supper." [1] So much of this one section is here given, in order that the reader may practically see what parts of a statute it is not necessary to cover by the allegations of an indictment. Upon this statute, the following form, for being a common seller, has been adjudged sufficient: —

"That A, &c., at, &c., on, &c., and from that day to the day of finding this indictment, was, without being duly authorized and appointed thereto according to law, a common seller of spirituous and intoxicating liquors, and mixed liquors, part of which were spirituous and intoxicating, contrary," &c.[2]

It is perceived that this form is a little more extended than necessary; hence it may be reduced to read as follows: —

That A, &c., at, &c., on, &c., and from that day to the day of the finding of this indictment, was a common seller of spirituous and intoxicating liquors, without being duly appointed or authorized thereto [3] according to law, against, &c.

§ 1036. *Views as to the Form of the Indictment:* —

Must satisfy Constitutional Requirements. — In many of our States, there has not only been legislation of a general sort abolishing, or attempting to abolish, more or less of the common-law rules regulating indictments in general, but in particular regulating indictments for this offence. We have already seen,[4] that such statutes are sometimes found to be

[1] Mass. Stat. 1852, c. 322, § 12.

[2] Commonwealth *v.* Kendall, 12 Cush. 414. And see The State *v.* Cottle, 15 Maine, 473; The State *v.* Stinson, 17 Maine, 154; Commonwealth *v.* Leonard, 8 Met. 529.

[3] For the reason of this change in the form of the negative averment, see post, § 1043; though the other form has been held, in this instance, to be adequate. Post, § 1042.

[4] Ante, § 370.

unconstitutional and void; rendering it necessary, notwithstanding the statute, to comply with the rules of the common law. Thus, for a further illustration, in Alabama, an enactment forbidding the sale of liquor to minors, pupils, &c. is in the following words: "Any person who keeps fermented, vinous, or spirituous liquors for sale, whether a licensed retailer or not, and who sells, gives, or delivers any such liquors to any minor, apprentice, student, or pupil of any school, academy, or college, or to any person for the use of any minor, apprentice, student, or pupil, knowing the use for which it was intended, without the consent of the parent, guardian, master, or other person having the legal charge of such minor, apprentice, student or pupil, must, on conviction, be," &c. And the following indictment, which conformed in substance to what a statute had pointed out as sufficient, was still held to be inadequate: "That, before the finding of this indictment, Luther Byran, a person keeping vinous or spirituous liquors for sale, unlawfully sold, gave, or delivered to one John A. Lowe, a minor, vinous or spirituous liquor, without the consent of the parent, guardian, or the person having the control of the said John A. Lowe, contrary," &c. Peck, C. J. in delivering the opinion of the court, observed: "Where a statute creates a new offence unknown to the common law, and describes the constituents necessary to constitute the offence, an indictment under the statute must conform to the description thus given. That is not done in this case. One of the important and necessary elements of the offence created by the section of the Revised Code referred to is, that the liquor must be sold, given, or delivered to the minor without the consent of the parent, guardian, *master*, or other person having the *legal* charge of such minor. In the indictment, as well as in the form given in the appendix [to the Code], the word *master*, and also the word *legal*, in reference to the person having the charge of the minor, are omitted. This makes the offence described in the indictment and in the form essentially different from the offence described in the statute. These omissions are not defects of form merely, but of substance. If the word 'master' may be omitted, for the same reason the words parent and guardian may be omitted also;

and the omission of the word 'legal,' in the connection in which it is used, and for the purpose for which it is used in the statute, destroys the character of the charge required to be had of the minor by the person whose consent may justify the accused in selling, giving, or delivering vinous or spirituous liquor to him. To hold that these, or other words used in the statute as descriptive of the offence, may be omitted in the indictment because they are not in the form given in the appendix, will be to set up the form above the statute. This should not be done. Therefore an indictment that strictly pursues the form will be insufficient, if the form is defective in matter of substance. This opinion is not in conflict with any of the cases heretofore decided by this court, in which it is held, that an indictment in the form given in the appendix of the Code is sufficient; because, in none of these cases, does the form used omit any statement or word required to make out any material ingredient in the description of the offence charged." [1]

§ 1037. **Name of Person to whom Sale is made.** — According to decisions in some of our States, it is not necessary for the indictment to mention the name of the person to whom the liquor is sold; [2] while, on the other hand, if the case is that of a single sale, this averment is, in other States, held to be essential when the name is known, or when it is not known, the fact of its being unknown to the jurors should be stated.[3] The decisions on the one side and the other of this question are not far from equal in number; and, on both sides, they

[1] Byran *v.* The State, 45 Ala. 86, 87, 88.

[2] The State *v.* Spain, 29 Misso. 415; The State *v.* Munger, 15 Vt. 290; Hulstead *v.* Commonwealth, 5 Leigh, 724; The State *v.* Parnell, 16 Ark. 506; People *v.* Adams, 17 Wend. 475; Cannady *v.* People, 17 Ill. 158; McCuen *v.* The State, 19 Ark. 630; Green *v.* People, 21 Ill. 125; The State *v.* Ladd, 15 Misso. 430, overruling Neales *v.* The State, 10 Misso. 489; The State *v.* Muse, 4 Dev. & Bat. 319; The State *v.* Blelby, 21 Wis. 204; The State *v.* Gummer, 22 Wis. 441; The State *v.* Spain, 29 Misso. 415; Commonwealth *v.* Dove, 2 Va. Cas. 26.

[3] Capritz *v.* The State, 1 Md. 569; The State *v.* Faucett, 4 Dev. & Bat. 107; Dorman *v.* The State, 34 Ala. 216; The State *v.* Walker, 3 Harring. Del. 547; The State *v.* Jackson, 4 Blackf. 49. And see Commonwealth *v.* Cook, 13 B. Monr. 149; The State *v.* Carter, 7 Humph. 158; Commonwealth *v.* Smith, 1 Grat. 553; The State *v.* Stinson, 17 Maine, 154; Commonwealth *v.* Blood, 4 Gray, 31; The State *v.* Nutwell, 1 Gill, 54.

seem to be supported by a considerable weight of reasoning. In Iowa, the statute provided, that, "if any person by himself, his clerk, servant, or agent, shall, for himself, or any person else, directly or indirectly, on any pretence, or by any device, sell, or, in consideration of the purchase of any other property, give, to any *other person*, any intoxicating liquors, he shall be deemed guilty of a misdemeanor," &c. And it was deemed that the form of words here employed was such as to require the allegation of the name of the purchaser. "If," said Miller, J. "any one of the material facts going to make up the offence be left out of the information, it fails to charge an offence, and no judgment can be rendered thereon upon a verdict of guilty. That the sale was made to some 'other person' is as material as that the thing sold was intoxicating liquor." [1] Under statutes otherwise drawn, the ground on which the name is required, if at all, is because it is a method of identifying the offence, and of giving the defendant the necessary means of meeting the charge made against him.[2] Therefore it was with great force laid down in South Carolina, that an indictment charging the defendant with unlawfully selling "spirituous liquors, that is to say, in quantities less than three gallons, he then and there not having any license," &c., without specification of any person to whom the sale was made, or of any other identifying circumstance, is bad.[3] Undoubtedly, however, there are cases in which the identification may be made sufficiently clear to satisfy the demands of legal principle without the name.[4] Where the charge is that of being a common

[1] The State *v.* Allen, 32 Iowa, 491, 493.

[2] Ante, § 373.

[3] The State *v.* Steedman, 8 Rich. 312. And see The State *v.* Cox, 29 Misso. 475.

[4] Perhaps the leading case on the side that it is not necessary to allege the name of the person to whom the sale was made, is People *v.* Adams, 17 Wend. 475. In this case, Nelson, C. J. observed: "The offence upon the statute consists in the *act of selling* the spirituous liquors without the license; and therefore the designation of the persons to whom sold is no way material to constitute it. The question is simply one of pleading, whether certainty to a common intent requires the names of the persons to be given to whom the liquor was sold. The precedents appear to be all the other way. Our statutes on this subject appear to correspond, substantially, with the English acts of Parliament, and were undoubtedly taken from them, forbidding the sale of 'distilled spirituous liquors, or strong water,' as will be seen from a collection of them in 2 Burn Just. 185 and onward. 4 Wentworth, 504, contains the form of an information upon these statutes, for selling without li-

seller,[1] the names of persons to whom specific sales are made need not be set out;[2] for, in these cases, not even the particular instances need be specified.[3]

cense, in which *the mere act of retailing* the liquor without a license is averred; the persons to whom it was sold are not mentioned, or in any way referred to. The same remark is applicable to an information and complaint before the justices for selling ale without license. 1 Burn Just. 23, 25. There is a precedent in 2 Chit. Crim. Law, 434, for selling ale and beer on Sundays, in which the sale is charged as made to *divers idle and ill-disposed persons*, whose names to the jurors aforesaid are yet unknown. Here, though the persons are mentioned as unknown, yet, from the manner in which it is stated, it is, I think, to be inferred that the names were not deemed material, as in the precedents where they are so worded, it is indicated by the form. In 4 Wentworth, 525, a precedent is given for selling hard soap, in a shape different from that required by the statute of 24 Geo. 3, c. 48, § 14, in which the names of the persons are not mentioned, or in any way referred to. The case is strictly analogous to the one under consideration, so far as respects the question involved. The precedents are clearly with the pleader in this case; and, upon a question the decision of which depends so much upon the opinion of the court as to what amounts to certainty to a common intent, these afford perhaps as safe a guide as can be found." p. 477. The Mississippi court followed this case, and many other collected authorities on the same side, in an able opinion by Tarbell, J. in Riley *v.* The State, 43 Missis. 397. It is difficult, perhaps impossible, to settle a question like this by an appeal to principle; but, if such an appeal were to be made, the writer would say, that, according to the principles of both law and natural justice, the particular transaction, where, by the statute, the transaction is a specific one, should be pointed to by the indictment. One of the methods of doing this, where the offence consists in a single specific sale, is to name the person to whom the sale was made. That would seem to be a natural method, and a fair one. But there may be others. Thus, it was well laid down in Texas, that an indictment for selling spirituous liquors without license should state at what house or establishment, or to whom, the vending took place, or some other fact tending to identify the transaction; otherwise the objection is fatal on demurrer. Burch *v.* Republic, 1 Texas, 608. In this case, Wheeler, J. illustrated the doctrine thus: "Where a statute, for instance, makes the malicious killing of cattle a felony, it is not enough in an indictment on the statute, to charge the defendant with killing 'cattle' generally, but the particular species of cattle must be stated. And where a statute makes it a crime for any person, by any false pretence, to obtain from another any money, &c., with intent to cheat or defraud any person, it is not sufficient to charge the offender with being guilty of 'false pretences' generally, but the particular pretences must be set forth, according to the truth of the case, and also, that the money, &c., obtained was the property of the person whom it was

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[1] Ante, § 1018.

[2] Commonwealth *v.* Hart, 11 Cush. 130; Commonwealth *v.* Wilcox, 1 Cush. 503; The State *v.* Cottle, 15 Maine, 473.

[3] Commonwealth *v.* Pray, 13 Pick. 359; Commonwealth *v.* Odlin, 23 Pick. 275. See, as to a different form of the provision, Commonwealth *v.* Thurlow, 24 Pick. 374.

§ 1038. **Name of Liquor.** — If the statute prohibits, by name, the sale of particular kinds of liquor, which it mentions, the better doctrine is, that the indictment must in some form employ the name in describing the liquor.[1] Still, this is not necessary in all the States, and under all forms of the law.[2] And where the statutory words are "intoxicating liquor," the indictment is good if it uses the same words, without specifying the kind of liquor.[3] If, then, such a statute in another part provides, that "cider," for example, shall be deemed intoxicating liquor within the meaning of this act, sales of unfermented cider may be indicted and punished as sales of "intoxicating liquor."[4]

§ 1039. **Quantity.** — The statutes are so diverse, that there can be and is no one certain rule as to alleging the quantity of the liquor sold. Of course, if, by the statute, the offence is made to consist in selling a less quantity than so much, the indictment must in some way bring the alleged fact within the statutory definition of the offence. In Massachusetts, a statute having fixed the quantity within fifteen gallons, an indictment was held to be good which alleged that the defendant "did sell spirituous liquors in a less quantity than fifteen gallons and that delivered and carried away all at one time, to wit, two quarts of spirituous liquor."[5] Yet, where the allegation was

intended to defraud; who that person was; and from whom the money was so obtained." p. 610. And see Alexander *v.* The State, 29 Texas, 495. It appears to be the doctrine of a Virginia case, that the name of the person to whom the liquor is sold need not be given; but, if it is, the allegation must be proved as laid. Commonwealth *v.* Taggart, 8 Grat. 697. See, however, Hulstead *v.* Commonwealth, 5 Leigh, 724. In Arkansas, it is not necessary to allege or prove the kind or quantity of liquor sold, or the name of the person to whom the sale was made; but, if the kind or quantity is alleged under a *videlicet*, the allegation may be rejected as surplusage. McCuen *v.* The State, 19 Ark. 630.

[1] The State *v.* Fox, 1 Harrison, 152.

[2] The State *v.* Mullinix, 6 Blackf. 554; Fetterer *v.* The State, 18 Ind. 388; Downey *v.* The State, 20 Ind. 82; The State *v.* Carpenter, 20 Ind. 219.

[3] Commonwealth *v.* Conant, 6 Gray, 482; Commonwealth *v.* Ryan, 9 Gray, 137; The State *v.* Blaisdell, 33 N. H. 388.

[4] Commonwealth *v.* Dean, 14 Gray, 99.

[5] Commonwealth *v.* Pearson, 23 Pick. 280, note. And see The State *v.* Arbogast, 24 Misso. 363; The State *v.* Paddock, 24 Vt. 312; Redding *v.* Commonwealth, 3 B. Monr. 339; Haskill *v.* Commonwealth, 3 B. Monr. 342. In Tennessee, a presentment that the defendant on, &c., "did unlawfully sell, vend, and retail spirituous liquors, to wit, whiskey, to one M. and divers

simply, that the defendant sold "one pint," this was held to be bad; because, as the court viewed it, the pint might have been a part of a larger quantity, and so this did not amount to an allegation of a sale of less than fifteen gallons. "We do not," said Shaw, C. J. "consider 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."[1] This doctrine was affirmed in Indiana,[2] but afterward overruled in consequence of the differing provisions of the statute.[3] Where, by the provisions of the statute, it is immaterial what is the quantity sold, the simple allegation that it was so much, without adding that it was less than another quantity named, is adequate.[4] The quantity sold should be mentioned,[5] and it should be expressed by some term known to the law; thus, in Maine, it is bad to say "one *glass* of rum."[6] So, "one drink" will not answer.[7] On the other hand, however, in New Hampshire the term "two glasses" was held to be good,[8] and in Iowa "one glass."[9]

§ 1040. **Price.** — In some of the States, it is required even

other persons, in quantities less than a quart, the said defendant not having taken out a license," was held to be good. The State *v.* Young, 5 Cold. 51. The words "one gill of spirituous liquor, the same being a less quantity than one quart," have been adjudged sufficient. Zarresseller *v.* People, 17 Ill. 101.

[1] Commonwealth *v.* Odlin, 23 Pick. 275, S. P. The State *v.* Shaw, 2 Dev. 198.

[2] Struckman *v.* The State, 21 Ind. 160.

[3] Reams *v.* The State, 23 Ind. 111, 113. In an earlier Indiana case, where the allegation was that the defendant sold a "pint," not adding that the pint sold was less than a quart, this was held to be sufficient; Stuart, J. observing: "A pint is a measure as well known as a quart. The one word is quite as definite as the other. An allegation that a pint was less than a quart could not be more explicit, and was therefore unnecessary." Willard *v.* The State, 4 Ind. 407, 408.

[4] Commonwealth *v.* Brown, 12 Met. 522.

[5] Hubbard *v.* The State, 11 Ind. 554.

[6] The State *v.* Reed, 35 Maine, 489.

[7] Cool *v.* The State, 16 Ind. 355.

[8] The State *v.* Rust, 35 N. H. 438.

[9] Wrocklege *v.* The State, 1 Iowa, 167; Hintermiester *v.* The State, 1 Iowa, 101.

to state the price;[1] but this allegation, it is believed, is not generally deemed to be necessary.[2]

§ 1041. **Other Things sold with Liquor.** — If one sells the forbidden liquor and something not forbidden together, as one transaction and for an aggregate sum, the allegation against him may be the same as though the liquor only was sold, no mention being made of the other article. Said Dewey, J.: "The law does not require, in such cases, a contract of sale to be set out with all the terms, conditions, and stipulations, or the precise consideration paid for the thing purchased."[3]

§ 1042. **Negativing Qualifications to sell.** — The rules which determine when and how exceptions, provisos, and the like, found in statutes, must be negatived in indictments upon the statutes, were considered in detail in the author's work on Criminal Procedure,[4] and something on this subject has appeared in the earlier sections of the present volume.[5] Frequent illustrations of the rules there stated occur in indictments on liquor laws. We have seen[6] that these negative averments need not be so much drawn out into detail, or be so specific, as the main or affirmative ones. Yet these, like the affirmative ones, must cover the whole law to which they relate. Thus, in New Jersey, it was held to be insufficient to allege that the defendant did not obtain a "license in the manner directed by the act concerning inns and taverns;" because, said the learned judge, "that act does not alone prescribe the mode of obtaining license. It is in part prescribed by the act of 1820."[7] And in Massachusetts, as the law stood at one time, it was not sufficient to allege that the defendant sold "spirituous liquor in a less quantity than twenty-eight gallons, without being first duly licensed as a retailer of wine and spirits, according to law;" because, said

[1] Crim. Proced. 2d ed. I. § 514; Neales *v.* The State, 10 Misso. 498; Segur *v.* The State, 6 Ind. 451; Hubbard *v.* The State, 11 Ind. 554; The State *v.* Ladd, 15 Misso. 430. And see Miles *v.* The State, 5 Ind. 239; Harrison *v.* Bryant, 5 Ind. 240.

[2] Ante, § 385; Clare *v.* The State, 5 Iowa, 509; Commonwealth *v.* Roberts, 1 Cush. 505; The State *v.* Finan, 10 Iowa, 19; The State *v.* Miller, 24 Misso. 532.

[3] Commonwealth *v.* Thayer, 8 Met. 525.

[4] Crim. Proced. 2d ed. I. § 631–642.

[5] Ante, § 382, 605, 606.

[6] Ante, § 382.

[7] The State *v.* Webster, 5 Halst. 293.

Dewey, J. "if the sale were of liquor to be drank on the premises, then it might have been made by the defendant under a license as an innholder, or a common victualler; and there is no allegation in the complaint, that the defendant was not licensed as such innholder or common victualler."[1] But, where the words of the negative averment are broad enough to cover the whole law, they may be brief. Thus, "not being first duly licensed;" &c.,[2] "without then having a grocer's license, dram-shop keeper's license, an innkeeper's license, or any legal authority to sell;"[3] "not having then and there any authority or appointment according to law to make such sale;"[4] "without having a license for that purpose, continuing in force;"[5] "without being duly appointed and authorized therefor;"[6] "without having any license, appointment, or authority therefor, first duly had and obtained according to law;"[7] and various other phrases of the like kind,[8] have severally been held to be adequate. And if the affirmative allegation necessarily involves the required negative, it will be of itself alone sufficient.[9]

§ 1043. **Continued — "Or."** — We have seen, in other connections, that "or" is a dangerous word to use in an indictment; because it may leave the allegation too indefinite or uncertain. Yet there are circumstances in which it is proper, or even necessary.[10] Thus, as we saw elsewhere, while "or" is not ordinarily proper in alleging a breach of duty, it is

[1] Commonwealth *v.* Roberts, 1 Cush. 505. See Davis *v.* The State, 39 Ala. 521; Neales *v.* The State, 10 Misso. 498; Agee *v.* The State, 25 Ala. 67; The State *v.* Haden, 15 Misso. 447; Franklin *v.* The State, 12 Md. 236; The State *v.* Blaisdell, 33 N. H. 388; Commonwealth *v.* Kimball, 7 Met. 304; The State *v.* Clark, 23 Vt. 293; Commonwealth *v.* Baker, 10 Cush. 405.

[2] Commonwealth *v.* Pray, 13 Pick. 359; Commonwealth *v.* Leonard, 8 Met. 529.

[3] The State *v.* Hornbeak, 15 Misso. 478; The State *v.* Andrews, 28 Misso. 17; The State *v.* Owen, 15 Misso. 506; The State *v.* Sutton, 25 Misso. 300.

[4] Commonwealth *v.* Conant, 6 Gray, 482.

[5] The State *v.* Wishon, 15 Misso. 503.

[6] Commonwealth *v.* Murphy, 2 Gray, 510; Commonwealth *v.* Roland, 12 Gray, 132; Commonwealth *v.* Lafontaine, 3 Gray, 479; Commonwealth *v.* McSherry, 3 Gray, 481, note; Commonwealth *v.* Clapp, 5 Gray, 97; Commonwealth *v.* Keefe, 7 Gray, 332; Commonwealth *v.* Boyle, 14 Gray, 3.

[7] Commonwealth *v.* Wilson, 11 Cush. 412; Commonwealth *v.* Hatcher, 6 Grat. 667.

[8] Martin *v.* The State, 6 Humph. 204.

[9] Sword *v.* The State, 5 Humph. 102.

[10] Crim. Proced. 2d ed. I. § 434–446, 484, 585–592; II. § 438–440, 647; ante, § 795.

proper in alleging a duty.[1] This distinction has its most frequent illustration when a statute and an indictment on it are compared; the statute, setting out a duty, has the disjunctive "or," and the indictment, setting out a breach of duty, employs the conjunctive "and" where "or" was used in the statute.[2] But, in exceptional cases, an indictment, like a statute, may set out a duty; and then, like the statute, it employs "or." For a like reason "or" is, as we saw in examples given in the last section,[3] proper in these negative averments in the indictment; indeed, the general rule may be said to be, that it is here the proper conjunction, the same as "and" is the proper conjunction in affirmative averments. Suppose, for example, there are three ways in any one of which the authority to sell may be conferred; then, if the indictment charges that the defendant had not this form of the authority, "or" that form, "or" the other form, the negation is as broad as the statute, and it is precise, definite, and certain; while the word "and," instead of "or," would make the negative averment assume a form differing from the law itself, as though the law required the authority to be in all the three methods combined. And where the negative averment is in this conjunctive form, the entire allegations of the indictment do not show an offence; for, though the defendant, when he made the sale, was destitute of the compound authority thus negatived, he might have had some one of the single forms of authority made sufficient by the statute. Thus, in Kentucky, a statute prohibits a sale to an infant "without the written consent *or* request" of the father; and it has been held ill to say "without the written consent *and* request."[4] Prob-

[1] Crim. Proced. 2d ed. I. § 591.

[2] Ib. I. § 436, 484, 586.

[3] See also The State *v.* Swadley, 15 Misso. 515; People *v.* Gilkinson, 4 Parker C. C. 26; The State *v.* Burns, 20 N. H. 550; The State *v.* Boice, Cheves, 77.

[4] Commonwealth *v.* Hadcraft, 6 Bush, 91, Hardin, J. observing: "The act defines the offence 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 offence 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 offence defined by the statute." p. 93.

ably, if a pleader should have an invincible repugnance to "or," he might in most cases devise means to get along without it; as in this instance, the "and" might be employed by employing also a circumlocution, thus: "without the written consent and without the written request."

§ 1044. **Continued — When necessary.** — As to when the negative averment is necessary, and when not, there are no doctrines peculiar to the present title, but a reference to some of the authorities may be convenient to the reader.[1]

§ 1045. **Joinder of Offenders and Offences.** — Under this head, there are perhaps no principles which are peculiar to the present title. A reference to some cases is appended in a note.[2] If liquor is sold at one time and place to two distinct persons, two offences are thereby committed.[3] "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, in such a case, they may, if the prosecutor pleases, be proceeded against jointly.[4] But where there is no

[1] Commonwealth *v.* Thurlow, 24 Pick. 374; The State *v.* Watson, 5 Blackf. 155; The State *v.* Robbins, 9 Ire. 356; The State *v.* Miller, 7 Ire. 275; The State *v.* Wade, 34 N. H. 495; The State *v.* Garney, 37 Maine, 149; The State *v.* Shaw, 35 N. H. 217; The State *v.* Crowell, 30 Maine, 115; The State *v.* Abbott, 11 Fost. N. H. 434; The State *v.* Fuller, 33 N. H. 259; The State *v.* Blaisdell, 33 N. H. 388; Sword *v.* The State, 5 Humph. 102; The State *v.* Buford, 10 Misso. 703; Commonwealth *v.* Shaw, 5 Cush. 522; Becker *v.* The State, 8 Ohio State, 391; The State *v.* Miller, 24 Conn 522; Bode *v.* The State, 7 Gill, 326; The State *v.* Horan, 25 Texas, Supp. 271; Hirn *v.* The State, 1 Ohio State, 15; Townley *v.* The State, 3 Harrison, 311; Brutton *v.* The State, 4 Ind. 601; Kinzer *v.* The State, 9 Ind. 543; Commonwealth *v.* Edwards, 12 Cush. 187; The State *v.* Wade, 34 N. H. 495; Commonwealth *v.* Hill, 5 Grat. 682; The State *v.* Powers, 25 Conn. 48.

[2] Stephens *v.* The State, 14 Ohio, 386; Commonwealth *v.* Moorhouse, 1 Gray, 470; Commonwealth *v.* Tuttle, 12 Cush. 505; The State *v.* Priester, Cheves, 103.

[3] Commonwealth *v.* Dove, 2 Va. Cas. 26; Commonwealth *v.* Very, 12 Gray, 124. Perhaps this may not be exactly so under every form of statutory provision. Thus, in 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 offence. 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 offence." The State *v.* Anderson, 3 Rich. 172. And see Osgood *v.* People, 39 N. Y. 449; Peer's Case, 5 Grat. 674; The State *v.* Barron, 37 Vt. 57.

[4] The State *v.* Caswell, 2 Humph.

act which can in law be deemed joint, the indictment should not be so.[1] If two are charged with a joint sale, one only may be convicted.[2] When a man has committed several offences by several distinct sales, he may be charged with them in as many separate counts; and, on his conviction, a consolidated judgment will be rendered against him, for the accumulated penalty. 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.[3]

§ 1046. *Views of the Evidence :* —

How much prove. — In these cases, as in all others, it is sufficient to prove so much of the charge in the indictment as constitutes an offence.[4] Therefore, if, for example, the indictment is for being a common seller, and it appears that the defendant had a license during a part of the period embraced in the allegation, this does not constitute an answer to the whole charge.[5] And, on the other hand, all the particulars of what is necessary to constitute an offence must be established. Thus, the mere testimony of a witness that he had called for intoxicating liquor at a public-house kept by the defendant, and that a waiter, by the defendant's order, delivered it to him; that the witness had never paid the defendant or the waiter; that he offered to pay, but the defendant declined to take any thing; does not go far enough to show a transaction which in law constitutes a sale. Such evidence, standing alone, should not even be submitted to the jury.[6]

§ 1047. **Quantity, &c. — Name of Purchaser — Variance.** — It is not necessary to prove a sale of the precise quantity which the indictment alleges; but if, as to quantity, the

399. And see Commonwealth *v.* Major, 6 Dana, 293. The indictment against a principal for a sale made by the agent, may charge it as made by the principal. Commonwealth *v.* Park, 1 Gray, 553.

[1] Farrell *v.* The State, 3 Ind. 573.

[2] The State *v.* Simmons, 46 N. C. 622; Commonwealth *v.* Griffin, 3 Cush. 523.

[3] Borschenious *v.* People, 41 Ill. 236.

[4] Murphy *v.* The State, 28 Missis. 637.

[5] Commonwealth *v.* Putman, 4 Gray, 16.

[6] Commonwealth *v.* Packard, 5 Gray, 101. See Seibert *v.* The State, 40 Ala. 60.

indictment is within the provisions of the law as already described,[1] and the proof comes within those provisions, that is enough, even though the one should not fit the other in measure.[2] In those States in which it is necessary to allege the name of the purchaser, the proof must conform to the allegation on this point, or the variance will be fatal.[3] Proof of a sale of the liquor mixed with sugar and water will sustain a charge of selling the liquor.[4]

§ 1048. **General Evidence.** — There is no one kind or form of evidence required in these cases. While, as in other cases, the testimony of unimpeachable witnesses who saw the whole transaction is most satisfactory, the evidence may come in any other form competent within general rule, and the jury must judge of its sufficiency. Circumstantial evidence is admissible, as in other cases; as, for example, the presence of the liquor in the defendant's place of business, the hustling out of bottles of liquor on the entrance of the officers of the law, tumblers on the bar, strong beer in the beer-pump, and the like.[5] Evidence that the defendant kept liquor may be one link in the proofs,[6] though insufficient in itself alone. And where it further appears that the defendant kept a bar, with bottles in it, one further link is added to the chain.[7] "If," said a learned judge in one case, "a negro be seen going to a house in the night, with a jug, and after staying there only ten minutes returns with liquor in the vessel, we think a jury may very reasonably infer that the liquor was purchased of the owner of the house, and this inference is rendered almost a certainty when it is shown by other evidence that the owner had liquor for sale."[8] So, declarations of the defendant that he had kept and would keep liquor for sale, may, though not

[1] Ante, § 1039.

[2] The State *v.* Connell, 38 N. H. 81; The State *v.* Moore, 14 N. H. 451; Brock *v.* Commonwealth, 6 Leigh, 634; Schlict *v.* The State, 31 Ind. 246.

[3] Commonwealth *v.* Mehan, 11 Gray, 321; Commonwealth *v.* Brown, 2 Gray, 358; Commonwealth *v.* Shearman, 11 Cush. 546. See ante, § 1037, note.

[4] Commonwealth *v.* White, 10 Met. 14.

[5] Commonwealth *v.* Cotter, 97 Mass. 336; Commonwealth *v.* Van Stone, 97 Mass. 548.

[6] Vallance *v.* Everts, 3 Barb. 553.

[7] People *v.* Hulbut, 4 Denio, 133.

[8] The State *v.* Long, 7 Jones, N. C. 24, 27, opinion by Battle, J. To the like effect, see Huey *v.* The State, 31 Ala. 349; Pannell *v.* The State, 29 Ga. 681.

pointing to the particular transaction, be submitted to the jury in connection with the other proofs.[1] Where a witness testified that he and others went to the defendant's place of business, and, one of their number calling for whiskey, some liquid in a bottle was set out to them by him, and they drank it, this was held to be proper evidence tending to establish a sale.[2] So, where a witness had heard parties call for brandy, and then bottles labelled "brandy" were handed them, from which they poured out what looked like brandy and drank it, this was adjudged to be sufficient evidence that the liquor drank was brandy.[3] Any person is competent to testify to the kind of liquor drank; an expert is not necessary.[4] There is no need to confine the testimony to sales actually testified to before the grand jury.[5]

§ 1049. **Sales by Agent.** — Where the sale was by an agent, in the absence of the principal, who is the defendant, it must in some way appear in evidence that the person making the sale was the authorized agent. But the nature and kind of evidence will vary according to the circumstances of the particular case. The mere naked fact that the actual seller was the defendant's clerk is not enough; because, as observed by Byrd, J. sitting in the Alabama court: "A principal is not liable criminally for the unlawful act of his agent or clerk, unless he participated in the act, or consented to it; and this participation or consent cannot be presumed by the court or jury merely from the fact that the seller was the clerk of the accused."[6] But while the strict law is exactly as thus stated, the evidence which proves the agency will generally prove the particular authority. For example, if the jury are satisfied that the defendant did not restrain the selling in premises over which he had control,[7] or that the defendant in person had sold at other times,[8] or had suffered his clerk to sell at

[1] New Gloucester *v.* Bridgham, 28 Maine, 60; The State *v.* Bonney, 39 N. H. 206.

[2] The State *v.* Jarrett, 35 Misso. 357. And see Commonwealth *v.* Boyden, 14 Gray, 101.

[3] Baurose *v.* The State, 1 Iowa, 374.

[4] Commonwealth *v.* Timothy, 8 Gray, 480.

[5] Commonwealth *v.* Phelps, 11 Gray, 73. See Crain *v.* The State, 14 Texas, 634; ante, § 917, note.

[6] Seibert *v.* The State, 40 Ala. 60, 63.

[7] Commonwealth *v.* Major, 6 Dana, 293. And see Scott *v.* The State, 25 Texas, Supp. 168.

[8] The State *v.* Bonney, 39 N. H. 206.

other times,[1] they may infer the needful authority from this; and even proof that the defendant had forbidden his clerk to sell the liquor, will not exculpate him in respect of a sale made in his absence, if the act of forbidding was not performed in good faith.[2] Still, we must distinguish here between the law and the proofs; for, in matter of law, the defendant must have assented to the sale by his clerk, and mere knowledge of it is not enough.[3] And whether or not the jury shall be charged that the principal is to be deemed *prima facie* liable for sales made in his absence by a person in his employ is a question rather theoretical than practical, on which the authorities seem not to be uniform.[4]

[1] The State *v.* Foster, 3 Fost. N. H. 348. In an Alabama case, where one was indicted for selling liquor to a slave, and the proofs showed a sale made by the defendant's clerk in his absence, it was held to be error to instruct the jury, "that, if the defendant had previously sanctioned the acts of his clerk in selling liquor to slaves under similar orders, and if they believed that the defendant, if he had been present, would have done as his clerk did, they were authorized to find him guilty." Now, to this precise instruction in this form there are some objections the force of which would probably be everywhere recognized; but some of the observations of the learned judge, who delivered the opinion of the court, are such as would not be concurred in by most other judges. He said: "The principal is bound if he authorized or co-operated in the illegal acts of his clerk; but we think this must be an express, not an implied, authority. We have no right to conclude, that, because he has sanctioned previous violations of the law, he will continue to do so; on the contrary, as every party is to be presumed innocent until his guilt is made manifest, we should presume that he repented his former transgression, and therefore did not assent to the subsequent violation. At all events, we cannot imply an authority." Patterson *v.* The State, 21 Ala. 571. The entire criminal law is administered on the idea of inferring intents from acts. And if a man has a place of business, and permits his agent to do a particular thing in it on one occasion, then, if no indications of repentance appear, it accords with all the rules of evidence as administered both in civil and criminal causes to infer, that, under like circumstances occurring afterward, the authority continued.

[2] Riley *v.* The State, 43 Missis. 397.

[3] Commonwealth *v.* Putnam, 4 Gray, 16.

[4] In Parker *v.* The State, 4 Ohio State, 563, it was said to be error so to instruct the jury. In Commonwealth *v.* Nichols, 10 Met. 259, it was laid down that such is *only primâ facie* evidence. Dewey, J. observed, that the question "is certainly not free from difficulty. As to civil liabilities, a broader and more general principle of responsibility applies, and the master or principal may be held to answer in damages for default and misdoings with which he had no other connection than that which arises from the fact that the injury was occasioned by one employed in his service. As a general rule, something beyond this is necessary to charge the master criminally for acts done by the servant. There must be such a direct participation in the act, or such assent and concurrence therein, as would involve him morally in the guilt of the action. Hence the cases are comparatively rare, and may be

§ 1050. **Statutory Presumption.** — We have seen,[1] that a Massachusetts statute made the delivery of the liquor under certain circumstances *prima facie* evidence of a sale. The like provision exists in the statutes of some of the other States. It is held to be constitutional.[2]

§ 1051. **Defendant's Want of Authority.** — We have seen something of the necessity and nature of the averment, that the defendant was not authorized to make the sale.[3] But must this negative averment, when made, be established by affirmative evidence on behalf of the prosecution? If we look at the question as one of principle, we perceive, that, seeing it is a part of the case presented by the prosecuting power against the defendant, it must be established, like every other part, before the defendant can be called upon to meet the charge by his counter proofs. But, in the law of evidence, not every thing which a party must prove is required to be established by the testimony of *witnesses*. Some things are proved, *prima facie*, or even conclusively, by a *presumption*.[4] One of the leading presumptions in our law is, that what is common in general belongs also to the particular; this is a *prima facie* presumption, and the party who would resist its force must show, that, in the particular instance, the fact is otherwise. Thus, while slavery existed in a part of our States, and most of those persons who had the African features and color were slaves, every negro was presumed to be a slave,

considered as exceptions to the general rule, where by legal rules a party is charged criminally for acts of his servant done without his knowledge and assent. The case of a bookseller, or publisher of a newspaper, is to some extent one creating such liability; to what precise extent is, perhaps, yet an unsettled question." p. 260. If my own opinion were of any value, I should say that, while this sort of evidence ought always to be received, and with it all the attending circumstances should be shown, the jury should be permitted to pass upon it untrammelled by instructions as to its *prima facie* effect. As a question of *fact*, the jury in most instances would and should infer the authority. As a question of law, the defendant's consent must have accompanied the act of his agent; but it cannot be decided by the *law*, whether or not the actual consent of a man's mind is proved by particular admissible evidence.

[1] Ante, § 1035.

[2] Commonwealth *v.* Williams, 6 Gray, 1; Commonwealth *v.* Rowe, 14 Gray, 47; The State *v.* Hurley, 54 Maine, 562; Commonwealth *v.* Wallace, 7 Gray, 222; The State *v.* Day, 37 Maine, 244.

[3] Ante, § 1042, 1043.

[4] Crim. Proced. 2d ed. I. § 1059–1068.

and one who would take the benefit of an exception in the particular instance must prove it. But in a free State where the fact was not generally so, yet a person might be a slave by reason of his having escaped from his master in a slave State, the presumption was reversed to accord with the general fact. In like manner, as the mass of mankind are sane, each individual man is presumed to be so, in accordance with the general fact; therefore an allegation of sanity is not to be proved otherwise than by the presumption; and he who would rely on the contrary, as pertaining to the particular instance, must show it in evidence. From this it follows, that, if the law forbids the mass of the community to sell intoxicating liquor, but grants license to some particular individuals to sell it, then, if some one person is indicted for making an unlicensed sale, the presumption that what is common in general belongs likewise to the particular stands as *prima facie* proof, and the defendant, if he has a license, must show it. This conclusion of legal reasoning is aided by the further consideration, that, since the averment is a mere negative one, and, if it is not true, the defendant has in his own possession the evidence to show the truth, the orderly and convenient administration of justice is promoted, while no harm is done to the individual, by casting the burden on him.

§ 1052. **Continued.** — Looking at this question in the light of authority, we find that it has been decided both ways by differing courts of equal intelligence, while yet the true principle, as thus stated, seems not to have presented itself to the minds of the judges. In some of the States in which it had been held to be necessary for the prosecuting power to prove the want of a license in the first instance, legislation has interfered and reversed the rule. The question relates, not only to the want of a license from the public authorities, but the want also of the consent of parents, guardians, and the like. The reader will find something more upon it, with some of the authorities, in the note.[1]

[1] *Alabama.* — On the trial of an indictment for selling spirituous liquor to a minor, under § 3280 of the code, the burden is on the defendant to prove the consent of the parent, not on the prosecution to prove want of it. Said Rice, C. J.: "Here 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

§ 1053. **Conclusion.** — It would be easy to extend these discussions considerably further; but it is believed, that, in what

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.* The State, 32 Ala. 557, 559. See post, *Mississippi* and *North Carolina*.

Georgia. — The clerk of the inferior court is a competent witness to prove that no license had been granted by that court to the accused on trial for retailing liquor. Elkins *v.* The State, 13 Ga. 435.

Illinois. — If, when the defendant was arrested, he stated that the city charged too much for licenses and he could not afford to pay the price, and if he had pleaded guilty to a like charge before the police court, this is sufficient evidence that he had no license. Pendergast *v.* Peru, 20 Ill. 51.

Indiana. — The prosecutor must prove that the defendant had no license. Shearer *v.* The State, 7 Blackf. 99. Under the liquor law of 1853, no license was required where the retailing was for certain purposes. If, then, on an indictment for unlawful selling, there was some evidence that the selling was within the exceptional purposes, it was for the jury to find whether or not such was the fact. Howard *v.* The State, 5 Ind. 516.

Kentucky. — The defendant must show the license. Haskill *v.* Commonwealth, 3 B. Monr. 342.

Maine. — If the defendant relies on a license, the burden of proof is on him. The State *v.* Woodward, 34 Maine, 293; The State *v.* Crowell, 25 Maine, 171.

Massachusetts. — Under the common-law rules, it was held in this State to devolve on the prosecutor to prove that the defendant had no license. There were various ways of doing it. Where the license had been granted, it was presumed to have been done on proper evidence. Commonwealth *v.* Bolkom, 3 Pick. 281. Proof, in any proper form, of an examination of the records of the appointing power, and no license there appearing, — as, for example, a book of the city clerk containing the names of the persons licensed, Commonwealth *v.* Tuttle, 12 Cush. 502, or the records of the county commissioners when they were the licensing power, or even their docket entries and minutes before the records were formally made up, Commonwealth *v.* Kimball, 7 Met. 304, — was sufficient to establish the *prima facie* case. Afterward, a statute cast the burden of proof in these cases on the defendant. But though this applied to the particular sales and to the common selling, it was held not to apply to the offence of keeping a building used for the sale. Commonwealth *v.* Lahy, 8 Gray, 459; Commonwealth *v.* Kelly, 10 Cush. 69. If it appears that the consideration of a mortgage is a sale of spirituous liquors, the burden of proof is on a party who seeks to avoid the contract to show that the sale was illegal. Trott *v.* Irish, 1 Allen, 481. See also Commonwealth *v.* Keenan, 11 Allen, 262; Commonwealth *v.* Putnam, 4 Gray, 16.

Michigan. — In an action for the penalty, the plaintiff need not prove that the defendant had no license; for this averment will be taken to be true unless disproved by the defendant. Smith *v.* Adrian, 1 Mich. 495.

Mississippi. — On the trial of an indictment for selling liquor to a slave, "without the permission of the owner, master, or overseer," the prosecution must prove affirmatively that the liquor was sold without such 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.* The State, 13 Sm. & M. 257, 259. Afterward, on an indictment for selling liquor without license, the court held, that it was for the defendant to show 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

has already been said, most of the questions pertaining to this title, not of a local nature, and presenting special difficulties, have been elucidated.

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.* The State, 35 Missis. 210; Thomas *v.* The State, 37 Missis. 353. See *North Carolina*, where it will appear how the apparent discrepancy in these decisions is reconciled.

Missouri. — It devolves on the defendant, if he has a license, to produce it. Schmidt *v.* The State, 14 Misso. 137.

New Hampshire. — The State is not bound to prove that the defendant had no license, or that he was not a public agent for the sale of liquor. The State *v.* Foster, 3 Fost. N. H. 348; The State *v.* Shaw, 35 N. H. 217. In the civil action, if the sale of liquors except by persons duly licensed and for particular uses is prohibited, it is incumbent on a plaintiff suing to recover the price of liquors sold, to show affirmatively that he was duly licensed to sell them, and that they were sold for a lawful use. Bliss *v.* Brainard, 41 N. H. 256.

North Carolina. — On an indictment for a sale of liquor without a public license, the prosecutor need not prove the want of a license, but the defendant, if he has one, must produce it. The State *v.* Morrison, 3 Dev. 299. But where, under the former laws, the indictment was for selling liquor to a slave without the master's written permission (see *Mississippi*, in this note), it was held to be necessary for the prosecutor to prove the want of permission. Said Battle, J. after stating the general rule that the prosecuting power must make out the whole case against the defendant: "It is true, there is an exception, or rather an apparent exception, to the rule, arising from necessity, or that great difficulty in procuring the proof, which amounts practically to such necessity; or, in other words, where the prosecutor could not show the negative, and where the defendant could easily show the affirmative. The case of The State *v.* Morrison, 3 Dev. 299, may be cited as one coming within the exception. There, upon an indictment against a person for retailing spirituous liquor by the small measure, without a license, it was held that the prosecutor need not produce proof of a want of license, but the license must be shown by the defendant in his defence, and that the absence of such proof on his part was evidence that he had no license. The court, in commenting upon that case in The State *v.* Woodly, 2 Jones, N. C. 276, said, that it imposed no hardship upon the defendant to require him to produce his license, which was a written document, and which his interest, as well as his duty, required him to keep as a justification for acts which he might do every day, and many times every day. But the present case is very different; for it is manifest that the owner, employer, or manager of a slave can as easily be called on the part of the State to prove that he gave [not] permission in writing to the slave to purchase or receive as a gift spirituous liquors, as for the defendant to call him or any other person to prove the contrary; and we think it best to adhere to the general rule until the legislature may think proper to alter it." The State *v.* Evans, 5 Jones, N. C. 250, 251, 252. See ante, *Alabama*, and *Mississippi*, in this note.

Ohio. — On an information under § 1 of the act of May 1, 1854, "to prevent the adulteration of alcoholic liquors," the prosecution must give some evidence upon the negative averment that the liquor sold by the defendant had not been inspected. Cheadle *v.* The State, 4 Ohio State, 477.

South Carolina. — It is for one indict-

CHAPTER XLV.

KEEPING INTOXICATING LIQUOR FOR UNLAWFUL SALE.

§ 1054. **General View — How at Common Law.** — Under the rules of the common law, the *procuring* of counterfeit coin with the intent to pass it, is indictable as an attempt; but the *having* of it with such intent is not, because mere possession is not an act, and there must be a combination of wrongful act and intent to constitute a crime.[1] And if the selling of intoxicating liquor without license were deemed in the law to be as grave an offence as the passing of counterfeit money, the same doctrines would apply to the procuring and the having of it with the intent to sell it in violation of the statute. Yet, it being a mere minor misdemeanor, and of the sort known as *malum prohibitum*, and not *malum in se*, the same rules, to the same extent, plainly do not apply to it, and the case of an attempt to sell, especially where the attempt is so far removed from the direct act as the mere procuring,[2] comes within an exceptional principle mentioned in the preceding chapter.[3]

§ 1055. **How under Statutes.** — But it is within the general line of legislation on this subject, and proper and expedient if any legislation on the subject is so, to make the possession of the liquor with the wrongful intent criminal. And of late years, statutes in some of our States have so provided; and, in connection with this provision, have directed that the liquors so kept should be forfeited and confiscated.[4] It is not proposed, in this chapter, to enter into a wide discussion of these

ed for selling liquor without a license to prove that he had a license. Geuing *v.* The State, 1 McCord, 573.

Wisconsin. — The prosecution must produce some presumptive evidence that the defendant had no license, before he is required to prove the contrary. Mehan *v.* The State, 7 Wis. 670.

England. — On an information under 11 & 12 Vict. c. 49, § 1, against a licensed victualler for selling wines, beer, &c., on Sunday, otherwise than for the refreshment of travellers, the burden of proving that the case is not within the exception is on the informer. Taylor *v.* Humphries, 17 C. B. N. S. 539.

[1] Crim. Law, 5th ed. I. § 204.

[2] Crim. Law, 5th ed. I. § 759–761.

[3] Ante, § 1029.

[4] See ante, § 988, 993, 994.

statutory provisions, but to mention a few points, principally for the purpose of furnishing reasons for citing some cases which may be helpful to the practitioner.

§ 1056. **Constitutional.** — It is scarcely necessary to add, that, where no objectionable details encumber this sort of legislation, it is not obnoxious to the provisions of our constitutions;[1] though some statutes have been pronounced unconstitutional by reason of defects in their details. Thus, in Michigan, the search-warrant clause of a former "act to prevent the manufacture and sale of spirituous liquors" was declared to be void, because it did not require any notice to be given to the accused, or provide means by which he was to be informed when, or where, or before whom the warrant was to be returned;[2] and something like this was held under former statutes in Rhode Island,[3] Massachusetts,[4] and some of the other States.[5] These cases brought out great opposing talent and energy, they were decided under considerable public excitement; and it would be worthy of consideration, if similar questions should hereafter arise, whether something which was overlooked might not be said in favor of the law.[6] Without specifically pointing out any one of the decisions as wrong, the author will suggest, that, as explained in earlier pages of this volume, every new statute is a thing added to the mass of preëxisting law, statutory, common, and constitutional, and is to be interpreted and enforced as a part of the great body of laws, all of which, at whatever several times established, are to be woven together by construction into one seamless garment of jurisprudence.[7] For example, the

[1] Jones *v.* Root, 6 Gray, 435; Mason *v.* Lothrop, 7 Gray, 354; Lincoln *v.* Smith, 27 Vt. 328; The State *v.* Prescott, 27 Vt. 194; Gray *v.* Kimball, 42 Maine, 299; ante, § 993, 994.

[2] Hibbard *v.* People, 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." p. 130, 131.

[3] The State *v.* Snow, 3 R. I. 64; Greene *v.* James, 2 Curt. C. C. 187.

[4] Fisher *v.* McGirr, 1 Gray, 1.

[5] Ante, § 992, 993.

[6] Ante, § 987.

[7] Ante, § 82, 86–90, 123 et seq.

common law requires that no proceedings be taken against one without notice to him; therefore, if a statute authorizing such proceedings is silent on the question of notice, the common law is to be so construed with it as to require notice, the same as though it were provided for in the statute itself.[1] And, according to the better doctrine, if a statute authorizing a summary proceeding before a justice of the peace is silent on the question of appeal, but there is a general system of appeals established by law in the State, and the case is one in which by the constitution the defendant is entitled to a trial by jury and this can be secured by an appeal, the constitution and the statutes are to be so construed together as to authorize an appeal.[2] Therefore these liquor laws should not be adjudged unconstitutional on the mere ground of their being *silent* upon questions of right like these. In a case of mere silence, they and the constitution and the other statutes should be construed together, and by such construction the defendant's constitutional rights should be made available to him. Thus, if a particular right is secured by the constitution or by another statute, and this statute is silent on the subject, the defendant can resort to those other provisions, and to repeat the provisions in each individual enactment would be superfluous. Where the direct language of a statute is in denial of a constitutional right, the case is different.

§ 1057. **The Procedure.** — Most of the other questions of any importance, relating to this title, are such as concern the procedure. Now the procedure differs somewhat in the different States, and it is chiefly regulated by statutes. It will be convenient to the reader to be referred to some of the cases, on this topic, in the order of States; but no further discussion of the subject will be here attempted.[3] In the citations given,

[1] Bishop First Book, § 24; ante, § 141.

[2] Crim. Proced. 2d ed. I. § 894.

[3] *Connecticut.* — Barth *v.* The State, 18 Conn. 432; The State *v.* Raymond, 24 Conn. 204; The State *v.* Mosier, 25 Conn. 40; The State *v.* Brennan's Liquors, 25 Conn. 278; Gray *v.* Davis, 27 Conn. 447; Hine *v.* Belden, 27 Conn. 384. And see Boles *v.* Lynde, 1 Root, 195.

Iowa. — Santo *v.* The State, 2 Iowa, 165; Vaughn *v.* The State, 5 Iowa, 369; The State *v.* Munzenmaier, 24 Iowa, 87.

Maine. — The State *v.* Robinson, 33 Maine, 564; The State *v.* Gurney, 33 Maine, 527; Barnett *v.* The State, 36

are included some decisions which relate to the law of the offence, in distinction from the procedure.

§ 1058. **Evidence of Intent.** — A word as to the proof of the intent to sell may be useful. There is no one method by which this is to be made to appear. If a man has the forbidden liquor on his premises, and he sells some of it, the jury may well infer that the rest is kept for sale. Of course, therefore, the evidence of the particular sale is admissible.[1] But proof of a sale or of an offer or attempt to sell is not essential; for, said Eastman, J. "the jury 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 attempt to sell."[2] It may be shown against the defendant, for further example, that there were in his house jugs which recently contained liquor.[3] In Vermont, under the statute of 1852, the fact of finding liquor in a man's house may be *prima facie* evidence of his possessing it with the intent to sell.[4]

Maine, 198; The State *v.* Leach, 38 Maine, 432; The State *v.* Moran, 40 Maine, 129; Androscoggin Railroad *v.* Richards, 41 Maine, 233; Thurston *v.* Adams, 41 Maine, 419; The State *v.* Stevens, 47 Maine, 357; The State *v.* Bartlett, 47 Maine, 388; The State *v.* Kaler, 56 Maine, 88.

Massachusetts. — Commonwealth *v.* Edwards, 12 Cush. 187; Fisher *v.* McGirr, 1 Gray, 1; Jones *v.* Root, 6 Gray, 435; Allen *v.* Staples, 6 Gray, 491; Mason *v.* Lothrop, 7 Gray, 354; Commonwealth *v.* Kimball, 7 Gray, 328; Commonwealth *v.* Timothy, 8 Gray, 480; Downing *v.* Porter, 8 Gray, 539; Commonwealth *v.* Purtle, 11 Gray, 78; Commonwealth *v.* Intoxicating Liquors, 14 Gray, 375; Commonwealth *v.* Intoxicating Liquors, 13 Allen, 52; Commonwealth *v.* Intoxicating Liquors, 13 Allen, 561; Commonwealth *v.* Intoxicating Liquors, 97 Mass. 332; Commonwealth *v.* Intoxicating Liquors, 97 Mass. 601; Commonwealth *v.* Chisholm, 103 Mass. 213; Commonwealth *v.* Intoxicating Liquors, 103 Mass. 448; Commonwealth *v.* Intoxicating Liquors, 103 Mass. 454; Commonwealth *v.* Desmond, 103 Mass. 445.

New Hampshire. — The State *v.* McGlynn, 34 N. H. 422; The State *v.* Rum, 35 N. H. 222; The State *v.* Pecker, 47 N. H. 369.

Rhode Island. — The State *v.* Snow, 3 R. I. 64; Fenner *v.* The State, 3 R. I. 107.

South Carolina. — Weikman *v.* City Council, 2 Speers, 371.

Vermont. — Lincoln *v.* Smith, 27 Vt. 328; Gill *v.* Parker, 31 Vt. 610.

[1] The State *v.* Munzenmaier, 24 Iowa, 87; The State *v.* Raymond, 24 Conn. 204.

[2] The State *v.* McGlynn, 34 N. H. 422, 427.

[3] Commonwealth *v.* Timothy, 8 Gray, 480.

[4] Lincoln *v.* Smith, 27 Vt. 328.

CHAPTER XLVI.

LIQUOR NUISANCE.

§ 1059. **How at Common Law — Statutes.** — We have already seen,[1] that it is not an indictable nuisance at the common law to keep a house in which intoxicating drinks are sold, unless the house becomes disorderly.[2] But there are statutes, not entirely agreeing in their terms, by which the selling of liquor to be drank on the premises, the keeping of a tippling-house, the suffering of a building to be used for the unlawful sale of intoxicating drinks, and other similar violations of legal or moral propriety, are made specially punishable, — some of these acts under the name of nuisance.

§ 1060. *Selling Liquor to be drank on the Premises:* —

General View. — An indirect prohibition of tippling-shops is found in statutes of some of our States forbidding the sale of liquor, in whatever quantities, to be drank on the premises where it is sold.[3] The words of the statutes may differ; but the general doctrine is, that the sale, to be indictable, must be made with the *intent* that the liquor shall be drank on the premises where sold, but it need not be so drank in fact to render the offence complete. Thus, in Tennessee, it was held not to be necessary for the indictment to allege that the purchaser did drink the liquor on the premises. "If," said the learned judge, the defendant "did not so *intend*, he would not be guilty, though the purchaser, against the will of the vendor, were to drink the liquor in his house. So, on the other hand, if he intended it to be drank there, he would be guilty, though the purchaser might take it away from the place."[4] In Alabama the words are "in any quantity, if the same is drank on or about the premises" (an expression

[1] Ante, § 984.

[2] Rex *v.* Fawkner, 2 Keb. 506, pl. 79.

[3] The State *v.* Slate, 24 Misso. 530; The State *v.* Shearer, 8 Blackf. 262; Moore *v.* The State, 12 Ohio State, 387; Commonwealth *v.* Moulton, 10 Cush. 404.

[4] Sanderlin *v.* The State, 2 Humph. 315, 319; s. p. Wrocklege *v.* The State, 1 Iowa, 167.

which seems to require the actual drinking of the liquor by the purchaser to complete the offence of selling it);[1] and it was held, that this prohibition embraces places over which the seller has no legal right of control, if so near his actual premises, and so situated, that they are within the mischief meant to be remedied. But where the liquor is taken by the purchaser, in the seller's quart measure, to a place on the opposite side of the street, out of view of the seller's premises, some fifty feet away, and is there drank in front of another store, the court cannot say, as a matter of law, that this place is within the prohibition of the statute.[2]

§ 1061. **The Indictment.** — We have seen[3] what are the form and essential elements of an indictment simply for retailing the liquor, without the element of the intent that it should be drank, or the actual drinking of it, on the seller's premises. Doubtless the forms there approved, if enlarged by the element of the intent or the drinking, will be found sufficient under the present head. But, as the peculiar allegation necessary in this offence contains one element of identification not found in the other forms, and as the offence itself approximates the idea of a nuisance, in which mere general allegation is always held to be adequate, it seems to result, and so would seem to be the authorities, that less of the other matter will sometimes answer in these indictments than is required in those. Should the reader wish to investigate this point, and others relating to the indictment for this offence, he will consult the authorities here cited in a note.[4] A statute in Virginia having made it indictable "if any person sell, by retail, wine, ardent spirits, or a mixture thereof, to be drank in or at the store, or other place of sale," &c.; the following was held to be ill by reason of omitting the words "by retail:" that the defendant "did,

[1] See also, as to this, Christian *v.* The State, 40 Ala. 376.

[2] Easterling *v.* The State, 30 Ala. 46.

[3] Ante, § 1034–1041.

[4] Overshiner *v.* Commonwealth, 2 B. Monr. 344; Commonwealth *v.* Pearson, 3 Met. 449; The State *v.* Auberry, 7 Misso. 304; People *v.* Gilkinson, 4 Parker, C. C. 26; Commonwealth *v.* Head, 11 Grat. 819; Kilbourn *v.* The State, 9 Conn. 560; The State *v.* Freeman, 6 Blackf. 248; Commonwealth *v.* Stowell, 9 Met. 569; Rawson *v.* The State, 19 Conn. 292; Sanderlin *v.* The State, 2 Humph. 315.

without license so to do, sell ardent spirits, to be drank where sold, in a room occupied by him," &c.[1]

§ 1062. **Continued — Form.** — The Tennessee statute made it an offence to sell the liquor "*if intended* to be drank," &c.; and the following form was held to be adequate: —

"That A, &c., on, &c., at, &c., did unlawfully sell and retail spirituous liquor to one Edmond White, by the quart, to be drank on the premises, and which was then and there drank on the premises of him the said A, without having obtained a license so to do, contrary," &c.

It was deemed that the words "to be drank on the premises" were an equivalent for the statutory words at this point.[2]

§ 1063. **Evidence.** — If a man sells liquor to another, who drinks it on the premises of the vendor without objection from him, the presumption is that it was sold to be drank there,[3] or that it was drank with the seller's consent.[4] Again, if the vendor furnished bottles, glasses, sugar, water, &c., to the purchaser, this is evidence proper for the consideration of the jury as to the intent that the liquor should be drank where sold.[5]

§ 1064. *Keeping a Tippling-shop*: —

General View. — The statutory offence of keeping a tippling-shop, like the one discussed in the last four sections, is defined by differing forms of words in the different States. In Kentucky, this offence is made by the statute to be almost identical with that. The provision is: "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 sixty dollars."[6] In Maine, it is simply provided that "no person shall keep a drinking-house, or tippling-house, within this State;" another section, however, more specifically defining the offence, and stating the acts of which it shall con-

[1] Boyle *v.* Commonwealth, 14 Grat. 674.

[2] Bilbro *v.* The State, 7 Humph. 534.

[3] Sanderlin *v.* The State, 2 Humph. 315.

[4] Casey *v.* The State, 6 Misso. 646.

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

[6] Commonwealth *v.* Harvey, 16 B. Monr. 1; Commonwealth *v.* Allen, 15 B. Monr. 1.

sist.[1] And the provision in some of the other States is in still other forms.

§ 1065. **What is a Tippling-house.** — We thus see, that the term "tippling-house" is defined in the statutes both of Kentucky and Maine. Where there is no statutory definition of the term, it probably means a tenement in which intoxicating liquors are habitually sold to be drank there. This definition is framed by the author on a consideration of the various principles which govern this sort of subject; though, looking at the cases strictly, we may not have sufficient decisions to enable one to lay down the rule exactly, as to what constitutes a tippling-house.[2] A common tippling-house is not constituted by a single act of sale.[3]

§ 1066. **Indictment.** — We have seen[4] in what terms the statute of Maine is drawn. Upon this, an indictment in the following form has been adjudged sufficient: —

"That A, &c., on, &c., at, &c., did keep a drinking-house and tippling-shop, contrary to the form of the statute," &c.

"There is," said Davis, J. "another section of the same statute, defining the offence, and providing that it shall consist in certain specified acts; and it is contended, that this description should be set out in the indictment." But this objection was overruled; and it was laid down, that, where the same section of a statute prohibits an offence, and specifies the acts of which it consists, an indictment on the statute must, by express words, bring the case within the full terms of the compound provision. Yet, on the other hand, where the offence is prohibited in general terms in one section of the statute, and in another and distinct section the acts are specified of which the offence consists, the mere general description is sufficient in the indictment.[5] Now, without questioning the correctness of this adjudication of the particular point before

[1] The State *v.* Casey, 45 Maine, 435.

[2] See Moore *v.* The State, 9 Yerg. 353; Morrison *v.* Commonwealth, 7 Dana, 218; Howard *v.* The State, 6 Ind. 444; Bush *v.* The Republic, 1 Texas, 455; Burner *v.* Commonwealth, 13 Grat. 778.

[3] Dunnaway *v.* The State, 9 Yerg. 350; Hinton *v.* Commonwealth, 7 Dana, 216.

[4] Ante, § 1064.

[5] The State *v.* Casey, 45 Maine, 435. And see Commonwealth *v.* Turner, 4 B. Monr. 4; Woods *v.* Commonwealth, 1 B. Monr. 74.

the court, we cannot but notice, that this distinction as to whether a thing is in one section or two sections of the same statute is not sound either in legal reason or on the better authorities;[1] and whether or not the allegation on a statute forbidding a thing in general terms must be expanded in consequence of another provision, in the same or a separate section, more particularly defining the forbidden thing, is a question to be solved on a consideration of the particular case.[2]

§ 1067. **Continued.** — Some questions have arisen in these cases as to whether the want of authority must be negatived in the indictment: they will be seen by consulting the note.[3] The indictment must, to a reasonable degree, follow the terms of the statute.[4] Thus, where, in Arkansas, the statute was, that "no person shall keep any tavern or grocery for the retail of vinous or ardent spirits in quantities less than one quart, unless," &c.; an allegation was held to be ill which charged, that the defendant kept a grocery, and did retail, &c., there being no averment that the grocery was kept for the purpose of retailing.[5] There are some other points,[6] but they do not require specific exposition in the text.

§ 1068. *The Nuisance of keeping a Building for Illegal Sales:* —

General View. — We saw, in another connection,[7] that the keeping of a house in which petty offences are commonly perpetrated, by persons gathered for the purpose, is an indictable nuisance at the common law. In affirmance of the principle thus laid down, some statutes on the subject of liquor selling have been enacted. Thus, the General Statutes of Massachusetts declare, that "all buildings, places, or tenements, resorted to for prostitution, lewdness, or illegal gaming, or used for the illegal keeping or sale of intoxicating liquors, shall be deemed

[1] Ante, § 61, 66.

[2] Ante, § 511-514. On revising the proof, I see that the court has since applied the doctrine to distinct *clauses*, observing that the word "section" was used above through inadvertence. The State *v.* Collins, 48 Maine, 217.

[3] The State *v.* Brown, 8 Misso. 210; Webster *v.* Commonwealth, 7 Dana, 215; Commonwealth *v.* Allen, 15 B. Monr. 1; Commonwealth *v.* Harvey, 16 B. Monr. 1; ante, § 1042, 1043.

[4] Our *v.* Commonwealth, 9 Dana, 30.

[5] Hensley *v.* The State, 1 Eng. 252.

[6] The State *v.* Brown, supra; Shilling *v.* The State, 5 Ind. 443; The State *v.* Rhodes, 2 Ind. 321.

[7] Crim. Law, 5th ed. I. § 1119-1121.

common nuisances."[1] And in the next section a punishment is provided for the keeper of the nuisance.

§ 1069. **The Offence as indictable.** — This statutory offence is by no means common to our States, and it is not deemed best to enter here on a discussion of it, but simply to cite some of the cases.[2]

§ 1070. **Private Abatement.** — Some questions have arisen as to the right to abate this kind of nuisance, by a mere act *in pais*, where no judicial proceedings have been taken against it. We saw, in the work on the Criminal Law, that, as a general proposition, while a private person may with his own hand abate a private nuisance, any individual of the public — that is, anybody — may abate a public one.[3] Now, we have seen,[4] that, by the Massachusetts statute, "buildings" and "places" "used for the illegal keeping or sale of intoxicating

[1] Mass. Gen. Stats. c. 87, § 6.

[2] *Iowa.* — Our House *v.* The State, 4 Greene, Iowa, 172; Part of Lot *v.* The State, 1 Iowa, 507; Bowen *v.* Hale, 4 Iowa, 430; The State *v.* Hass, 22 Iowa, 193; The State *v.* McGrew, 11 Iowa, 112; The State *v.* Collins, 11 Iowa, 141; The State *v.* Kreig, 13 Iowa, 462; The State *v.* Baughman, 20 Iowa, 497; The State *v.* Munzenmaier, 24 Iowa, 87; The State *v.* Verder, 24 Iowa, 126; The State *v.* Schilling, 14 Iowa, 455; The State *v.* Freeman, 27 Iowa, 333; The State *v.* Harris, 27 Iowa, 429.

Massachusetts. — Commonwealth *v.* Kimball, 7 Gray, 328; Commonwealth *v.* Buxton, 10 Gray, 9; Commonwealth *v.* Skelley, 10 Gray, 464; Commonwealth *v.* Godley, 11 Gray, 454; Commonwealth *v.* McArty, 11 Gray, 456; Brown *v.* Perkins, 12 Gray, 89; Commonwealth *v.* Logan, 12 Gray, 136; Commonwealth *v.* Kelly, 12 Gray, 175; Commonwealth *v.* Farrand, 12 Gray, 177; Commonwealth *v.* Quinn, 12 Gray, 178; Commonwealth *v.* Howe, 13 Gray, 26; Commonwealth *v.* Langley, 14 Gray, 21; Commonwealth *v.* Shattuck, 14 Gray, 23; Commonwealth *v.* Hill, 14 Gray, 24; Commonwealth *v.* Foss, 14 Gray, 50; Commonwealth *v.* Bubser, 14 Gray, 83; Commonwealth *v.* Shea, 14 Gray, 386; Commonwealth *v.* Edds, 14 Gray, 406; Commonwealth *v.* Donovan, 16 Gray, 18; Commonwealth *v.* Higgins, 16 Gray, 19; Commonwealth *v.* Welsh, 1 Allen, 1; Commonwealth *v.* Gallagher, 1 Allen, 592; Commonwealth *v.* Carolin, 2 Allen, 169; Commonwealth *v.* Davenport, 2 Allen, 299; Commonwealth *v.* Hill, 4 Allen, 589; Commonwealth *v.* O'Donnell, 8 Allen, 548; Commonwealth *v.* Cutler, 9 Allen, 486; Commonwealth *v.* Greenen, 11 Allen, 241; Commonwealth *v.* Wright, 12 Allen, 190; Commonwealth *v.* McDonough, 13 Allen, 581; Commonwealth *v.* Hogan, 97 Mass. 122; Commonwealth *v.* Kennedy, 97 Mass. 224; Commonwealth *v.* Austin, 97 Mass. 595; Commonwealth *v.* Carpenter, 100 Mass. 204; Commonwealth *v.* Smith, 102 Mass. 144; Commonwealth *v.* Heffron, 102 Mass. 148; Jones *v.* McLeod, 103 Mass. 58; Prescott *v.* Kyle, 103 Mass. 381.

Rhode Island. — The State *v.* Hopkins, 5 R. I. 53; The State *v.* Paul, 5 R. I. 185; The State *v.* Knott, 5 R. I. 293; The State *v.* Kingston, 5 R. I. 297; The State *v.* Keeran, 5 R. I. 497.

[3] Crim. Law, 5th ed. I. § 828, 1081.

[4] Ante, § 1068.

liquors" are declared to be "common nuisances." What is the consequence in respect of abatement? In one instance, in Massachusetts, persons whose relations and friends frequented a building of this sort to their injury, broke it open and destroyed a quantity of the forbidden liquor. But it was held that this was an unlawful proceeding, for which they must answer in a civil suit brought by the owner of the liquor.[1] In like manner, in Rhode Island, under a similar statute, the right to destroy the building by way of abating the nuisance was denied.[2] Precisely what right of abatement, or whether any, does exist under a statute framed like this, is a question which it may not be easy to answer, and an answer will not be here attempted. The Iowa statute is in different terms. It provides that the building in which the unlawful manufacture, sale, or keeping for sale of intoxicating liquors 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, &c., accordingly.[3] And this statute could not probably be interpreted like the Massachu-

[1] Brown *v.* Perkins, 12 Gray, 89. In this case, the doctrine is laid down, that the right to abate a public nuisance can be exercised only by those who are personally and specially injured by it. If the reader will consult the places in the author's work on the Criminal Law referred to in a preceding note to this section, he will see that the authorities are not so. And what is said sustaining such a view in the cases cited 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 any occasion to use the way, 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, 5th ed. 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 such a 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 person, 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 every thing which is indictable under the name of nuisance is abatable; at least, not every such thing is abatable by every means which a person ignorant of law might suggest.

[2] The State *v.* Paul, 5 R. I. 185; The State *v.* Keeran, 5 R. I. 497.

[3] The State *v.* Freeman, 27 Iowa, 333, 336.

setts one.[1] How far a statute may constitutionally provide for the destruction of buildings, liquor, and the like, either on mere proceedings *in rem*, or without any judicial proceedings, is a question which we have had occasion to consider in other connections.[2]

CHAPTER XLVII.

HAWKERS AND PEDDLERS.

1071. Introduction.
1072–1080. Law of the Offence.
1081–1088. The Procedure.

§ 1071. **General View — How the Chapter divided.** — Statutes in various States make the hawking and peddling of goods without license an indictable offence. We shall, therefore, consider, I. The Law of the Offence; II. The Procedure.

I. *The Law of the Offence.*

§ 1072. **How in England.** — In Jacob's Law Dictionary we have the following: "*Hawkers.* Those deceitful fellows who went from place to place, buying and selling brass, pewter, and other goods and merchandise, which ought to be uttered in op n market, were of old so called; and the appellation seems to grow from their uncertain wandering, like persons that with hawks seek their game where they can find it. They are mentioned Stat. 25 Hen. 8, c. 6, and 33 Hen. 8, c. 4. Hawkers and peddlers, &c.," he adds, referring to Stat. 8 & 9 Will. 3, c. 25, and subsequent statutes, "going from town to town, or house to house, are now to pay a fine and duty to the king." There are many English statutes, belonging, however, rather to the department of internal police and of revenue than

[1] Bowen *v.* Hale, 4 Iowa, 430; Our House *v.* The State, 4 Greene, Iowa, 172.

[2] Crim. Law, 5th ed. I. § 816–835, being the entire chapter entitled "Quasi Crime in Rem;" ante, § 533–535. And see Our House *v.* The State, supra; Bowen *v.* Hale, supra.

to the pure criminal law, regulating the industry of hawking and peddling. The old English enactments on this subject have given place to later revisions; the last to which the author's attention has been directed being 22 & 23 Vict. c. 36; 33 & 34 Vict. c. 72; and 34 & 35 Vict. c. 96.[1]

§ 1073. **How in our States.** — There are statutes in several of our States against peddling goods except under restrictions. These statutes differ from one another; yet some points concerning them, and some expositions of the courts relating to this general subject, may be made helpful to the reader.

§ 1074. **What a Hawker — Peddler.** — The two words "hawker" and "peddler," as employed in modern statutes, are nearly, if not quite, identical in meaning; and each of them signifies an itinerant vendor of goods. Perhaps the words "by retail" should be added to this definition. When, in 1864, an act of Congress required, as a revenue measure, "peddlers" to take out a license from the general government, it defined: "Any person, except persons peddling only newspapers, Bibles, or religious tracts, who sells or offers to sell, at retail, goods, wares, or other commodities, travelling from place to place, in the street, or through different parts of the country, shall be regarded a peddler under this act."[2]

§ 1075. *What constitutes an Infringement of the Statute:* — **Making Peddling a Business — Single Sales.** — A decision in Indiana sheds some light on the question of what is peddling. The court there held, that the statute of 1838, against selling clocks without a license, applied only to persons who make the selling their business. Said the judge: "These provisions, we think, were designed to apply to those persons only who made the vending of clocks a business or occupation, and do not include occasional sales made by other persons, as their interest or convenience might require. It is impossible to believe that the legislature intended that no owner of a clock whatever should be allowed to sell it, without a license procured, at the expense, perhaps, of five times the value of the

[1] And see Burn Just. tit. Hawkers and Peddlers.

[2] Stat. c. 173, § 79, cl. 32, 13 U. S. Stats. at Large, 255.

clock."[1] In a like spirit, the South Carolina court held, that a single shipment of goods, consigned to auctioneers and merchants, and regularly sold by them at auction and at private sale for the benefit of the consignor, is not a hawking and peddling within the statute of 1835.[2]

§ 1076. **Itinerancy — Having other Business — Supplying Orders.** — In Massachusetts there was at one time the following provision: "Every hawker, peddler, or petty chapman, or other person, going from town to town, or from place to place, or from dwelling-house to dwelling-house in the same town, either on foot or with one or more horses, or otherwise carrying for sale or exposing to sale any goods," &c. And Shaw, C. J. observed: "The leading primary idea of a hawker and peddler is, that of an itinerant or travelling 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 it was held to be a violation of the statute for a person to sell the goods therein prohibited, from house to house, at the request of purchasers; although he was travelling about in the exercise of some other and lawful employment, without any previous intention of exposing such goods for sale. Yet, on the other hand, it was deemed not to be a violation of the statute for an agent to go about delivering, to traders in the country, goods made by his principals in the city, and ordered previously by the country traders; neither was it a violation to deliver, also, at the same time, and under the same circumstances, a larger quantity of these goods than the previous orders covered.[3]

§ 1077. **Manner of Travelling — Selling Goods from Canal Boat.** — In Pennsylvania, the selling of groceries from a canal boat has been held to be within the statute punishing any unlicensed

[1] Alcott *v.* The State, 8 Blackf. 6, opinion by Dewey, J.

[2] The State *v.* Belcher, 1 McMullan, 40. And see Merriam *v.* Langdon, 10 Conn. 460; Commonwealth *v.* Willis, 14 S. & R. 398; Colson *v.* The State, 7 Blackf. 590; Page *v.* The State, 6 Misso. 205. So in England it has been held, that a single act of selling, to one person only, does not alone constitute the vendor a hawker, peddler, or petty chapman, under the statutes. Rex *v.* Little, 1 Bur. 609. And see Rex *v.* Buckle, 4 East, 346.

[3] Commonwealth *v.* Ober, 12 Cush. 493, 495. And see Rex *v.* McKnight, 10 B. & C. 734.

person who should "be found hawking, peddling, or travelling from place to place, to sell or expose for sale," &c. Said Rogers, J.: "Hawkers, peddlers, and petty chapmen are defined to be persons travelling from town to town with goods and merchandise. The manner of travelling, whether on foot or horseback, in wagons, carts, sleighs, or canal boats, does not enter into the definitions."[1]

§ 1078. **Travelling Auctioneer — Traveller selling through Resident Auctioneer — Sales at Market.** — In England, Stat. 50 Geo. 3, c. 41, § 6, employed the words, "every hawker, peddler, petty chapman, and every other travelling person and persons going from town to town, or to other men's houses, and travelling either on foot or with horse, horses, or otherwise, &c., carrying to sell or exposing to sale any goods, wares, or merchandise." And it was held that an auctioneer, conveying goods by a public stage-wagon from place to place, and selling them on commission, was within this statute.[2] So a person travelling from town to town, and having packages of books sent after him by public conveyance, and taking rooms at each town, and there selling at retail by auction, is a trading person within this provision. And Abbott, C. J. added: "The argument urged on the part of the defendant, arising out of the extent of his dealings, would go to show, that, where the inconvenience to the resident tradesman is the greatest, no offence would be committed."[3] In such cases as these, the travelling person is not the less within the statute, though he employs a resident auctioneer at the several places where the goods are, by auction, sold.[4] The fifth section of this act excepts from its penalties sales made in "any public mart, market, or fair legally established." And if one claims that a sale was made at a public market, he must show that the market was "legally established," by grant from the crown, it not being sufficient if it was a mere market *de facto*.[5]

[1] Fisher *v.* Patterson, 1 Harris, Pa. 336, 338.

[2] Rex *v.* Turner, 4 B. & Ald. 510. See Allen *v.* Sparkhall, 1 B. & Ald. 100.

[3] Dean *v.* King, 4 B. & Ald. 517.

[4] Attorney-General *v.* Tongue, 12 Price, 51. And see Attorney-General *v.* Woolhouse, 1 Younge & J. 463, 12 Price, 65.

[5] Benjamin *v.* Andrews, 5 C. B. N. S. 299. In Vermont, a man who had sold

§ 1079. *Other Points:* —

Exceptions — Goods manufactured in the State, &c. — Under the Pennsylvania act of 1830, one who had tinware, which was manufactured within the State, might peddle it under certain restrictions.[1] There are other points of the like local nature decided under these statutes, but we need only refer to the authorities.[2]

§ 1080. **Constitutional.** — In a sort of general way, these State statutes are held not to be any infringement of the Constitution of the United States.[3] Still, as in the case of the liquor law,[4] they cannot be made to interfere with imports.[5]

II. *The Procedure.*[6]

§ 1081. **General View.** — The chief difficulty connected with the procedure in these cases relates to the form of the indictment. Upon this head, the discussions in the following sections will have a use beyond the mere questions themselves.

§ 1082. **Whether Sales to be alleged — Massachusetts — Points as to Indictment.** — In Massachusetts, a statute was passed in 1846 (Stat. 1846, c. 244), the first section of which was in the following words: "From and after the first day of July next, every hawker, peddler, or petty chapman, or other person, going from town to town, or from place to place, or from dwelling-house to dwelling-house in the same town, either on foot, or with one or more horses, or otherwise carrying for sale, or exposing to sale, any goods, wares, or merchandise, or

goods one year at Montpelier, and given his list and paid his taxes there, transferred his stock of goods and his United States license as merchant to Corinth. Here he hired a store for ten days, and sold goods through a licensed auctioneer. Then he made a like transfer to Chelsea, where he advertised that he should remain only ten days. Before the latter period had expired, and before procuring from the county clerk a license as a peddler, he was indicted; and it was held that he was a peddler within the meaning of the statute. The State *v.* Hodgdon, 41 Vt. 139.

[1] Wolf *v.* Clark, 2 Watts, 298.

[2] Page *v.* The State, 6 Misso. 205; Hirschfelder *v.* The State, 18 Ala. 112; Colson *v.* The State, 7 Blackf. 590; Foster *v.* Dow, 29 Maine, 442; Mabry *v.* Bullock, 7 Dana, 337; Jones *v.* Berry, 33 N. H. 209.

[3] Biddle *v.* Commonwealth, 13 S. & R. 405; Wynne *v.* Wright, 1 Dev. & Bat. 19; Beall *v.* The State, 4 Blackf. 107; Commonwealth *v.* Ober, 12 Cush. 493; contra, The State *v.* North, 27 Misso. 464.

[4] Ante, § 990.

[5] People *v.* Moring, 47 Barb. 642.

[6] For forms of proceedings under the English statutes, see Burn Just. tit. Hawkers and Peddlers.

taking a residence in any town for that purpose, for a less time than one year, except as provided in the second section, or under a license, granted as hereinafter provided, shall forfeit a sum not exceeding two hundred dollars for every offence; and that nothing contained in this section shall be construed to restrain sales at public auction, according to law." [1] Upon this statute, an indictment in the following form was held to be insufficient; because it did not allege, that the defendant sold the goods as a hawker, peddler, or petty chapman, or while going about as such: That the defendant, on, &c., at Milford, &c., "was a hawker, peddler, and petty chapman, and did then and there go from place to place and from dwelling-house to dwelling-house in said town of Milford on foot, exposing to sale goods, wares, and merchandise, and did then and there sell certain jewelry, to wit, one gold chain and compass, to one Benjamin B. Congdon." [2]

§ 1083. **Continued — Why — Alleging Sale.** — The ground upon which the above decision proceeded, was, as stated by the learned judge, that it was no offence for the defendant to sell the jewelry to Congdon, "unless he sells it in the capacity or character of hawker, peddler, or petty chapman," "or while going about as such." "But, for aught that this indictment avers, the defendant, though he was, at the time and place of the alleged sales, a hawker, &c., may have made those sales without going about selling or exposing jewelry for sale, or acting as a hawker." In this case, as it not unfrequently happens in the hurry of judicial business, the attention of the judges was not directed to the exact words of the statute, else they interpreted them differently from what most other tribunals woul have done. The statute says nothing of selling the goods; but the offence is made to consist in the going about "carrying for sale, or exposing to sale;" and, if a man does this, he is guilty, though he finds no customers. Can it, therefore, be necessary to allege, at all, that any sale was made?

§ 1084. **Continued — Specific Acts — Alabama.** — In an Alabama case, where the report does not give the exact terms of the statute, but it contained the word "business," while yet

[1] See ante, § 1076.

[2] Commonwealth *v.* Buckheimer, 14 Gray, 29.

it seems to have been of the like effect with the Massachusetts enactment, the following indictment was held to be good: That the defendant, at, &c., "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," &c. The objection overruled was, that some particular acts of hawking and peddling should have been alleged. Said Goldthwaite, J.: "It may be, that, if the law had made it a penal offence for any one to hawk or peddle, it might be necessary to allege the particular act of hawking and peddling, and that the charge in general terms, although in the words of the statute, would not be sufficient." With reference to this intimation, it should be observed, that, if we accept it as sound in law, still it does not necessarily require specific sales to be mentioned, with the names of the persons to whom they were made. The indictment, agreeably to this intimation, might follow the forms given for keeping a disorderly house, where, according to some opinions, acts of disorder must be stated, but not in a minute way, and the names of the frequenters of the house need not be averred.[1] The learned judge proceeds: "But such is not the case we are called upon to decide. In the case presented, the gist of the offence is, not the hawking and peddling, but the being engaged in it under such circumstances as show that the defendant followed the pursuit *as a business*. It is not necessary, therefore, . . . to set forth the facts which constitute hawking and peddling, any more than it would be required, in an indictment for keeping a pool and bagatelle table without a license, to state what constitutes such a table. . . . 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 offences, that, where the charge is of a complicated nature, consisting of a repetition of acts, or where the offence includes a continuation of acts, it is unnecessary to set them out in the indictment."[2] This Ala-

[1] Crim. Proced. 2d ed. II. § 273–276.

Sterne *v.* The State, 20 Ala. 43, 46. The Massachusetts decision presents occasion, also, for another inquiry; namely, suppose it to be necessary to

bama doctrine is in exact harmony with the law, as held in Massachusetts, respecting the form of an indictment for being an unlicensed common seller of intoxicating liquors.[1]

§ 1085. **Continued — South Carolina.** — In a South Carolina case, an indictment upon a statute not given alleged, that the defendant Andrew Powell, at a time and place mentioned, "did sell and expose to sale divers goods, wares, and merchandise, the said Andrew Powell then and there being a peddler, and not having obtained a lawful license for that purpose," &c. And this was held to be inadequate, the learned judge observing: "In all criminal proceedings, the party charged should not be led blindfold to the altar. He should know the crime he is called to answer, and it should be so definitely charged that he may know how to shape his defence."[2] But here, the reader will observe, there was no allegation that the defendant pursued the business of peddling, or went about from house to house peddling, or any thing of the sort. If, by the terms of the statute, or by the judicial interpretation of it, the offence consisted in any thing of this kind, there should have been an allegation covering the words, or the meaning which judicial construction had given the enactment, though extending beyond the words; embracing, in due legal form, this idea. If, on the other hand, the offence was made by the statute to consist of specific acts of sale, then those acts should be set out, with names, dates, and the like.

§ 1086. **Continued — Indiana.** — In Indiana, in a case where the statute, as in the cases before mentioned, does not appear in the report, an indictment alleging, as the reporter observes, 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,

set out a particular sale, and to say that it was made by the defendant as hawker, &c., — Is not the allegation that the defendant, at a time and place named, was a hawker, and was then and there engaged in hawking, and did then and there make a sale which it specifies, equivalent to the averment that he made the sale as hawker? If, at the time he made the sale, he was engaged in hawking, in what other capacity than as a hawker could he have made it? The argument which denies this conclusion must chop the logic of the indictment pretty fine.

[1] Commonwealth *v.* Pray, 13 Pick. 359.

[2] The State *v.* Powell, 10 Rich. 373, 374.

for the sum of twenty dollars each, whereby the revenue of the county was diminished and defrauded," was held to be inadequate. It was considered, that the offence did not consist in making a single sale without license, but in being employed in the business of selling, without having obtained a license therefor. Here there was merely an allegation of a specific sale made by an unlicensed person; and this did not constitute an offence within the proper construction of the statutory terms.[1]

§ 1087. **Form of Indictment.** — Following the views thus suggested, if the author were to draw an indictment upon a statute worded like the before-recited Massachusetts one, he would select such of the alternative words in the statute as might best meet the facts of the particular case; and, if the facts rendered the particular selection advisable, the indictment would be somewhat as follows: —

That A, late of, &c., on, &c., went about from dwelling-house to dwelling-house in the town of M, in the county of W, aforesaid, on foot; peddling and carrying for sale and exposing to sale to the people then and there found in said town, large quantities of goods, wares, and merchandise, to wit, watches, ear-knobs, gold chains, chains in imitation of gold chains, finger-rings, and other jewelry; and did then and there follow, carry on, and conduct the business of peddler, not having received any license authorizing the same; the wares and goods and merchandise and jewelry which he then and there peddled, not being such as it is lawful to peddle without license; against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.

§ 1088. **Observations on the Form — Negativing License — (Points, in the Note).** — If the indictment were to be used in a State where a decision such as the Massachusetts one already mentioned had been rendered, of course, as matter of prudence, it should be made to contain the further allegations therein indicated. And in the above form, there are some averments which would probably not be held, in most of our States, to be absolutely necessary. The indictment must negative that there was a license.[2] Some other points appear in a note.[3]

[1] Alcott *v.* The State, 8 Blackf. 6.

[2] May *v.* The State, 9 Ala. 167.

[3] The Illinois statute of 1835, "regulating the mode of granting licenses to clock peddlers," provided, that the delinquent person should forfeit and pay for each offence fifty dollars; one-half for the use of the informer, and the other half for the use of the county. And it was held, that an action on the

CHAPTER XLVIII.

DEALING AS A MERCHANT WITHOUT LICENSE.

§ 1089. **General View — Missouri Statute.** — In some of the States, merchants are required to purchase a license, and those who pursue the business without are indictable. The offence of trading as an unlicensed merchant does not differ essentially from unlicensed hawking and peddling, except that the element of itinerancy is, in it, wanting. By a Missouri statute, "every person or copartnership of persons who shall deal in the selling of goods, wares, and merchandise, at any store, stand, or place occupied for that purpose, is declared to be a merchant." Then the statute provides, that "no person or copartnership of persons shall deal as a merchant without a license first obtained according to law."

§ 1090. **In what the Offence consists — Form of Indictment.** — On this statute it was judicially observed: "The essence of the offence is the dealing as a merchant without a license. The single act of selling one or more articles would not constitute the offence; and, if the sale of a specific article were charged [in the indictment], it would be necessary also to charge that the defendant did deal as a merchant." Therefore the following form of the indictment, though not artistic,

statute cannot be maintained in the name of the people, but it must be brought in the name of the county or of the informer. Said the judge: "The defendant has forfeited nothing to the people." Higby *v.* People, 4 Scam. 165. See, also, Merriam *v.* Langdon, 10 Conn. 460. In Alabama, the act of 1848 having prescribed a specific and different penalty for each of the several classes of peddlers who may violate its provisions, an indictment under it must designate the class to which the accused belongs, otherwise no judgment can be rendered upon it. Hirschfelder *v.* The State, 18 Ala. 112. Under the Tennessee act of 1838, c. 167, a warrant charging the defendant with "Hawking and peddling without license, as required by law," is sufficiently specific and valid. The State *v.* Sprinkle, 7 Humph. 36. Upon an indictment under the Massachusetts statute of 1820, c. 45, § 1, for peddling goods not of the produce or manufacture of the United States, the government must prove affirmatively that the goods sold were of foreign produce or manufacture. Commonwealth *v.* Samuel, 2 Pick. 103. As to the form of the indictment in Kentucky, see Commonwealth *v.* Dudley, 3 Met. Ky. 221.

and not quite conforming to common-law requirements, was deemed to be, under curative legislation of the State, adequate: —

"That A, &c., on, &c., at, &c., did unlawfully sell, at a certain store, stand, and place occupied by him for that purpose, various articles of goods, wares, and merchandise, and drugs and medicines, the names of which are unknown to said grand jurors, without having any license or legal authority whatever to sell the same, contrary," &c.[1]

It is plain, that a skilful and careful pleader would, at least, bring the allegation more completely within the statutory words in such a case; as, for example: —

That A, &c., on, &c., at, &c., not being licensed to deal as a merchant, did then and there, without license as aforesaid, deal as a merchant, by then and there dealing in the selling of, &c., the same being goods, wares, and merchandise, at a store and place of business then and there occupied by him the said A for that purpose; contrary, &c.

§ 1091. **Person to whom Goods sold.** — It appears from the cases cited to the last section, that, in Missouri, it is not necessary the indictment aver to whom the goods were sold. But in Maryland this allegation is held to be necessary.[2]

§ 1092. **Form of Goods changed by Labor.** — Under the Missouri statute it was held to be immaterial that the defendant had changed the form of the goods sold, by expending his labor upon them.[3]

[1] The State *v.* Cox, 32 Misso. 566, 568, opinion by Bates, J. To the like effect is The State *v.* Willis, 37 Misso. 192. In another case, an indictment was held to be good which alleged, that the defendant "did then and there unlawfully deal as a merchant at a certain store, and did then and there sell divers goods, wares, and merchandise, to wit, one black coat, to L. for the sum of six dollars, without then and there having a merchant's license or any other legal authority therefor." The State *v.* Jacobs, 38 Misso. 379.

[2] Spielman *v.* The State, 27 Md. 520.

[3] The State *v.* Whittaker, 33 Misso. 457. For various other points under these statutes, see The State *v.* Hunter, 5 Misso. 360; The State *v.* Martin, 5 Misso. 361; Tracy *v.* The State, 3 Misso. 2; Williamson *v.* The State, 16 Ala. 431.

CHAPTER XLIX.

CRUELTY TO ANIMALS.

1093–1095. Introduction.
1096–1103. Older Statutory Law.
1104–1118. Recent Enactments.

§ 1093. **How at Common Law.** — We saw, in another connection,[1] that cruelty to animals is not, of itself alone, when viewed in combination with no other element of wrong, indictable at the common law. One or two modern writers have laid down, in general terms, the contrary doctrine; namely, that cruelty to animals is, at common law, indictable; but they cite no cases which, on examination, are found to support the assertion. At the same time, there are circumstances in which the common law accepts it as an element which, combined with other elements, makes an indictable wrong. Thus, according to some cases adjudged in the District of Columbia, which are probably to be accepted as sound in law, if one cruelly beats a horse in the public streets of a city,[2] or beats a cow to death in such a place,[3] or in a locality of this sort wantonly incites a ferocious dog to bite and tear a cow,[4] he commits an indictable public nuisance; the same as, we saw,[5] a man may make himself a nuisance at the common law by drunkenness in a place like this. At the same time, and while the writer accepts this view as sound in legal doctrine, there is a suspicious dearth of adjudication on the point, rendering it not quite certain that all courts would so hold.

§ 1094. **Continued.** — And it may be, as intimated elsewhere,[6] that there are other circumstances in which the element of cruelty to an animal will make that indictable at the common law, which otherwise would not be so. In a

[1] Crim. Law, 5th ed. I. § 594–597.
[2] United States *v.* Logan, 2 Cranch C. C. 259.
[3] United States *v.* Jackson, 4 Cranch C. C. 483.
[4] United States *v.* McDuell, 5 Cranch C. C. 391.
[5] Ante, § 968, 974-976.
[6] Crim. Law, 5th ed. I. § 596.

Vermont case of malicious mischief at the common law,[1] where the particular injury was inflicted on some animals instead of inanimate things, the cruelty to the animals was adverted to by the court in a way, perhaps, to justify the inference that it was deemed to be one of the elements of the crime.[2] But the precise nature and bounds of the general doctrine brought to view in these two sections it is not possible, on the few adjudications which the books contain, satisfactorily to state.

§ 1095. **Statutes — How the Chapter divided.** — We have, however, statutes regulating this subject; some of them, not very effectual ones, of many years' standing, and others more effectual of a very recent date. Let us, therefore, consider these statutes, and their interpretation, and the practice upon them, in the following order: I. The Older Statutory Law; II. The Recent Enactments.

I. *The Older Statutory Law.*

§ 1096. **Oldest Statute.** — The oldest statute on this subject, in the countries governed by the common law, perhaps the oldest in any country, is said to be an act of the General Court of Massachusetts Colony, in 1641, as follows: "It is ordered by this court, that no man shall exercise any tyranny or cruelty towards any brute creatures, which are usually kept for the use of man." [3]

§ 1097. **Subsequent American Statutes — English.** — Provisions more or less like this, accompanied by penalties, were afterward introduced among the statutes of some of our States. In England, the earliest enactment on this general subject, so far as the author is aware, was Stat. 3 Geo. 4, c. 71, A. D. 1822, entitled "An Act to prevent the Cruel and Improper Treatment of Cattle." 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;" provided the prosecution was commenced within ten days. And if the complaint should

[1] Ante, § 330 et seq.

[2] The State *v.* Briggs, 1 Aikens, 226.

[3] Old Colony Laws, p. 95.

appear to the magistrate on the hearing to be "frivolous or vexatious," then the complainant was to be ordered 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." Afterward, in 1833, Stat. 3 & 4 Will. 4, c. 19, § 28 and 29, made it penal to set dogs on cattle, or pelt them with stones, or the like, or engage in "fighting or baiting of bears, cock-fighting, baiting or fighting of badgers, or other animals," "within five miles of Temple Bar." But in 1835 these provisions were superseded by more ample ones, constituting Stat. 5 & 6 Will. 4, c. 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." Though this statute has also been superseded by a later revision, it seems to have formed a sort of basis for the present enactments, English and American; from which, indeed, they were in some measure copied. It may be added, that the present English statute is 12 & 13 Vict. c. 92, amended by 17 & 18 Vict. c. 60; the former enacted in 1849, and the latter in 1854.

§ 1098. *Construction and Procedure:* —

Beating Horse — Massachusetts — New Hampshire — Form of Indictment. — The Massachusetts General Statutes, enacted before the late laws restraining cruelty to animals, provide as follows: "Whoever cruelly beats or tortures any horse, ox, or other animal, whether belonging to himself or another, shall be punished," &c.[1] The New Hampshire statute is, or was, like it, except that it is silent on the question of ownership, and the terms expressive of the intent are not exactly the same. It is: "If any person shall wilfully and maliciously kill, maim, beat, or wound any horse, cattle, sheep, or swine, he shall be punished," &c. But by the construction of this New Hampshire statute, the same as by the terms of the Massachusetts one, the offence may be committed by a man on his own animal, as well as on another's.[2] On the Massachusetts statute,

[1] Mass. Gen. Stats. c. 165, § 41. [2] The State *v.* Avery, 44 N. H. 392.

the following form of the complaint for cruelly beating a horse has been sustained on motion in arrest of judgment; the specific objection being, that it charged two offences in a single count: —

"That Richard Lufkin, &c., on, &c., at, &c., with force and arms unlawfully and cruelly did beat and torture a certain horse, of the property of him the said Edward Bassett [the complainant] and one Knott P. Martin, against," &c.[1]

And another form of the indictment, still more brief, as follows, has been held to be adequate: —

"That A, &c., on, &c., at, &c., did cruelly beat a certain horse, against the peace of the Commonwealth, and contrary to the form of the statute," &c.[2]

§ 1099. **Ownership, continued — Texas — Wounding Bull.** — Not only is the ownership technically unimportant under these statutes, as just stated, but it is perhaps practically so for every purpose. Thus, in Texas, under a similar enactment, it was held that the ownership need not be alleged in the indictment. The words of the statute were: "If any person shall wilfully and wantonly kill, maim, wound, poison, or cruelly and unmercifully beat and abuse any dumb animal, such as is enumerated in the preceding article, he shall be fined," &c. And the following form of the indictment was sustained as adequate: —

"That Joseph Brocher, late of said county, on, &c., in the county aforesaid, unlawfully did wilfully and wantonly wound a certain bull, contrary," &c.[3]

While this Texas doctrine, with which also the Massachusetts doctrine accords,[4] is, in the strict view of the law, sound, still, as we saw in a preceding chapter,[5] every offence should be identified and made specific in the allegation, and to state the name of the owner is one means of identification; therefore, we may presume, a court might, under some circumstances and forms of the offence, hold to be good an indictment in which the owner's name is alleged, where, for want of identification, the allegation would be adjudged inadequate

[1] Commonwealth *v.* Lufkin, 7 Allen, 579.

[2] Commonwealth *v.* McClellan, 101 Mass. 34.

[3] The State *v.* Brocker, 32 Texas, 611.

[4] Ante, § 1098; Commonwealth *v.* McClellan, 101 Mass. 34.

[5] Ante, § 1037 and note.

without the name; though doubtless most courts would deem any other form of identification to be as good as this. But whether the name of the owner is alleged or not, it will be error to instruct the jury in such a way as to lead them to believe that there are differences in the law depending on the question of ownership.[1]

§ 1100. **"Torture" — The Means — "Beat."** — From a Missouri case,[2] where a statute was in terms like those of Massachusetts, New Hampshire, and Texas, it appears that, if "torture" is the cruelty inflicted, it is not sufficient simply to employ the word "torture" in the indictment, but the means by which the suffering is inflicted must be averred; and they must be such as will enable the court to see that they resulted in "torture," as forbidden by the statute.[3] We ought probably to assume these several decisions to be sound; and infer, that the difference in doctrine depends on an obvious distinction between the two words "torture" and "beat," the former being of a compound signification and being answered in meaning by a great diversity of acts, and the latter signifying one certain and known thing.[4] It was once objected to an allegation, "that," observed the learned judge, "the word 'beat' does not of itself describe with sufficient certainty the alleged act; because it may refer to a race, or some other act of contest." Yet the objection was not sustained.[5]

§ 1101. **What justify "Beating" a Horse — Discipline and Training.** — Under the New Hampshire statute before quoted, the words of which, expressive of the intent, are "wilfully and maliciously,"[6] it has been laid down, that, if one in good faith is training his horse, or administering discipline to the animal, he does not violate the statute however severe or unreasonable the blows, provided he administers them honestly, and within his own theory of what is right and proper in the case.[7] Perhaps this is putting the doctrine a little stronger than the court meant;[8] but, if not, it seems to the writer that the

[1] Commonwealth *v.* Lufkin, 7 Allen, 579.

[2] The State *v.* Pugh, 15 Misso. 509.

[3] See, more at large, Crim. Proced. 2d ed. I. § 629.

[4] And see ante, § 446–448; post, § 1113.

[5] Commonwealth *v.* McClellan, 101 Mass. 34, 35, opinion by Chapman, C. J.; Crim. Proced. 2d ed. I. § 356.

[6] Ante, § 1089.

[7] The State *v.* Avery, 44 N. H. 392.

[8] The head-note, as to this point, is:

interpretation, in just these terms, is not sound; because this statute, like all others on the subject, is based on the theory, unknown to the common law, that animals have rights, which, like those of human beings, are to be protected. A horse, under its master's hand, stands in a relation to the master analogous to that of a child to a parent. The law must fix bounds to the right of discipline by blows, in the one case the same as in the other. And no man can carry out a "theory" contrary to the law, without being punished for doing it.[1] Still the words "wilfully and maliciously" must have their effect; and the interpretation of the statute, on the present point, should not be the same as if these words were not in it, or words of a milder meaning were employed. The signification of these words was attempted to be given in another connection.[2] They do not differ greatly from the phrase "wilfully and of malice aforethought," employed to distinguish murder from manslaughter,[3] though possibly they should not be construed as requiring so much intensity of evil in the intent. And a man standing *in loco parentis* to a child will under some circumstances be held to have "malice aforethought" when he unreasonably beats the child in the way of discipline; while, under other circumstances, he will not, though the beating is unreasonable and illegal, so that if death follows he will be indictable for manslaughter.[4] The corresponding Massachusetts statute, as we have seen,[5] employs the single word "cruelly" in the place of the phrase "wilfully and maliciously" in the New Hampshire enactment; and Hoar, J. sitting in the Massachusetts court, observed: "Although the most common case to which the statute would apply is undoubtedly that in which an animal is cruelly beaten and tortured for the gratification of a malignant or vindictive temper, yet other cases may be suggested, where no such express purpose could be shown to exist, which would be within the intent

"A beating for the purpose of training or discipline, although unreasonably severe, does not constitute an offence under this statute, so long as it is in good faith administered for such purpose."

[1] Crim. Law, 5th ed. I. § 309 and note, 344.

[2] Ib. I. § 427–429. See ante, § 467.

[3] Ante, § 465–468; Crim. Proced. 2d ed. II. § 542–546.

[4] Crim. Law, 5th ed. II. § 656, 663, 684, 685.

[5] Ante, § 1098.

as well as the letter of the law. Thus, cruel beating or torture for the purpose of training or correcting an intractable animal; pain inflicted in wanton or reckless disregard of the suffering it occasioned, and so excessive in degree as to be cruel; torture inflicted by mere inattention and criminal indifference to the agony resulting from it, as in the case of an animal confined and left to perish from starvation; we can have no doubt would be punishable under the statute, even if it did not appear that the pain inflicted was the direct and principal object. Severe pain inflicted upon an animal for the mere purpose of causing pain or indulging vindictive passion is cruel. And so it is if inflicted without any justifiable cause, and with reasonable cause to know that it is produced by the wanton or reckless conduct of the person who occasions it." [1]

§ 1102. **Continued — Surgical Operation — Preservation of Human Life.** — On another point, the Massachusetts and New Hampshire statutes, now under consideration, should be interpreted alike, and it appears that they are. For, continued Hoar, J. in the case just cited, " it certainly is not true, as an abstract proposition, that it is immaterial what may be the motive of a person who inflicts pain upon an animal, in determining the criminality of the act. Pain inflicted for a lawful purpose, and with a justifiable intent, though severe, does not come within the statute meaning of 'cruel.' Thus, a surgical operation, occasioning the most intense suffering, may be justifiable, and is not criminal. To drive a horse at a rate of speed most distressing to the brute, when the object is to save human life, for example, or to attain any other object of adequate importance, may yet be lawful." [2] And as far as the New Hampshire case goes on these points, it accords with these views.[3]

§ 1103. **Conclusion.** — There are a few further points derivable from the older cases, but they will better appear under our next sub-title. On the whole, it seems remarkable that these earlier statutes, existing at times when cruelties inflicted on

[1] Commonwealth *v* Lufkin, 7 Allen, 579, 581.

[2] Commonwealth *v.* Lufkin, 7 Allen, 579, 582.

[3] The State *v.* Avery, 44 N. H. 392.

dumb creatures were perhaps even more common than now, should have been drawn so little into discussion in the courts.

II. *The Recent Enactments.*

§ 1104. **General Statement — Course of the Discussion.** — We have already seen[1] that the statute at present in force in England on this subject is 12 & 13 Vict. c. 92, amended by 17 & 18 Vict. c. 60. It has not been so far settled in its meaning by the courts as to render expedient a copying of it, preparatory to introducing the decisions. In a sort of general way, this enactment, and the respective late legislative acts in our States, are alike, while in minor particulars they differ from one another. It is proposed, under this sub-title, to introduce so much of the statutory law of our States as will render plain the discussions to follow, and then to undertake a general elucidation of these statutes. In the latter endeavor, we shall be obliged to proceed with almost no help from direct judicial authority; for, so far as the author is aware, not a single case on these late enactments has passed to judgment before the higher courts.

§ 1105. **Illinois Statute.** — The Illinois statute is a good representative of the American ones generally. It is as follows: —

"SECTION 1. Whoever shall wilfully overdrive, overload, overwork, torture, torment, deprive of necessary sustenance, cruelly beat, mutilate, or kill, or cause or procure to be so overdriven, overloaded, overworked, tortured, tormented, deprived of necessary sustenance, cruelly beaten, mutilated, or cruelly killed, any horse or other animal (the word 'animal,' as used in this act, shall be taken to mean any living creature); and whoever, having the charge or custody of any such animal, either as owner or otherwise, shall unnecessarily fail to provide such animal with proper food and drink, shall, for each and every offence, be punished, &c., to be recovered on complaint before any justice of the peace, or by indictment in the county where such offence shall be committed.

"SECT. 2. Every owner of, or person having the charge or custody of, any horse, ox, or other animal, who shall knowingly and wilfully authorize or permit the same to be subjected to or suffer any unnecessary torture or cruelty, shall be punished for every such offence in the manner provided in section one.

"SECT. 3. Every owner, driver, or possessor, or person having charge or custody of an old, maimed, or disabled or diseased horse, mule, or other animal, who shall cruelly work the same when unfit for work, or cruelly abandon the

[1] Ante, § 1097.

same, shall be punished for every such offence in the same manner provided in section one.

"SECT. 4. Any person who shall carry, or cause to be carried, in or upon any vehicle or otherwise, any animal in an unnecessarily cruel or inhuman manner, shall be punished in the same manner provided in section one.

"SECT. 5. No railroad company in this State, in the carrying and transportation of cattle, sheep, swine, or other animals, shall confine the same in cars for a longer period than twenty-eight consecutive hours, unless delayed by storm or other accidental causes, without unloading for rest, water, and feeding, for a period of at least five consecutive hours. In estimating such confinement, the time the animals have been confined without such rest on connecting roads, from which they are received, shall be computed, it being the intention of this act to prevent their continuous confinement beyond twenty-eight hours, except upon contingencies hereinbefore stated.

"SECT. 6. If the owner or person in charge of said animals refuses or neglects to pay for the care or feed of animals so rested, the railroad company may charge such expense to the owner or consignee, and retain a lien upon the animals until the same is paid, and no claim of damages for detention shall be recovered by the owner or shipper of any animals for the time they are detained under the provisions of this act.

"SECT. 7. Any railroad company, owner, or consignee, or person in charge of said cattle, sheep, swine, or other animals, who shall violate any provision of the fifth or sixth sections of this act, shall, for each and every such violation, be liable for, and forfeit and pay a penalty of one hundred dollars, to be recovered in the name of the people of the State of Illinois, before any justice of the peace of the proper county.

[SECTS. 8–10 relate to the enforcement of this act, and the care of impounded cattle.]

"SECT. 11. If any maimed, sick, infirm, or disabled animal shall be abandoned to die, by any owner or person having charge of the same, such person shall, for every such offence, be punished in the same manner provided in section one."[1]

§ 1106. **New York Statute.** — The New York statute differs, perhaps, from this Illinois one as much as the late statutes in our States generally on this subject differ from one another. It is, in full, as follows: —

"SECT. 1. If any person shall overdrive, overload, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill, or cause or procure to be overdriven, overloaded, tortured, tormented, or

[1] Act of March 31, 1869, as amended in the first section by act of March 8, 1872; 1 Gross, 18, 19, § 27–36; 2 Ib. 3, § 55. This statute contains also two more sections, § 12 being in the exact terms of § 2 of the New York act, but ending thus: "and every person who shall visit such place, so kept or used, or who shall be found therein, shall, upon conviction thereof, be punished for every such offence in the same manner provided in section one." By § 13, "The provisions of section five of this act, requiring animals to be unloaded, shall not apply when they are properly fed and watered on the cars in which they are transported."

deprived of necessary sustenance, or to be unnecessarily or cruelly beaten, or needlessly mutilated or killed, as aforesaid, any living creature, every such offender shall, for every such offence, be guilty of a misdemeanor.

"SECT. 2. Any person who shall keep or use, or in any way be connected with, or interested in the management of, or shall receive money for the admission of any person to any place kept or used for the purpose of fighting or baiting any bull, bear, dog, cock or other creature, and every person who shall encourage, aid or assist therein, or who shall permit or suffer any place to be so kept or used, shall, upon conviction thereof, be adjudged guilty of a misdemeanor.

"SECT. 3. Any person who shall impound, or cause to be impounded in any pound, any creature, shall supply to the same, during such confinement, a sufficient quantity of good and wholesome food and water, and in default thereof shall, upon conviction, be adjudged guilty of a misdemeanor.

"SECT. 4. In case any creature shall be at any time impounded as aforesaid, and shall continue to be without necessary food and water for more than twelve successive hours, it shall be lawful for any person, from time to time, and as often as it shall be necessary, to enter into and upon any pound in which any such creature shall be so confined, and to supply it with necessary food and water so long as it shall remain so confined. Such person shall not be liable to any action for such entry, and the reasonable cost of such food and water may be collected by him of the owner of such creature, and the said creature shall not be exempt from levy and sale upon execution issued upon a judgment therefor.

"SECT. 5. If any person shall carry, or cause to be carried, in or upon any vehicle or otherwise, any creature, in a cruel or inhuman manner, he shall be guilty of a misdemeanor; and whenever he shall be taken into custody therefor by any officer, such officer may take charge of such vehicle and its contents, and deposit the same in some safe place of custody; and any necessary expenses which may be incurred for taking charge of and keeping and sustaining the same, shall be a lien thereon, to be paid before the same can lawfully be recovered. Or the said expenses or any part thereof remaining unpaid, may be recovered by the person incurring the same, of the owner of said creature, in any action therefor.

"SECT. 6. Every person who shall hereafter use any dog or dogs for the purpose of drawing or helping to draw any cart, carriage, truck, barrow, or other vehicle, in any city or incorporated village, for business purposes, shall be required to take out a license for that purpose, from the mayor or president thereof, respectively, and shall have the number of said license and the residence of the owner distinctly painted thereon; and for each violation of this section shall forfeit and pay a fine of one dollar for the first offence, and a fine of ten dollars for each subsequent offence.

"SECT. 7. If any maimed, sick, infirm or disabled creature shall be abandoned to die, by any person, in any public place, such person shall be guilty of a misdemeanor; and it shall be lawful for any magistrate or captain of police in this State to appoint suitable persons to destroy such creature if unfit for further use.

"SECT. 8. Any agent of the American Society for the Prevention of Cruelty to Animals, upon being designated thereto by the sheriff of any county in this

State, may, within such county, make arrests, and bring before any court or magistrate thereof having jurisdiction, offenders found violating the provisions of this act; and all fines imposed or collected in any such county, under the provisions of this act, shall enure to said society, in aid of the benevolent objects for which it was corporated.

"SECT. 9. This act shall take effect on the first day of May next. And the said American Society for the Prevention of Cruelty to Animals shall cause the same to be published once in each week for three weeks, in four daily papers published in New York city, or in default thereof shall forfeit the right to receive the penalties and fines as provided.

"SECT. 10. Nothing in this act contained shall be construed to prohibit or interfere with any properly conducted scientific experiments or investigations, which experiments shall be performed only under the authority of the faculty of some regularly incorporated medical college or university of the State of New York."[1]

§ 1107. **Form of the Indictment for Overloading.** — The first section of each of the foregoing statutes makes it punishable to "overload" the animal; which is a very common offence, especially in the case of horses. This term "overload" is used in most of the late statutes, but not all. In a case of overloading a railroad car drawn by horses, tried before Recorder Hackett in New York city, the indictment, which appears to have been accepted as good in form, was in the following words: —

"That George W. Tinsdale, late of the first ward of the city of New York in the county of New York aforesaid, he then and there being a conductor of a passenger car on the Bleecker Street and Fulton Ferry Railroad of the city of New York, and Arthur Taggart, late of the same place, he then and there being the driver of said passenger car of said railroad, on the second day of January, in the year of our Lord one thousand eight hundred and sixty-eight, at the ward, city, and county aforesaid, with force and arms did unnecessarily overload and procure said passenger car to be overloaded, then and there being attached to said passenger car two living creatures, to wit, two horses; by means whereof on a certain portion of the route of the said railroad the horses so attached to said passenger car were unable to draw said passenger car, but were, by reason of the premises aforesaid, overloaded, overdriven, tortured, and tormented; against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity."[2]

§ 1108. **Observations on this Form. — Proposed Change of Form.** — Now, turning back to the New York statute on which this form is drawn (§ 1), we see that the words

[1] Act of April 12, 1867, 7 Edm. Stats. 86.

[2] People *v.* Tinsdale, 10 Abb. Pr. N. S. 374.

meant to be covered by the allegation are, "If any person shall overload, or procure to be overloaded, any living creature, every such offender shall," &c. In misdemeanors, every person who causes or procures the wrongful thing to be done, or in any way by his will contributes to it, is, whether present or absent, a principal offender, and he is liable in the same manner, and to the same extent, and, if the pleader chooses, may be indicted, usually, in exactly the same form of words, as if the thing done had been executed by his own personal and manual touch.[1] This New York statute, and most of the other statutes of our States on the same subject, together with the present English enactment, contain the superfluous clause "cause or procure," &c.; having been penned, it would seem, by persons who supposed they were addressing ignorant hackmen and other like individuals, who, they thought, did *not* know the law. But, though this is so, there is no good reason why the pleader should plant himself on the superfluous matter, out of a like consideration for the "lay gents," as Mr. Justice Powell called them, who constitute the jury; because, though the jurors may not have known this bit of law when summoned on the panel, they will be informed of it by the court. The author, therefore, would prefer to draw the indictment according to the legal, rather than the mere outward fact, and so would make no mention of causing or procuring.[2] Again, the form of indictment we are considering states, as *consequences* of its premises, various superfluous things; or, if we should suppose them not to be superfluous, they ought to be set out differently. Without questioning, therefore, the sufficiency of this indictment as actually drawn, the author would prefer some change in it, principally, not wholly, on the ground of mere taste; and, though it is easier to find fault than to do a faultless thing, he would suggest the following: —

That A, late of, &c., horse-car driver, and B, late of, &c., horse-car conductor, on, &c., at, &c., the said A being then and there the driver and the said B being then and there the conductor of a certain horse-car there passing and going, to which said car were attached two horses [the same being living creatures [3]], did

[1] Crim. Law, 5th ed. I. § 629, 631, 632, 656, 685, 686; Crim. Proced. 2d ed. I. § 332; II. § 1–6, 59; ante, § 1024.

[2] Crim. Proced. 2d ed. I. § 333, 334.

[3] Some pleaders might choose to in-

then and there, by admitting into said horse-car too great a weight of passengers and other things for the strength of said horses, and requiring said horses to draw and attempt to draw said car so overladen, wilfully overload said horses, to their great pain, damage, and injury, against the form of the statute, &c.

§ 1109. **Course of the Further Discussion.** — It is not proposed, in this chapter, to enter minutely into every sort of undecided question which may be suggested by the subject; but simply to direct the attention of the reader to a few particulars, in respect of which some suggestions, and a reference to illustrative doctrines of the law, will be specially helpful to him. The order of the discussion is of little consequence, and it will be indicated as we go on.

§ 1110. **"Overloading."** — The indictment, in the case before Recorder Hackett already mentioned,[1] seems to be framed upon the theory that to overload is to put upon the vehicle a weight beyond the power of the horses to draw; and, on the trial, evidence was introduced that passengers were obliged to get out of the car and help it along.[2] But, though this form of the allegation and the evidence might have been judicious in the particular case, plainly the law does not require the facts to go so far. If so great a weight is put upon the vehicle that the horses cannot draw it, yet they are cruelly compelled to strain at it in a fruitless attempt, this is undoubtedly an overloading; but it is not a case of such unmitigated cruelty, and so completely within the statute, as where they are compelled to draw a load which overtasks their strength, and the vehicle is almost made to stop, but not quite. This is overloading in its worst form. Yet how extreme the case must be, to come within the statute, is a point which cannot be exactly set down in words; and it must be left to the good sense of the court and jury on the particular facts of each case. The habits and general disposition of the individual horse may be shown by the testimony of any person who is acquainted with them;[3] and these, in connection with what appears at the

sert these words because they are in the statute. But they are unnecessary. And it would not do to say simply "two living creatures," instead of two horses. Ante, § 440; post, § 1112, 1113.

[1] Ante, § 1107.

[2] People *v.* Tinsdale, 10 Abb. Pr. N. S. 374.

[3] The State *v.* Avery, 44 N. H. 392.

time of the alleged overloading, will in general be found to be a sufficient guide to the decision.[1]

[1] The president of the Massachusetts Society for the prevention of Cruelty to Animals, Mr. George T. Angell, is a competent lawyer, who has given great attention to this class of cases; and, though he may be supposed to write in some measure as an advocate, the following from him, in answer to the question, "What is overloading and how proved?" will commend itself to most readers as being, in the main, sound: —

"Must an animal be worked until he breaks a blood-vessel or drops dead, before the law takes cognizance? Is the horse to be strained, or worked to the extreme limit of his strength, before such straining or working becomes cruelty [that is, before the act of his master becomes 'overloading'] ? Can an expert, or any number of experts, say what is the limit of strength or endurance of any horse simply by knowing his weight? It seems to me that these questions can be easily answered. Horses, like men, are of different ages, constitutions, temperaments, formations, and degrees of strength. One horse, just like one man, may be twice as fast, twice as tough, twice as strong, as another of precisely the same weight, and inasmuch as horses, like men, are liable to a great variety of sicknesses, and suffer just like men from previous overworking, and from heat, want of proper rest, food, water, shelter, and care, it follows that the same horse, like the same man, may be able to perform without injury more labor on one day than another.

"Can a thousand experts prove that all men of a given weight, or size, are equally competent, on every day of the year, to perform a given labor? Can their testimony establish how much load a man of given weight should carry, and how far he should carry it on a given day, without regard to whether the man is old or young, sick or well, strong or weak, tough or tender, already tired or rested, full fed or starved, or the day hot or cold? And does not precisely the same reasoning apply to the horse, — that what one horse can do on one day has no force in showing what another ought to do on another day, unless you show the weather, the age, strength, toughness, and bodily condition of the two to be precisely similar? I say, then, that it is just as impossible for any number of experts, knowing only the weight or size of a horse, and nothing of his age, health, strength, toughness, and bodily condition, to establish what is, or is not, overloading him, as it would be, knowing only the size or weight of a man and nothing of his age, health, strength, toughness, or bodily condition, to establish what is or is not an overload for him.

"How, then, are we to determine when a horse is overloaded? *Just exactly and precisely as we determine when a man is overloaded.* First, we are to take his own evidence. If a man stops and says, I am overloaded, I am working too hard, I feel that the task put upon me is too heavy, that is evidence. So when the horse, ordinarily kind and willing to pull, comes with a heavy load to a rise of land, and after one or two efforts stops and says as plainly as he can speak it, I am overloaded, I am working too hard, I feel that the task put upon me is too heavy, that's evidence; and there is not a court or jury or man, *with the heart of man,* who will not recognize it as such. Besides, the signs of overwork are just as visible in the horse as the man. *No magistrate or juror would have any difficulty in deciding in his own mind whether a case to which his attention might be attracted in our public streets was or was not a case of cruelty.*

"*Is not, then, the testimony of competent, intelligent, and credible by-standers, who see how the horse looks, and acts, and his bodily condition, health, and capability to perform the labor required, the best evidence that can possibly be obtained? Where can you get better?* And when disinter-

§ 1111. **Other like Statutory Words.** — These views of the meaning of the word "overload," are applicable also to other statutory words of the like sort; such as "overdrive," "overwork," "deprive of necessary sustenance," and some others. There is a point, to be indicated by good sense, to which the wrong must be carried to be indictable, but it cannot well be set down in terms. Perhaps the best criterion is, that it must have proceeded so far as to be "cruel." Yet between this point, and the utmost extreme which might be imagined, a greater or less distance will be found to lie. So "cruelly kill" means something more than merely to "kill;" if it did not, every man would be indictable who should kill a pig for his table. But the amount and kind of torture in the killing, necessary to constitute the offence, cannot well be defined in advance, except as the statute has done it by employing the word "cruel."

§ 1112. **"Animal" — "Living Creature," &c. — How the Allegation.** — These statutes are so worded as to leave little room for controversy as to what particular animals or creatures are within their protection. But, when considering the doctrines relating to malicious mischief to animals, we saw, that, as already stated in a note,[1] it is not sufficient for the indictment to employ this general term and no more, it must be specific; as, for example, if the statutory word is "cattle," which is much less broad than either "animal" or "living creature,"

ested and intelligent witnesses, who are present and see and hear all that is said and done in a given case, voluntarily leave their ordinary avocations and come into court to testify that they are fully satisfied that the case is a clear case of cruelty, can such evidence be overbalanced by that of any number of experts who are not present, see nothing that occurs, know nothing of the age, health, strength, or bodily condition of the horse at the time, and who base their calculations simply upon the avoirdupois weight of the animal? *It is perfectly evident, then, I say, that the highest and best evidence which any court or jury can ask, or possibly obtain, in a case of overloading, overworking, or overdriving, is the evidence of the horse himself, as interpreted by those present when the cruelty is inflicted.*

"*Cruelty begins very far short of tasking the extreme strength of the animal.* God has given to men and animals an excess of strength, to be husbanded carefully and used occasionally. But to task that strength to its full limit unnecessarily is against nature, breaks down the man, or the animal, before his or its time, and is a cruelty against which men, having speech and reason, may protect themselves, but against which animals, having neither speech nor reason, like men, *must look to them for protection.*"

[1] Ante, § 1108.

this word alone will not do in the indictment, but the pleader must say "ox," "sheep," or whatever other word indicates the particular species, and he need not, unless he chooses, add that the animal is "cattle."[1] The application of this doctrine to these statutes restraining cruelty to animals is plain.

§ 1113. **Words to indicate, in the Allegation, the Cruel Act.** — We have seen,[2] that, if a statute makes it indictable to "cruelly beat" a horse, or to "wilfully and wantonly wound" a bull, a count which states the offence in the naked words of the statute, — as, "did cruelly beat a certain horse," or "did wilfully and wantonly wound a certain bull," — is, according to decisions in Massachusetts and Texas, sufficient. So, if a statute forbids any one to "maliciously kill" (the term "*cruelly* kill" is entirely different) the animal of another, it is adequate in allegation to say, that the defendant "did maliciously kill" the animal, without entering into any particulars of the killing.[3] On the other hand, according to doctrine which we have assumed to be correct, if the statutory word relied on is "torture," an indictment in this naked form will not do, but the particulars must be set out.[4] In like manner we have assumed, that, where the statutory word is "overload," an indictment employing this word, without any specifying of the particulars, will not answer; at least, such was not the form in the New York case already mentioned.[5] If we look at this question in the light of principle, and of such decisions in analogous cases as the books furnish, we shall come to the following conclusion. To charge a defendant with crime in general is equivalent to making no allegation whatever against him. He is entitled to have the *specific criminal act* for which he is to be put on trial — his act — the act special to his case — set out in allegation. If it is not sufficient to say that he is a criminal in general, so also it is not to allege simply that he committed a crime of a particular name or description; the facts (not the evidence of them) special to the special case must be set out.[6] Now, there are some words which, in their

[1] Ante, § 440.
[2] Ante, § 1098, 1099. Ante, § 446.
[3] Ante, § 447, 1100.
[4] Ante, § 1107, 1108.
[5] Ante, § 373, and many other places.

meaning, and in the nature of the subject to which they are applied, are both full and precise; and, if such a word is employed in the statute, the use of the same word, without expansion, is adequate in the indictment. Such is the word "beat;" the act of beating may be performed with different weapons, but in all circumstances it is substantially one act. The word "wound" possibly admits of a greater variety of instruments and forms, but substantially it may well enough be taken to be always one thing; consequently, though there might be some difference of opinion among judges, we may reasonably accept the Texas decision [1] as sound. The word "torture" conveys a more complex idea, therefore the transaction is not sufficiently individualized, or the charge made sufficiently precise, unless the particulars are specified. And what is true of torture is so also of "overload." The idea is a complex one, and the act may be performed in a great variety of ways; therefore the particulars pertaining to the individual instance should be mentioned. We have seen,[2] that, if the statute employs the word "horse" to designate the animal, the same word is sufficient in the indictment, because it is specific; while, if the term of the statute is "any living creature," the same term in the indictment will not do, but the specific word "horse" must be used. If this view is not admitted, then the indictment may merely charge, that the defendant, at a time and place named, "did overload a living creature;" and he will not know whether he is to answer for having put too heavy a burden on a horse's back, or too great weight in a vehicle drawn by a donkey, or too many clothes on the baby, or too ponderous a flower on the back of a butterfly.

§ 1114. **Continued.** — It is not deemed best to proceed here entirely in advance of decisions, and attempt to forestall the judgment of the courts relating to each one of all the several words employed in these statutes. The true principle, it is believed, is stated above; but doubtless some differences of opinion will occur among judges concerning its application.

§ 1115. **Several Animals — How many Offences — Joinder.** — There is one question, however, which is of so much impor-

[1] Ante, § 1099.

[2] Ante, § 440, 441, 1098, 1107, 1108 and note.

tance as to require a consideration here, though it appears to be hitherto wholly undecided. It is, whether, if in one transaction cruelty is inflicted on more animals than one, there are constituted as many offences as there are animals, or whether the whole is only one offence, the same as though one animal only was injured. Now, in respect of other crimes generally, it pertains to the obscure and uncertain part of the law of criminal procedure to determine into what specific offences a given criminal transaction is separable.[1] The pleader has often a wide election in this matter, but there are limits to it. Yet the most important part of the present inquiry is, into what division of the criminal law we are to look for analogies to guide us in these cases. Plainly, at this point, the two offences of malicious mischief to animals, and of cruelty to animals, are very wide apart. The former is a crime analogous to larceny, and it is purely a wrong done to the owner of the animal;[2] and, beyond doubt, the rules in larceny, as concerns the present point of inquiry, govern it. But the latter is a crime against the animal itself;[3] and, in reason, it is governed, as to the questions now under consideration, by the rules prevailing in assaults, battery, homicide, and the kindred crimes against the persons of individuals.

§ 1116. **Continued.** — If a man by one blow beats two persons, he may be indicted in one count for the battery of the two, or for the battery of one only, at the election of the pleader. Yet it has been held that there is but one offence in such a case; and, if an offender is convicted as respects one of these persons, he cannot afterward be prosecuted in respect of the other. And suppose an indictment charges the beating of two persons, yet the proof is only of one, still, according to the better opinion on a disputed question, there may be a conviction as respects one. Yet this entire doctrine, though sound in principle as thus stated, is somewhat obscure in the authorities.[4] The law on this subject, whatever it is, undoubtedly is applicable to the beating of animals. But, if a man by separate

[1] See Crim. Law, 5th ed. I. the chapter commencing § 791, 1048–1069; Crim. Proced. 2d ed. I. § 444 et seq.

[2] Ante, § 430 et seq.

[3] Ante, § 1101.

[4] Crim. Proced. 2d ed. II. § 60; Crim. Law, 5th ed. I. § 1061.

blows beats more animals than one in one continuous transaction, and no one blow takes effect on more than one animal, there can be no doubt that he commits an offence for each animal offended against; or, in other words, as many offences as there are animals beaten, and he may be convicted on separate counts of one indictment, or on separate indictments.

§ 1117. **Continued.** — When we come to such an offence as overloading, if two horses are harnessed to one vehicle which they are required to draw, there appears to be but one criminal act, and not a crime for each horse. Therefore, in the New York case already referred to, a single count very properly embraced the charge of overloading two horses.[1] Probably if the charge had been that the defendants overloaded one of the horses, it would have been good; but, in reason, and in analogy to the better authorities, the defendants could not then be convicted of overloading the other horse, either on a separate count of the same indictment, or on a separate indictment. And, in conclusion of the whole matter, the rule furnished by reason and by analogies drawn from the better authorities is the following: If by one volition, or series of volitions where the separate volitions do not terminate each on its separate animal, the defendant injures more animals than one, he commits but one offence, however many the animals may be. But if the injury comes from separate volitions, where each one takes effect only on its particular animal, or from separate series of volitions, where each single volition is of the like sort, he commits as many offences as there are animals injured.[2]

§ 1118. **Cock-fighting, &c.** — Some cases have arisen respecting cock-fighting and the like;[3] but it is deemed best that the chapter and the volume should here close.

[1] Ante, § 1107.

[2] Of course, the pleader will bear in mind the doctrine stated ante, § 244, 383, which will be found applicable under some of these statutes.

[3] 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.

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