A

TREATISE

ON

CRIMINAL LAW

BY

FRANCIS WHARTON, LL.D.,

COUNSEL FOR THE DEPARTMENT OF STATE OF THE UNITED STATES;
PROFESSOR IN LAW SCHOOL OF BOSTON UNIVERSITY;
MEMBER OF THE INSTITUTE OF INTERNATIONAL LAW:

AUTHOR OF "COMMENTARIES ON AMERICAN LAW," AND OF TREATISES ON "EVIDENCE," "CONFLICT OF LAWS," "NEGLIGENCE," AND "AGENCY."

IN TWO VOLUMES.

VOLUME II.

NINTH EDITION.

PHILADELPHIA:
KAY & BROTHER,
LAW PUBLISHERS, BOOKSELLERS, AND IMPORTERS.
1885.

COLLINS PRINTING HOUSE,
705 Jayne Street.

ANALYSIS.

BOOK II.

CRIMES.

PART II.

OFFENCES AGAINST PROPERTY (*continued*).

PART III.

OFFENCES AGAINST SOCIETY.

BOOK II.

CRIMES.

PART II.—OFFENCES AGAINST PROPERTY.

(CONTINUED.)

CHAPTER XVI.

MALICIOUS MISCHIEF.

I. BY STATUTE.

§ 1065. In prior editions, the statutes in force in a series of States were given on this topic. They are now omitted for purposes of condensation; but the adjudications upon them are hereafter noticed, as throwing light upon the exposition of the offence as it exists at common law. It is proper to add, also, that for two reasons the points about to be

Statutes based on common law.

stated bear closely upon the offence as determined by statute. In the first place, most of the statutes are but a codification of the common law. In the second place, many of these statutes define the offence as the "malicious injury of the property of another;" leaving it to the common law to define what these general terms comprise.[1]

Offence of wider scope in this country than in England.

§ 1066. Malicious mischief in this country, as a common law offence, has received a far more extended interpretation than has been attached to it in England. In the latter country, each object of investment, as it arose into notice, became the subject of legislative protection; and as far back as the reports go, there has scarcely been a single article of property, which was likely to prove the subject of mischievous injury, which was not sheltered from such assaults by severe penalties. Thus, for instance, a series of statutes, upwards of twelve in number, beginning with 37 Hen. VIII. c. 6, and ending with the Black Act, were provided for the single purpose of preventing wanton mischief to cattle and other tame beasts; and so minute was the particularity of the law-makers that distinct and several penalties were assigned to the cutting out of the tongue of a cow,[2] to the breaking of the fore-legs of a sheep, when attempting to escape inclosures,[3] and to the wounding of cattle, when the injury was only temporary.[4] Upwards of eighteen hundred sections, it is estimated, of acts, running from Henry VIII. to George III., repealed or otherwise, were enacted for the special purpose of providing against malicious mischief; and as the statutory penalty was both more specific and more certain than that of the common law, the books, in this class of offences, give but few examples of common law indictments. But as the later English statutes are not in force in this country, malicious mischief, as a common law offence, has here been the subject of frequent adjudications.[5]

[1] For special statutes, see *infra*, § 1081. In New York, by § 654 of Penal Code of 1882, "A person who unlawfully and wilfully destroys or injures any real or personal property of another, in a case where the punishment thereof is not prescribed by statutes," is to be punished, etc.

For several forms of indictments under this head, see Wharton's Precedents, 213, etc., 470 *et seq.*

[2] Stat. 37 Hen. VIII. c. 6. See *supra*, § 16.

[3] 9 Geo. I. c. 22, s. 16.

[4] Ibid. c. 19.

[5] Loomis *v.* Edgerton, 19 Wend. 419.

Offence includes malicious physical injury to the rights of another person or to those of the public.

§ 1067. In its general application malicious mischief may be defined to be any malicious or mischievous physical injury, either to the rights of another or to those of the public in general.[1] Thus, it has been considered an offence at common law to maliciously destroy a horse belonging to another;[2] or a cow;[3] or a steer;[4] or any beast whatever which may be the property of another;[5] to wantonly kill an animal where the effect is to disturb and molest a family;[6] to be guilty of wanton cruelty to animals,[7] either publicly (when the animal belongs to the defendant himself),[8] or secretly, through specific malice against another person who is the owner, in such case mere wantonness not being sufficient; to maliciously cast the carcass of an animal into a well in daily use;[9] to maliciously poison chickens, fraudulently tear up a promissory note, or break windows;[10] to mischievously set fire to a number of barrels of tar belonging to another;[11] to maliciously destroy any barrack, corn or crib;[12] to maliciously girdle or injure trees or plants kept either for use or ornament;[13] to put cow-itch on a towel,

[1] That it is a misdemeanor at common law, see 2 East P. C. 1072; Black *v.* State, 2 Md. 376.

[2] Resp. *v.* Teischer, 1 Dallas, 335; State *v.* Council, 1 Tenn. 305; though see, *per contra*, Shell *v.* State, 6 Humph. 283; Taylor *v.* State, Ibid. 285. See *supra*, § 894.

[3] Com. *v.* Leach, 1 Mass. 59; People *v.* Smith, 5 Cow. 258.

[4] State *v.* Scott, 2 Dev. & Bat. 35; Whart. Prec. 213. See *supra*, §§ 894 *et seq.*

[5] State *v.* Wheeler, 3 Vt. 344; Loomis *v.* Edgerton, 19 Wend. 419; Henderson's Case, 8 Grattan, 708; though see Illes *v.* Knight, 3 Texas, 316; and see, also, a learned article in 7 Law Rep. (N. S.) 89, 90. As to dogs see *infra*, § 1076; *supra*, § 872. *Cf.* Mr. Gerry's argument in Davis *v.* Society for Prevention of Cruelty, etc., 75 N. Y. 362.

[6] Henderson's Case, 8 Grattan, 708.

[7] U. S. *v.* Logan, 2 Cranch C. C. R. 259; State *v.* Briggs, 1 Aiken, 226. See Statutes, *infra*, § 1082 *d*. But it has been held that "wounding" a horse or other animal belonging to another without violence or specific malice to the owner is not indictable. Ranger's Case, 2 East P. C. 1074. See State *v.* Beckman, 3 Dutch. 124; State *v.* Manual, 72 N. C. 201, cited *infra*, §§ 1068, 1082 *d*. As to cruel sports see *infra*, §§ 1461, 1465 *a*.

[8] U. S. *v.* Logan, 2 Cranch, C. C. R. 259; U. S. *v.* Jackson, 4 Ibid. 483.

[9] State *v.* Buckman, 8 N. H. 203.

[10] Resp. *v.* Teischer, 1 Dallas, 338.

[11] State *v.* Simpson, 2 Hawks, 460.

[12] Parris *v.* People, 76 Ill. 274.

[13] Loomis *v.* Edgerton, 19 Wend. 420; Com. *v.* Eckert, 2 Browne, 249; *per contra*, Brown's Case, 3 Greenl. 177; and State *v.* Helmes, 5 Ired. 364, where it was held not to be indictable to maliciously cut down a crop of Indian corn standing in a field. See *infra*, § 1082 *c*.

with intent to injure a person about to use it;[1] to maliciously break up a boat;[2] to maliciously cut off the hair of the tail or mane of a horse, with intent to annoy or distress the owner;[3] to discharge a gun with the intention of annoying and injuring a sick person in the immediate vicinity;[4] to maliciously and indecently break into a room with violence for the same purpose;[5] though it is held not an indictable offence to remove a stone from the boundary line between the premises of A. and B. with intent to injure B.[6]

But offence must be with malice to owner, or involve a breach of the peace.

§ 1068. The recent inclination, however, so far as the common law is concerned, is to restrict the party injured to his civil remedies, except (1) where the offence is committed secretly, in the night-time, or in such other way as to inflict peculiarly wanton injury, so as to imply malice to the owner;[7] or (2) where it is accompanied with a breach of the peace.[8] Thus, in New York, an indictment charging that the defendant, "with force and arms, unlawfully, wilfully, and maliciously did break in pieces and destroy two windows in the dwelling-house of M. C. to the great damage of the said M. C., and against the peace," etc., was held not to set forth an offence indictable by the laws of the State; it being held that an act which would otherwise be only a trespass does not become indictable by being charged to have been done with force and arms, or by being alleged to have been committed maliciously, or without claim of right, or without any motive of gain. Whether if the breaking of the windows in this case had been charged to have been done secretly, or in the night-time, the act would have been indictable was doubted by Beardsley, C. J., it being said generally that the cases in which indictments have been sustained for maliciously kill-

[1] People *v.* Blake, 1 Wheel. C. C. 490.

[2] Loomis *v.* Edgerton, 19 Wend. 420.

[3] Boyd *v.* State, 2 Humph. 39. This, however, was under a statute prohibiting "disfiguring." *Infra*, § 1082 *d*.

[4] Com. *v.* Wing, 9 Pick. 1. *Supra*, § 167.

[5] Com. *v.* Taylor, 5 Binn. 277; Hackett *v.* Com., 15 Penn. St. 95. See *infra*, § 1093.

[6] State *v.* Burroughs, 2 Halsted, 426.

[7] See People *v.* Moody, 5 Parker C. R. 568, where an indictment for wantonly and clandestinely injuring harness in the *daytime* was held good at common law. And see State *v.* Newby, 64 N. C. 23; Northcot *v.* State, 43 Ala. 330. Under the English statutes, see R. *v.* Martin, L. R. 8 Q. B. D. 547; 14 Cox C. C. 633; 45 L. T. (N. S.) 444.

[8] Dawson *v.* State, 52 Ind. 478.

ing or wounding domestic animals depend upon features peculiar to such offences, as the depravity of mind, and the cruelty of disposition, which such acts evince.[1] Maiming or wounding an animal, also, without killing it, was held in New Jersey, in 1858, to be not indictable either at common law or under the statute law of that State.[2] And it is held in other States that at common law an injury to personal property, to be indictable, must be marked by special malice to the owner, or accompanied by or provocative of a breach of the peace.[3]

Distinguishable from larceny by absence of intent to steal.

§ 1069. It has been shown[4] that whenever goods are fraudulently taken against the owner's will *animo furandi*, the offence is larceny; while when they are simply maliciously injured, without being taken *animo furandi*, it is malicious mischief. It must also be noticed that there are articles of property not objects of larceny (*e. g.*, real estate, dogs, etc.),[5] for maliciously injuring which a person may be indicted.

§ 1070. Neither negligent injury, nor an injury inflicted angrily in hot blood, is sufficient to constitute the offence.[6] There must be

[1] Kilpatrick *v.* People, 5 Denio, 277. See this case commented on in 5 Parker C. R. 568.

[2] State *v.* Beekman, 3 Dutch. (N. J.) 124. See, also, to same effect, R. *v.* Ranger, 2 East P. C. 1074; State *v.* Allen, 72 N. C. 114.

[3] State *v.* Phipps, 10 Ired. 17; State *v.* Manual, 72 N. C. 201; Dawson *v.* State, 52 Ind. 478; see Illies *v.* Knight, 3 Tex. 312. Under the latter head fall cruel games, such as cock-fighting. *Infra*, § 1465 *a*.

[4] *Supra*, §§ 894 *et seq.* But see, as to some extent conflicting with views of the text, State *v.* Leavitt, 32 Me. 183.

[5] See *infra*, §§ 1076, 1082 *d*.

[6] Com. *v.* Walden, 3 Cush. 558; State *v.* Robinson, 3 Dev. & Bat. 130; Dawson *v.* State, 52 Ind. 478; U. S. *v.* Gideon, 1 Minn. 292; State *v.* Enslow, 10 Iowa, 115; Wagstaff *v.* Schippel, 27 Kan. 450; Thompson *v.* State, 51 Miss. 353. See Davis *v.* Society for Prevention of Cruelty, etc., 75 N. Y. 362; 21 Alb. L. J. 265.

In R. *v.* Pembliton, 12 Cox C. C. 607; L. R. 2 C. C. R. 119, the defendant was indicted for unlawfully and maliciously committing damage upon a window in the house of the prosecutor, contrary to the 23 & 24 Vict. c. 97, s. 51. It appeared that the defendant, who had been fighting with other persons in the street, after being turned out of a public house, went across the street, and picked up a stone, and threw at them. The stone missed them, passed over their heads, and broke a window in a public house. The jury found that he intended to hit one or more of the persons he had been fighting with, and did not intend to break the window. It was held by all the judges, that upon this finding the prisoner was not guilty of the charge within the above statute.

malice to the owner[1] or possessor,[2] though such owner or possessor is personally unknown to the wrongdoer;[3] but there is ground to argue that malignant cruelty to an animal is indictable at common law, irrespective of particular malice to the owner, when there is shock or scandal to the community;[4] and that a man may in such cases be indicted for malicious cruelty to an animal belonging to himself.[5] The same reasoning would lead us to conclude that malignant and intentional injury to public works of art, or to public libraries, is indictable, irrespective of malice to individuals.

Malice is essential to the offence.

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

In Com. *v.* Williams, 110 Mass. 401, it was held that for a conviction under the St. of 1862, c. 160, which provides for the punishment of any one who "wilfully or maliciously injures" a building, it is not enough that the injury was wilful and intentional, but it must have been done out of cruelty, hostility, or revenge.

[1] R. *v.* Austen, R. & R. 490; R. *v.* Kean, 2 East P. C. 1075; Taylor *v.* Newman, 4 B. & S. 89; 9 Cox C. C. 314; State *v.* Beekman, 3 Dutch. 124; State *v.* Latham, 13 Ired. 33; State *v.* Robinson, 3 Dev. & Bat. 130; State *v.* Hill, 79 N. C. 656; State *v.* Newby, 64 Ibid. 23; State *v.* Sheets, 89 Ibid. 543; State *v.* Doig, 2 Rich. 179; State *v.* Pierce, 7 Ala. 728; Northcot *v.* State, 43 Ibid. 330; Hobson *v.* State, 44 Ibid. 380; State *v.* Wilcox, 3 Yerg. 278; Duncan *v.* State, 49 Miss. 331; Wright *v.* State, 30 Ga. 325; Chappel *v.* State, 35 Ark. 345; Branch *v.* State, 41 Tex. 622; State *v.* Enslow, 10 Iowa, 115; U. S. *v.* Gideon, 1 Minn. 292; though, under Tennessee statute, see State *v.* Council, 1 Tenn. 305; Hampton *v.* State, 10 Lea, 639. In England by statute (R. *v.* Tivey, 1 C. & K. 705) malice to the owner need not now be proved. As to Alabama, see Tatum *v.* State, 66 Ala. 465. In Texas the qualifying terms of the statute are "wilfully" and "wantonly." These are regarded as convertible with "maliciously." Thomas *v.* State, 14 Tex. Ap. 200.

[2] Stone *v.* State, 3 Heisk. 457. See Com. *v.* Goodwin, 122 Mass. 19.

[3] State *v.* Linde, 54 Iowa, 139. That this is the case with injury to buildings, see Com. *v.* Williams, 110 Mass. 401.

[4] See R. *v.* Austen, R. & R. 490; R. *v.* Tivey, 1 C. & K. 704; U. S. *v.* Jackson, 4 Cranch C. C. 483; Stage Horse Cases, 15 Abb. Pr. (N. S.) 51; Brown *v.* State, 26 Ohio St. 176; State *v.* Jackson, 12 Ired. 329; State *v.* Latham, 13 Ibid. 33; Mosely *v.* State, 28 Ga. 190; State *v.* Pierce, 7 Ala. 728; State *v.* Wilcox, 3 Yerg. 278. As to cruelty in dog and cock fighting, see *infra*, § 1465 *a*.

[5] State *v.* Avery, 44 N. H. 392; Mosely *v.* State, 28 Ga. 190. See Com. *v.* Tilton, 6 Met. 232; Kilpatrick *v.* People, 5 Denio, 277. Under statute malice to owner may not be essential. R. *v.* Tivey, 1 C. & K. 704, cited *infra*, § 1062 *d*.

§ 1071. The usual line of evidence as to proof and disproof of malice is here admissible.[1] Malice may be inferred from declarations; from prior acts; and even from the peculiar malignity of the act.[2]

Malice is to be inferred from facts.

§ 1072. Malice may be negatived by showing that the act was induced by other causes; *e. g.*, that an animal killed was vicious, and was trespassing on the defendant's grounds, threatening hurt which could not otherwise be averted.[3] But unless an animal thus trespassing is vicious, and cannot be safely driven out, so that killing or maiming him is the defendant's only safe means of riddance, killing or maiming is not justifiable, because the animal trespassed even within a cultivated inclosed field.[4] And malice may also be disproved, by proof that the object of the defendant was not malicious but friendly.[5] And on a charge of cruelly over-driving a horse, ignorance and want of malice is a defence.[6]

May be negatived by proof of other motives.

§ 1072 *a*. An honest belief in title is a defence to an indictment for a malicious trespass.[7] And this is peculiarly the case when the trespass is the removal of fences.[8]

Honest belief in title a defence to malicious trespass.

§ 1073. Consent of owner, when malice against the owner is alleged, is a defence. But the onus of proving consent is on the defendant.[9]

Consent of owner is a defence.

[1] See *supra*, §§ 101 *et seq.*; and see fully Whart. Crim. Ev. §§ 46, 734 *et seq.*

[2] See R. *v.* Welch, 13 Cox C. C. 121; Allison *v.* State, 42 Ind. 354; State *v.* Sheets, 89 N. C. 543. See for other cases, *infra*, § 1082 *d*.

[3] R. *v.* Prestney, 3 Cox C. C. 505; Wright *v.* State, 30 Ga. 325. See State *v.* Waters, 6 Jones (N. C.), 276; Hodges *v.* State, 11 Lea, 528; Thomas *v.* State, 14 Tex. Ap. 700. *Infra*, § 1082 *d*.

[4] Snap *v.* People, 19 Ill. 80.

[5] R. *v.* Mogg, 4 C. & P. 364.

[6] Com. *v.* Wood, 111 Mass. 408.

[7] *Infra*, § 1077; R. *v.* Langford, C. & M. 602; R. *v.* Matthews, 14 Cox C. C. 5; Dye *v.* Com., 7 Grat. 662; Sattler *v.* People, 59 Ill. 68; Howe *v.* State, 10 Ind. 492; Windsor *v.* State, 13 Ibid. 375; Losser *v.* State, 62 Ibid. 437; Goforth *v.* State, 8 Humph. 37; State *v.* Gurnee, 14 Kans. 296; Malone *v.* State, 11 Lea, 701; Behrens *v.* State, 14 Tex. Ap. 121. *Supra*, § 87, and cases cited *infra*, § 1082 *d*.

[8] In Palmer *v.* State, 45 Ind. 388, the point in the text is sustained by Downey, C. J., citing Howe *v.* State, 10 Ind. 492; Windsor *v.* State, 13 Ibid. 375.

[9] State *v.* Whittier, 21 Me. 341; Welsh *v.* State, 11 Tex. 368. See *supra*, §§ 141 *et seq.* See as to North Carolina statute, State *v.* Waters, 6 Jones, N. C. 276.

Injury must be such as to impair utility.

§ 1074. To sustain a conviction, there must be proof of injury done to such an extent as to impair utility, or materially diminish value.[1]

Owner is competent witness.

§ 1075. As in larceny, the owner of the property injured may be a witness for the prosecution.[2]

All kinds of property are subjects of offence.

§ 1076. Not merely personal property, as has been already shown,[3] may be thus protected, but so may real estate, it being held that it is indictable at common law maliciously to injure or deface tombs,[4] maliciously to strip from a building copper pipes or sheetings,[5] and maliciously to damage either immovables or movables in any way.[6] The authorities in reference to the malicious injury of trees and plants are elsewhere given.[7]

Owner's *title* is immaterial.

§ 1077. In prosecutions of this class the prosecutor's title to the property injured cannot be tried. It is enough if he had any special interest, rightful or wrongful, which may have been hurt.[8]

Indictment must contain proper technical averments.

§ 1078. The manner of describing the property injured[9] has been already stated.

The nature of the injury must be specified.[10]

An indictment is sufficiently descriptive of the property destroyed, if laid to be "one horse beast of the value, etc., of the proper goods and chattels.[11] But unless required by statutory direction, the averment of value is unessential.[12]

[1] Com. *v.* Soule, 2 Met. 21; State *v.* Cole, 90 Ind. 112. *Infra*, § 1082 *d*.

[2] State *v.* Pike, 33 Me. 361.

[3] See *supra*, §§ 1067, 1068. That there is such a property in dogs as sustains an indictment for malicious mischief, see State *v.* Latham, 13 Ired. 33; State *v.* Sumner, 2 Ind. 377; State *v.* McDuffie, 34 N. H. 523; though see *contra*, under statute, R. *v.* Searing, R. & R. 350; Com. *v.* Maclin, 3 Leigh, 809; U. S. *v.* Gideon, 1 Minn. 292; and *supra*, § 872; *infra*, § 1082 *d*, for statutes.

[4] 3 Inst. 202.

[5] R. *v.* Joyner, J. Kel. 29.

[6] Loomis *v.* Edgerton, 19 Wend. 419; Resp. *v.* Teischer, 1 Dallas, 335, where "breaking windows" maliciously was held indictable.

[7] *Supra*, § 1067; *infra*, § 1082 *c*.

[8] State *v.* Pike, 33 Me. 361; People *v.* Horr, 7 Barb. 9; Goforth *v.* State, 8 Humph. 37; Dawson *v.* State, 52 Ind. 478; State *v.* Gurnee, 14 Kans. 296. But see R. *v.* Whateley, 4 M. & R. 431, cited *infra*, § 1082 *b*. As to "title" see *supra*, § 932. As to "honest belief," see *supra*, §§ 884, 1072 *a*.

[9] *Supra*, § 977.

[10] Brown *v.* State, 76 Ind. 85.

[11] State *v.* Pearce, Peck, 66.

[12] See State *v.* Blackwell, 3 Ind. 529; and State *v.* Shadley, 16 Ibid. 230, as cases where, under statute, value is necessary.

The owner of the property must be alleged,[1] if known, and the allegation must be proved as laid.[2]

Malice must usually be averred.

§ 1079. An indictment for malicious mischief must either expressly charge malice in the defendant against the owner, or otherwise fully describe the offence as indicating general malice.[3] It is not sufficient, at common law, to set forth that the act was done "wilfully and maliciously," without averring that it was done with malice against the owner or possessor.[4] When, however, the term "maliciously" is not in the statute, it will be both sufficient and essential to use the statutory terms;[5] and when "wilful" is in the statute, it must be averred.[6]

Mode of injury must be averred.

§ 1080. It is not enough to aver that the defendant maliciously "injured" the prosecutor's property.[7] This is a conclusion of law, and the facts leading to it must be expressed.[8]

Yet the means or instruments of injury need not be set out.[9] Where there is a killing, as a statutory offence, it is enough to say, "maliciously and wilfully did kill,"[10] and where

[1] R. *v.* Patrick, 2 East P. C. 1059; R. *v.* Howe, 2 Leach, 541; Davis *v.* Com., 30 Penn. St. 421; and see as to when designation of locality is required, Com. *v.* Bean, 11 Cush. 414; Com. *v.* Dougherty, 6 Gray, 349; Com. *v.* Cox, 7 Allen, 577.

[2] *Supra*, § 977. Haworth *v.* State, Peck, 89; State *v.* Weeks, 30 Me. 182.

An indictment charging that the defendant "did unlawfully, maliciously, and secretly, in the night-time, with force and arms, break and enter the dwelling-house of A., with intent to disturb the peace of the commonwealth, and unlawfully and vehemently did make a noise, etc., and did thereby greatly frighten the wife of the said A., by means whereof she miscarried," etc., is good at common law, as an indictment for malicious mischief. Com. *v.* Taylor, 5 Binn. 277. See State *v.* Batchelder, 5 N. H. 549.

[3] *Supra*, § 1070; R. *v.* Lewis, 2 Russ. on Cr. 1067; Boyd *v.* State, 2 Humph. 39; Thompson *v.* State, 51 Miss. 353. See State *v.* Allison, 90 N. C. 734.

[4] State *v.* Jackson, 12 Ired. 329; Hobson *v.* State, 44 Ala. 380; though see State *v.* Scott, 2 Dev. & Bat. 35.

[5] Com. *v.* Turner, 8 Bush. 11.

[6] Woolsey *v.* State, 14 Tex. Ap. 57.

[7] See State *v.* Langford, 3 Hawks, 381; State *v.* Jackson, 7 Ind. 270.

[8] See Whart. Cr. Pl. & Pr. §§ 154, 230; State *v.* Aydelott, 7 Blackf. 157.

[9] State *v.* Merrill, 3 Blackf. 346. See McKinney *v.* People, 32 Mich. 284; State *v.* Jackson, 7 Ind. 270. Under a statute, "cut, injure, and destroy," is enough. State *v.* Jones, 33 Vt. 443. For indictments where the mode of injury is adequately stated, see Com. *v.* Cox, 7 Allen, 577, and Moyer *v.* Com., 7 Barr, 439.

[10] Com. *v.* Sowle, 9 Gray, 304; State *v.* Merrill, 3 Blackf. 346; Hayworth *v.* State, 14 Ind. 590; Taylor *v.* State, 6 Humph. 285; State *v.* Scott, 2 Dev. & B. 35; Whart. Prec. 476.

there is a cutting down of trees, under a statute, it is enough to aver, following the statute, that the defendant, the trees, etc., maliciously and wilfully did cut, etc.[1]

Statutory offence of endangering lives of railroad travellers.

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

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

[1] State *v.* Watrous, 13 Iowa, 489. See State *v.* Jones, 33 Vt. 443. And as to indictments generally, see Com. *v.* Thornton, 113 Mass. 457; Com. *v.* Whitman, 118 Ibid. 458; State *v.* Comfort, 22 Minn. 271; Caldwell *v.* State, 49 Ala. 34.

[2] See *supra*, § 608; McCarty *v.* State, 37 Miss. 411.

[3] R. *v.* Holroyd, 2 M. & Rob. 339. See *supra*, § 119.

[4] R. *v.* Bowry, 10 Jur. 211.

[5] See *supra*, §§ 112, 608.

[6] R. *v.* Sanderson, 1 F. & F. 37—Channell. This accords with the rule stated *supra*, § 186; but see *contra*, R. *v.* Court, 6 Cox C. C. 202.

[7] R. *v.* Rooke, 1 F. & F. 107.

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

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

Obstructing engine or railroad carriage indictable.

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

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

[1] R. *v.* Pardenton, 6 Cox C. C. 247.

[2] R. *v.* Bowry, 10 Jur. 211.

[3] For homicide resulting from such misconduct, see *supra*, §§ 337 *et seq.*

[4] R. *v.* Bradford, 8 Cox C. C. 309; 6 Jur. N. S. 1102; 2 L. T. N. S. 392; Bell C. C. 268; 29 L. J. M. C. 171; 8 W. R. 531.

[5] Roberts *v.* Preston, 9 C. B. N. S. 208.

[6] Allison *v.* State, 42 Ind. 354.

[7] Com. *v.* Temple, 14 Gray, 69.

[8] R. *v.* Hadfield, L. R. 1 C. C. 253.

[9] R. *v.* Hardy, L. R. 1 C. C. 278.

[10] Com. *v.* Killam, 109 Mass. 345.

might be travelling thereon, it was ruled that if this were done mischievously, and with an intention to obstruct the carriages of the company, the jury would be justified in finding that it was done maliciously.[1] But the presumption, in such case, is one of fact, not of law.[2] Title to the land is no defence.[3]

So malicious injury to manufactures, materials, and machinery.

§ 1082 *a*. For the protection of manufactures and machinery analogous statutes have been enacted.[4] Under these statutes the following points have been ruled:—

A warp, not sized, but upon its way to the sizers, to fit it for being used in manufacturing goods, is not a "warp in any stage, process, or progress of manufacture," or prepared for carding or spinning.[5] It is not necessary that goods should be incomplete to be in "a stage, process, or progress of manufacture," under the statute.[6] The working tools of a loom, and the cords employed to raise the harness, are "tackle employed in weaving."[7] And so of any material part of the machinery.[8]

In another case in England the owner removed a wooden stage belonging to the machine on which the man who fed the machine was accustomed to stand, and took away the legs, and it appeared in evidence that though the machine could not be conveniently worked without some stage for the man to stand on, yet that a chair or table, or a number of sheaves of corn would do nearly as well, and that it could also be worked without the legs; it was held, that the machine was an entire one within the act, though the stage and legs were wanting.[9] And where certain side boards were wanting to a machine at the time it was destroyed, but the want did not render it so defective as to prevent it altogether from working,

[1] R. *v.* Upton, 5 Cox C. C. 298.

[2] Allison *v.* State, 42 Ind. 354; McCarty *v.* State, 37 Miss. 411. Under the Texas statute the obstruction must be of a character likely to endanger life. Bullion *v.* State, 7 Tex. Ap. 462.

[3] State *v.* Hessenkamp, 77 Iowa, 25.

[4] The English "Black Acts," are not in force in South Carolina, State *v.* Sutcliffe, 4 Strobh. 372; nor in Georgia, State *v.* Campbell, T. U. P. Charlton, 167. *Aliter* in South Carolina, as to statute of 37 Hen. VIII. as to burning frames. State *v.* Sutcliffe, *ut sup.*; *supra*, §§ 835, 840. As to English statutes in force in South Carolina, see, also, State *v.* De Bruhl, 10 Rich. 23.

[5] R. *v.* Clegg, 3 Cox C. C. 295.

[6] R. *v.* Woodhead, 1 M. & Rob. 549.

[7] R. *v.* Smith, 6 Cox C. C. 198.

[8] R. *v.* Tacey, R. & R. 452.

[9] R. *v.* Chubb, Deac. C. L. 1518.

though it would not work so effectually as if those boards had been made good; it was held that it was still a threshing-machine within the meaning of the statute.[1] A threshing-machine is within the purview of the act, though it had been, prior to its destruction, taken to pieces to avoid an expected mob.[2] Plugging up the feed pipe of a steam-engine, and displacing other parts of the machinery so as to cause its stoppage, are within the statute;[3] and so of injuring ploughs used in agriculture.[4] As has been just incidentally seen, when a machine is broken by a mob, it is no defence that it was previously taken to pieces by the owner for its protection.[5] On the other hand, where the prosecutor had not only taken the machine to pieces, but had broken the wheel of it, before the mob came to destroy it, for fear of having it set on fire and endangering his premises, and it was proved that without the wheel the engine could not be worked, it was held that the remaining parts of the machine, which were destroyed by the mob, did not constitute a threshing-machine.[6]

So as to mines.

§ 1082 *b*. Mines have also been protected by special enactments. In this country there can be no question[7] that malicious injury to mining property is indictable at common law. But in such matters the interests involved are so large,

[1] R. *v.* Bartlett, Deac. C. L. 1517.

[2] R. *v.* Hutchins, Deac. C. L. 1517. See R. *v.* Mackerel, 4 C. & P. 448; R. *v.* Fidler, Ibid. 449.

[3] R. *v.* Fisher, 10 Cox C. C. 146; L. R. 1 C. C. 7.

[4] R. *v.* Gray, 9 Cox C. C. 417. For injuring aqueduct, see State *v.* Jones, 38 Vt. 443; for defacing omnibus, Com. *v.* Coe, 7 Allen, 577.

[5] R. *v.* Mackerel, 4 C. & P. 448; R. *v.* Fiddler, Ibid. 449.

[6] R. *v.* West, Deac. C. L. 1518.

As to damaging property generally, see *supra*, § 1070. As to South Carolina statute in respect to packing cotton, see State *v.* Holman, 3 McCord, 306.

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

An indictment on 7 & 8 Geo. IV. c. 30, s. 3, for feloniously damaging warps of linen yarn, with intent to destroy or render them useless, need not allege that the warps at the time of the damage done were prepared for or employed in carding, spinning, weaving, etc., or otherwise manufacturing or preparing any goods or articles of silk, woollen, linen, etc. R. *v.* Ashton, 2 B. & Ad. 750.

[7] *Supra*, §§ 1066, 1076.

and the risk to life so great, that statutes have been passed imposing heavy penalties on malicious injury to mines. Under these statutes it has been held that the offence of damaging an engine was consummated where a steam-engine used in draining and working a mine having been stopped and locked up for the night, the defendant got into the engine-house, and set it going, and there being no machinery attached, the engine went with great velocity, and received damage.[1] A scaffold erected for the purpose of working a vein of coal is such an erection used in conducting the business of a mine, that injuring with intent to destroy it, or to render it useless, is included in the statute.[2]

So as to trees and shrubs.

§ 1082 *c*. We have already seen that in several jurisdictions in this country it is at common law indictable to maliciously injure fruit or ornamental trees. In England prosecutions of this kind are now exclusively statutory; the statutes having absorbed the common law. Under these statutes, apple and pear-trees grafted in a wild stock, and producing fruit, are "trees;"[3] and cutting down a tree is sufficient to bring a case within the statute, although the tree is not thereby totally destroyed.[4] As to hop-binds, however, it was held that when "destroying" is alleged, it must be shown that the plant died in consequence of the injury received. Proof of the infliction of injury by cutting and bruising is insufficient.[5] It has been further ruled that where shrubs are cut upon an unproved allegation that they are likely to be injurious to an adjoining wall, it is a malicious trespass, though the title to the spot on which the shrubs grow is in dispute between the parties.[6] "Woods," when used in this relation in a statute, includes

[1] R. *v.* Norris, 9 C. & P. 241.

[2] R. *v.* Whittingham, 9 C. & P. 234—Patteson.

As to "stacks," see R. *v.* Salmon, R. & R. 26; R. *v.* Spencer, D. & B. 131, 7 Cox C. C. 189; Com. *v.* Macomber, 3 Mass. 354.

[3] R. *v.* Taylor, R. & R. C. C. 373. See R. *v.* Whiteman, Dears. 353; Read *v.* State, 1 Ind. 511; State *v.* Shadley, 16 Ibid. 230.

[4] R. *v.* Taylor, R. & R. C. C. 373.

[5] R. *v.* Boucher, 5 Jur. 709.

[6] R. *v.* Whateley, 4 M. & R. 431. But see *supra*, §§ 1072 *a*, 1077; Dawson *v.* State, 52 Ind. 478.

The title to the land on which the plant grows is not in controversy in such a prosecution. Possession is enough. State *v.* Gurnee, 14 Kans. 296. *Supra*, §§ 1072 *a*, 1077.

Where the prisoner was indicted for damaging apple-trees growing in a garden, and the indictment alleged that the damage was done feloniously and not unlawfully or maliciously, this

a field which has been overgrown with wild brush.[1] It is usually enough, in such cases, if the indictment follow the statute.[2]

Statutory cruelty to animals.

§ 1082 *d*. Similar legislation has taken place to protect animals from cruelty, irrespective of the question of ownership.[3] As "cattle," under the statutes, have been considered steers;[4] pigs;[5] hogs;[6] asses;[7] geldings;[8] horses, mares, and colts.[9] In Missouri, however, the term has been held not to

was held bad. R. *v.* Lewis, 2 Russ. C. & M. 1066.

In an indictment on 6 Geo. III. c. 36, for destroying trees, the name of the owner of the trees must have been truly stated, otherwise it is fatal. R. *v.* Patrick, 2 East P. C. 1059. And see R. *v.* Howe, 1 Leach C. C. 481; 2 East P. C. 588.

A party might be convicted under the 7 & 8 Geo. IV. c. 30, s. 24, of having wilfully and maliciously damaged growing wood, to the value of sixpence, though section 20 expressly imposed a penalty for unlawfully and maliciously damaging such wood, "the injury done being to the amount of one shilling at least." R. *v.* Dodson, 9 A. & E. 704.

[1] Hall *v.* Crawfurd, 5 Jones, N. C. L. 3. As to "timber," see Com. *v.* Percavil, 4 Leigh, 686.

Under the statute of 24 & 25 Vict. evidence of damage committed at several times in the aggregate, but not at any one time exceeding £5, will not sustain an indictment. R. *v.* Williams, 9 Cox C. C. 338.

It has been held, that at common law an indictment does not lie for maliciously injuring trees (Brown's Case, 3 Greenl. 177), and growing corn (State *v.* Helmes, 5 Ired. 364). Cases to the contrary will be found *supra*, § 1067.

[2] State *v.* Priebnow, 14 Neb. 484.

[3] By 24 & 25 Vict. c. 97, s. 40, "whosoever shall unlawfully and maliciously kill, maim, or wound any cattle shall be guilty of felony." (*Former provision*, 7 & 8 Geo. IV. c. 30, s. 16.) By sec. 58, "malice against the owner of the cattle or other animal injured is unnecessary to be shown."

For statutes in this country, see State *v.* Avery, 44 N. H. 392; State *v.* Pratt, 54 Vt. 484; People *v.* Brunell, 48 How. N. Y. Pr. 435; State *v.* Barnard, 88 N. C. 661; State *v.* Comfort, 22 Minn. 271; Tatum *v.* State, 66 Ala. 465; Davis *v.* State, 13 Tex. Ap. 215; Jones *v.* State, 9 Ibid. 178. As to common law, see *supra*, §§ 1068, 1070. That the offence is exclusively statutory, see State *v.* Allen, 72 N. C. 114.

The history of New York legislation on this topic is given in Mr. Gerry's argument in Davis *v.* Society for Prevention of Cruelty to Animals, 75 N. Y. 302; 16 Abb. N. Y. Pr. N. S. 73; 21 Alb. L. J. 265. That cruel experiments on animals are illegal, see Davis *v.* Society, *ut sup.* For indictment for driving cattle from their range, see Long *v.* State, 43 Tex. 467. For cruel sports see *infra*, § 1465 *a*.

[4] State *v.* Abbott, 20 Vt. 537.

[5] R. *v.* Chapple, R. & R. C. C. 77. Compare Com. *v.* Percavil, 4 Leigh, 686; Duncan *v.* State, 49 Miss. 331. As to description of animals, see Whart. Cr. Ev. § 124.

[6] State *v.* Enslow, 10 Iowa, 115.

[7] R. *v.* Whitney, 1 M. C. C. 3.

[8] R. *v.* Mott, 2 East P. C. 1075; 1 Leach C. C. 73, n.

[9] R. *v.* Paty, 2 East P. C. 1074; 1 Leach C. C. 72; 2 W. Bl. 721; R. *v.*

include a tame buffalo.[1] Dogs, though not the subject of larceny, have been held in this country to be protected by the statutes.[2] The statute of 12 & 13 Vict. c. 92, § 2, which makes cruelty to "any animal" penal, goes on, in its interpretation clause, to specify as falling under this head, "any horse . . . sheep . . . goat, dog, cat, or *any other domestic animal*." Under the words italicized cocks are held to be included.[3]

Injury must be serious.

It is not necessary that the injury inflicted be permanent, if it be serious and painful.[4] Hence driving a nail into a horse's frog out of malice to the owner was held to be within 9 Geo. I. c. 22, though the damage was but temporary;[5] and so of putting deleterious acid in a mare's eye.[6] It has also been held, that injuring a mare internally, not out of malice, but merely from wantonness, is within the statute.[7]

The omission to kill a wounded animal which is in great suffering is not cruelty, under the statute.[8]

It is not necessary to prove, when this is out of the power of the prosecution, the particular instrument of cruelty used.[9]

Magle, 2 East P. C. 1076; State *v.* Abbott, 20 Vt. 237; State *v.* Hambleton, 22 Mo. 452. And see, generally, as to "cattle," R. *v.* Tivey, 1 C. & K. 704; 1 Den. C. C. 63. *Supra*, § 1070; R. *v.* Austen, R. & R. 490. As to "beast," see Taylor *v.* State, 6 Humph. 285.

[1] State *v.* Crenshaw, 22 Mo. 457.

[2] State *v.* McDuffie, 34 N. H. 523; State *v.* Sumner, 2 Ind. 377; Kinsman *v.* State, 77 Ibid. 132; *contra*, Com. *v.* Maclin, 3 Leigh, 809. In Minnesota a dog was held not within a statute specifying "horse, cattle, or other beast." U. S. *v.* Gideon, 1 Minn. 292. In State *v.* Harriman, 75 Me. 562, a dog was held not to be a "domestic animal" under the statute. See *supra*, § 1076.

If A. set fire to a cow-house and burnt to death a cow which was in it, A. was indictable under 7 & 8 Geo. IV. c. 30, s. 16, for killing the cow. R. *v.* Haughton, 5 C. & P. 559. See *supra*, § 152.

[3] Budge *v.* Parsons, 3 B. & S. 382—Wightman and Mellor, JJ.

[4] Ashworth *v.* State, 63 Ala. 120. See, however, R. *v.* Jeans, 1 C. & K. 539.

[5] R. *v.* Hayward, 2 East P. C. 1076; R. & R. 16.

[6] R. *v.* Hughes, 2 C. & P. 420; R. *v.* Owens, 1 Moody C. C. 205.

[7] R. *v.* Welch, L. R. 1 Q. B. D. 23; 13 Cox C. C. 121. Shaving a horse's tail is "disfiguring," within the statute. Boyd *v.* State, 2 Humph. 39.

[8] Powell *v.* Knights, 38 L. T. 607. It is otherwise when the owner sends out a wounded or diseased horse to graze, thereby causing it intense pain, which is held to be "torturing" under the statute. Everitt *v.* Davies, 38 L. T. 360.

[9] R. *v.* Bulloch, L. R. 1 C. C. 115; 11 Cox C. C. 125.

Statutes limiting common carriers.

Statutes exist both in England and in this country requiring common carriers to take due care of animals under their charge for transportation. Federal statutes to this effect have been held constitutional.[1]

Wanton cruelty essential to offence.

To "cruelty," deliberateness and malice are essential,[2] and these are negatived by proof of passion, arising from provocation or excitement, or that the act was one of discipline, however ill-judged;[3] and so when the object was *bonâ fide*, to improve the appearance of the animal.[4] Drunkenness, when the mind is incapable of intent, is a defence, but not otherwise.[5] But when the object is simply to use the animal more effectively for sport (*e. g.*, cutting the combs of cocks so as to fit them better for fighting), this is no defence.[6]

"Discipline" or necessity as a defence.

When the cruelty is such as is incident to the subjugation or destruction of the animal for the purposes of use or food (*e. g.*, trapping or taming wild creatures, catching of fish by hooks laid at night), or to preclude its depredations or ward off its attacks, this may be defended on ground of

[1] U. S. *v.* Bost. etc., R. R., 15 Fed. Rep. 209.

For proceedings under statute requiring carriers to provide food and water to cattle, see Johnson *v.* Colom, L. R. 10 Q. B. 544; Swan *v.* Sanders, 14 Cox C. C. 566.

Whether a car or team is overloaded is a question of fact for the jury. People *v.* Tinsdale, 10 Abb. Pr. N. S. 374.

[2] Duncan *v.* State, 49 Miss. 331; Thompson *v.* State, 51 Ibid. 353. That under these particular statutes malice to the owner need not be shown, see R. *v.* Tivey, 1 C. & K. 704; 1 Den. C. C. 68; Brown *v.* State, 26 Ohio St. 176. *Supra*, § 1070.

[3] *Supra*, §§ 106 *et seq*; State *v.* Avery, 44 N. H. 392 (under a statute which makes it penal to "wilfully and maliciously kill, maim, beat or wound any horse, cattle, sheep, or swine"). See Thompson's Case, 51 Miss. 353; Rembert *v.* State, 56 Ibid. 280.

[4] R. *v.* Mogg, 4 C. & P. 363.

[5] State *v.* Avery, 44 N. H. 392, citing R. *v.* Thomas, 7 C. & P. 87.

[6] Murphy *v.* Manning, L. R. 2 Ex. D. 307, 313; 36 L. T. 592. See U. S. *v.* McDuell, 5 Cranch C. C. 391. But how is it with cutting the ears and tails of terriers?

In Pitts *v.* Miller, L. R. 9 Q. B. 380; 30 L. T. 328; Cockburn, C. J., went so far as to hold that putting rabbits into an inclosed field and then setting two dogs at them to see how many each dog could kill, was not "baiting" under the statute. That "worrying" animals with dogs may be cruelty, see Elmsley's Case, 2 Lew. C. C. 126.

That *cock-fighting* is cruelty to the animal, apart from the question of public scandal, and of gambling, see Budge *v.* Parsons, 3 B. & S. 382; Martin *v.* Hewson, 10 Exch. 737. But see Morley *v.* Greenhalgh, 3 B. & S. 374; Clark *v.* Hague, 8 Cox C. C. 324; 2 E. & E. 281; and see *infra*, § 1465 *a*.

duty or necessity.[1] When the injury is inflicted with malignity, so as to torture, it is no defence that the animal injured was trespassing on the defendant's field.[2] But all proper force may be used to eject an animal doing damage to an inclosed field; and it may even be killed if it cannot otherwise be excluded.[3]

Indictment must conform to statute.

Under statutes making indictable cruelty to animals, irrespective of ownership, it is not necessary to aver the owner's name.[4] When, however, the ownership is inaccurately stated, this may be a variance.[5] Nor is it necessary, particularly, to describe the animal injured;[6] though if there be inserted a description of the animal likely to mislead, a variance might be fatal.[7] "Maiming" is not held to be a sufficient designation of the injury;[8] though it is otherwise as to "killing."[9] When the statute prohibits "cruelly beating," it is enough to aver that the defendant did "cruelly beat," etc.[10] This, however, may be doubted, when the pleader could readily have individuated the offence.[11] "Cruelly over-drive" has been held to be enough when the statute prohibits cruel over-driving.[12] "Cruelly torture" is enough

[1] *Supra*, §§ 95 *et seq.*; Jansen *v.* Brown, 1 Camp. 41; Protherie *v.* Mathews, 5 C. & P. 581. See argument of Hoar, J., in Com. *v.* Lufkin, 7 Allen, 582; and see Com. *v.* Wood, 111 Mass. 408; Walker *v.* Court of Special Sessions, 4 Hun, 441.

[2] Snap *v.* People, 19 Ill. 80; Thompson *v.* State, 67 Ala. 106. See Davis *v.* State, 12 Tex. Ap. 11. *Supra*, § 1072.

[3] In Branch *v.* State, 41 Tex. 624, adopted in Benson *v.* State, 1 Tex. Ap. 11, the court said: "It may be done under such circumstances as negative a wanton act—as where a man has a good fence, and a horse or cow is in the habit of trespassing upon his crop, and he kills it during an act of trespass on his crop, not from wantonness, but to prevent the destruction of his crop, he would not be criminally liable." And so where poison is laid in an inclosure to kill a trespassing dog; Daniel *v.* Janes, L. R. 2 C. P. D. 351. As to spring guns, see *supra*, § 464.

[4] State *v.* Avery, 44 N. H. 392 (under statute); Com. *v.* McClellan, 101 Mass. 34; Com. *v.* Whitman, 118 Ibid. 458 (under statute); State *v.* Brocker, 32 Tex. 612; Benson *v.* State, 1 Tex. Ap. 6; Darnell *v.* State, 6 Ibid. 482; Jones *v.* State, 9 Ibid. 178. See R. *v.* Woodward, 2 East P. C. 653.

[5] Smith *v.* State, 43 Tex. 433; Collier *v.* State, 4 Tex. Ap. 12.

[6] Ibid. See, however, R. *v.* Chalkley, R. & R. 258. Whart. Cr. Pl. & Pr. § 94. *Supra*, § 932.

[7] Whart. Cr. Ev. § 146.

[8] State *v.* Pugh, 15 Mo. 509.

[9] Com. *v.* Sowle, 9 Gray, 304. *Supra*, § 1080.

[10] Com. *v.* McClellan, 101 Mass. 34.

[11] See Whart. Cr. Pl. & Pr. § 221.

[12] State *v.* Comfort, 22 Minn. 271.

under the Massachusetts statute.[1] "Maliciously" is essential;[2] but not alternative or cumulative predicates of the statute when not part of the case.[3] It is not duplicity to join the over-driving of two horses in a team in one indictment;[4] nor to aver the poisoning of eight horses, when the poison was distributed in the feed placed before the whole eight.[5]

[1] Com. *v.* Thornton, 113 Mass. 457; Com. *v.* Whitman, 118 Ibid. 459.

[2] Thompson's Case, 51 Miss. 353; State *v.* Rector, 34 Tex. 565.

[3] Rembert *v.* State, 56 Miss. 280.

[4] Com. *v.* Welsh, 7 Gray, 324; People *v.* Tinsdale, 10 Abb. Pr. N. S. 374; State *v.* Comfort, 22 Minn. 271; Whart. Cr. Pl. & Pr. § 254.

[5] R. *v.* Mogg, 4 C. & P. 364.

CHAPTER XVII.

FORCIBLE ENTRY AND DETAINER.

I. CHARACTER OF OFFENCE.

§ 1083. When a man violently takes and keeps possession of any lands and tenements occupied by another, with menaces, force,

and arms, and without the authority of law, he may be indicted at common law, for forcible entry and detainer. To enter, with intent to keep possession, constitutes the offence of forcible entry. Of this there may be a conviction without proving a forcible detainer.[1] A forcible detainer is where a party, "having wrongfully entered upon any lands or tenements, detains such lands or tenements in a manner which would render an entry upon them for the purpose of taking possession forcible."[2] In many of the States, through the substitution of statutory remedies giving the injured party summary relief by recourse to a civil tribunal, criminal procedure in such cases has fallen into disuse.[3]

Forcible exclusion of another from his lands and tenements is an offence at common law.

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

[1] 4 Bla. Com. 148; Russ. on Cr. (6th Am. ed.) 303; Henderson's Case, 8 Grat. 708. See State *v.* Laney, 87 N. C. 535; Coggins *v.* State, 12 Tex. Ap. 109. As to malicious injury to timber and fences, see *supra*, § 1082 *c*; Franklin *v.* State, 86 Ind. 90; Brumley *v.* State, 12 Tex. Ap. 609.

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

[3] In Massachusetts (Rev. Stats. c. 104), the person thus forcibly expelled or kept out may take, from any justice of the peace, a writ in the form of an original summons (Ibid. § 4), and the suit thus commenced is subjected to the same incidents as accompany other civil actions before justices of the peace. Ibid. § 5. Under this statute it has been held that a mere refusal to deliver possession, when demanded, will not warrant the process for forcible entry and detainer; but the possession must be attended with such circumstances as might excite terror in the owner, and prevent him from claiming his rights; such as apparent violence offered in deed or word to the person, having unusual offensive weapons, or being attended by a multitude of people. Com. *v.* Dudley, 10 Mass. 403. Where a writ of restitution has been executed, and the proceedings are afterwards quashed upon certiorari, a new writ of restitution may be awarded. Com. *v.* Bigelow, 3 Pick. 31. The process, it is said, will not lie against one who has merely entered into land under a levy upon it, as the property of a tenant in possession; Ibid.; nor for the lessor of a tenant at will against a stranger for expelling the tenant. Ibid.

In New York, see People *v.* Anthony, 4 Johns. 198; People *v.* Van Nostrand, 9 Wend. 62; People *v.* Rickert, 8 Cow. 226.

The statutes of both Pennsylvania and Virginia are simply declaratory of the common law, as modified by 5 Ric. II. st. 1, c. 8, and 21 Jac. I. c. 15, as will hereafter appear in the adjudication given to them by the courts. See 2 Penn. L. J. 391, for a learned article on the law as obtaining in Pennsylvania.

Modification of common law by statutes.

5 Ric. II. st. 1, c. 8.

Entry with Strong Hand and Multitude of People.—"And also the king defendeth, that none from henceforth make any entry into any lands and tenements but in case where entry is given by the law, and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner; and if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will."[1]

21 Jac. I. c. 15.

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

Gist of offence is the violence.

§ 1085. The violent and forcible taking or keeping of another man's property is, apart from the operation of particular statutes, a breach of the public peace, punishable in a criminal court by indictment. The gist of the offence is the violence, or threat of violence;[2] and from the peculiar sanctity attached by the common law to every man's dwelling-house, violence offered to it is distinguished as a substantive offence, and punished with peculiar severity. Forcible entry and detainer, as an indict-

[1] By stat. 8 Hen. VI. this statute is extended to cases where the entry was peaceable but the detainer forcible; and restitution is given in such cases. Rob. Dig. 284. Both statutes are in force in Pennsylvania. Van Pool *v.* Com., 13 Penn. St. 392.

By 15 Ric. II. there is a summary power given to justices to convict on view. This as well as the preceding statutes is in force in Pennsylvania and Maryland. See Robert's Digest; Van Pool *v.* Com., *supra;* Kilty's Report, etc., 227–36.

[2] State *v.* Camp, 41 N. J. L. 306.

able offence, continues, therefore, to be punished in the courts even of those States where the injured party is furnished with the most summary civil remedies.[1] Nor, notwithstanding occasional hesitation,[2] can its continued common law efficiency be disputed. At common law, to support an indictment there must be a breach of the peace.[3] But by the 5 Ric. II. st. 1, c. 8, and 21 Jac. I. c. 15, the common law, as we have seen, received a modification, which, in many of the States, has been considered as a constituent part of the offence.[4]

Statutory offence requires less force than common law, but either freehold or leasehold title.

§ 1086. There is a distinction to be observed between forcible entry, etc., as it existed and still exists at common law, and forcible entry, etc., under the above-given statutes. In the first place, more force is necessary to constitute the former offence than the latter;[5] in the second place, in an indictment for the latter offence it is necessary to set forth either a freehold or a leasehold in the prosecutor, while in the former, an averment of mere possession is sufficient.[6] Keeping these distinctions in mind, the construction given by the courts to the statutory offence will apply with equal force to the offence at common law.

Any person forcibly putting out another from possession may be indicted.

§ 1087. Any one who forcibly puts out and keeps out another from possession may be indicted for forcible entry and detainer.[7] Hence, as will hereafter be observed, a landlord who violently dispossesses a tenant whose lease has expired may be guilty of forcible entry.[8] But where his mansion is detained by one having a bare charge, a man may break open the doors and forcibly enter without

[1] R. *v.* Wilson, 8 T. R. 357; Newton *v.* Harland, 1 Man. & Gran. 664; Harding's Case, 1 Greenl. 22; Langdon *v.* Potter, 3 Mass. 215; Com. *v.* Taylor, 5 Binney, 277; State *v.* Mills, 2 Dev. 420; State *v.* Speirin, 1 Brev. 119; Cruiser *v.* State, 3 Harr. (Del.) 205.

[2] Com. *v.* Toram, 5 Penn. L. J. 296; 2 Pars. 411.

[3] R. *v.* Wilson, 8 T. R. 357; R. *v.* Bake, 3 Burr. 1731; Com *v.* Dudley, 10 Mass. 403; Henderson's Case, 8 Grat. 708.

[4] Harding's Case, 1 Greenl. 22; Roberts's Digest, 283.

[5] R. *v.* Wilson, 8 T. R. 357; R. *v.* Bake, 3 Burr. 1731; Com. *v.* Dudley, 10 Mass. 403; Archbold's C. P. 569, and cases cited *infra*, §§ 1100, 1101.

[6] R. *v.* Wilson, 8 T. R. 357; Harding's Case, 1 Greenl. 22; State *v.* Speirin, 1 Brev. 119; State *v.* Mills, 2 Dev. 420. *Infra* § 1111.

[7] See Woodside *v.* Ridgeway, 126 Mass. 292; Newton *v.* Doyle, 38 Mich. 645; Campbell *v.* Coonradt, 22 Kan. 704.

[8] See Morris *v.* Bowles, 1 Dana, 97.

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

Wife may be so indicted as against her husband.

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

So as to tenant in common ejecting his companion.

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

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

So as to third person dispossessing officer of law.

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

Real estate, corporeal or incorporeal, may be thus protected.

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

[1] 1 Russ. on Cr. 9th Am. ed. 420 *et seq.* Mr. Greaves, in a note, holds this statement of Sir. W. Russell to be erroneous. See *infra*, §§ 1097–1100.

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

[3] R. *v.* Smyth, 5 C. & P. 201; 1 M. & Rob. 155.

[4] 1 Russ. on Cr. 6th Am. ed. 307; Com. *v.* Oliver, 2 Par. 420; Burt *v.* State, 2 Tr. Con. R. 489.

[5] Com. *v.* Oliver, 2 Par. 420.

[6] State *v.* Gilbert, 2 Bay, 355.

[7] 1 Russ. on Cr. 9th Am. ed. 421 *et seq.* See State *v.* Bordeaux, 2 Jones N. C. 241; State *v.* Caldwell, Ibid. 468. Compare, as qualifying text, authorities cited *infra*, § 1103.

[8] 1 Russ. on Cr. 9th Am. ed. 423.

[9] Reese *v.* Lawless, Little's Cas. (Ky.) 184.

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

To forcibly trespass on personalty force is essential.

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

To forcible entry force exceeding trespass is necessary.

§ 1093. On an indictment at common law for forcible entry, it is necessary to prove that the defendant entered with such force and violence as to exceed a bare trespass, and to give reasonable grounds for terror;[4] but where a party entering on land in possession of another, either by his behavior or speech, gives those who are in possession just cause to fear that he will do them some bodily harm if they do not give way to him, his entry is deemed forcible, whether he causes the terror by carrying with him an unusual number of attendants, or by arming himself in such a manner as plainly to intimate a design to

[1] Penn. *v.* Robison, Addis. 14, 17.

[2] State *v.* Barefoot, 89 N. C. 567, per Smith, C. J.

[3] R. *v.* Gardiner, 1 Russ. on Cr. 53; State *v.* Mills, 2 Dev. 420; State *v.* Phipps, 10 Ired. 17; State *v.* McDowell, 1 Hawks, 449. See *infra*, § 1112. State *v.* Laney, 87 N. C. 535.

[4] R. *v.* Smyth, *infra*; R. *v.* Deacon, R. & M. 27; Com. *v.* Keeper of Prison, 1 Ashm. 140; Com. *v.* Conway, 1 Brewst. 509; Rees *v.* Com., 2 Ibid. 1100; State *v.* McClay, 1 Harring. 520, and cases cited at close of this note. That any force in a dwelling-house likely to produce terror may constitute the offence, see R. *v.* Smyth, 5 C. & P. 201; 1 M. & R. 156; R. *v.* Deacon, R. & M. (N. P.) 27; Harding's Case, 1 Greenl. 22; Penn. *v.* Dixon, 1 Smith's Laws, 3; Com. *v.* Taylor, 5 Binn. 277; People *v.* Smith, 24 Barb. 16; State *v.* Pollok, 4 Ired. 305; State *v.* Tolever, 5 Ibid. 452; State *v.* Godsey, 13 Ibid. 348; State *v.* Ross, 4 Jones (N. C.) 315, and cases cited *supra*.

back his pretensions by force, or by actually threatening to kill, maim, or beat those who continue in possession, or by making use of expressions plainly implying a purpose of using force against those who make resistance.[1]

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

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

Force may be inferred from facts.

§ 1094. An entry by breaking the doors or windows, etc., whether any person be in the house or not, especially if it be a dwelling-house, is a forcible entry within the statute.[5] So an entry, where personal violence is done to the prosecutor, or any of his family or servants, or to any person or persons keeping the possession for him;[6] or even where it is accompanied with such threats of personal violence (either actual or to be implied from the actions of the defendant, or from his being unusually armed or attended, or the like) as are likely to intimidate the prosecutor or his family, and to deter them from defending their possessions,[7] is a forcible entry within the statute. The issue is,

[1] 1 Russ. on Cr. 9th Am. ed. 426; Penn. *v.* Robison, Add. 14, 17; Resp. *v.* Devore, 1 Yeates, 501; State *v.* Pollok, 4 Ired. 305; Bennett *v.* State, 1 Rice Dig. 340; State *v.* Cargill, 2 Brev. 445. *Infra*, § 1099.

[2] State *v.* Caldwell, 2 Jones (N. C.), 465.

[3] State *v.* Pollok, 4 Ired. 305; State *v.* Simpson, 1 Dev. 504.

[4] Burt *v.* State, 2 Tr. Con. R. 489.

[5] See 1 Hawk. c. 64, s. 26.

[6] Ibid.

[7] 1 Hawk. c. 64, ss. 20, 21, 27; Milner *v.* Maclean, 2 C. & P. 17; Com. *v.* Shattuck, 4 Cush. 141; Com. *v.* Dudley, 10 Mass. 403; State *v.* Pollok, 4 Ired. 305; State *v.* Armfield, 5 Ibid. 207.

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

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

Rule does not apply to out-houses when house has been peaceably entered.

But when the goods of the defendant in an execution are in the house of a third person, or in a smoke-house within the curtilage of said third person, a demand for admittance by the officer holding the execution, and a refusal upon the part of the person holding the property, are necessary to justify the officer in breaking the door, and entering either house or smoke-house.[3]

§ 1096. An entry by an open window, or by opening the door with a key, or by mere trick or artifice, such as by enticing the owner out, and then shutting the door upon him, or the like, without further violence,[4] or if effected by threats to destroy the owner's goods or cattle merely, and not by threats of personal violence,[5] is not deemed a forcible entry.

Entry by trick not "forcible."

§ 1097. A peaceable entry may be followed, as will be seen, by a forcible detainer.[6] Thus, where an intruder, having entered peaceably, said to the former possessor, "It will not be well for you, if you ever come upon the premises again by day or night," it was left to the jury whether this was a threat of personal violence, and so a forcible detainer within the statute: they having found it was, a conviction was held proper.[7] And keeping forcibly a lessee out of possession to which he is entitled may be a forcible detainer.[8] But a tenant entitled to possession may defend it by force adequate to the purpose.[9]

Peaceable entry may be followed by forcible detainer.

[1] R. *v.* Smyth, 5 C. & P. 201; 1 M. & R. 155; Com. *v.* Shattuck, 4 Cush. 141; Com. *v.* Rees, 2 Brewst. 564; State *v.* Pollok, 4 Ired. 305.

[2] State *v.* Pridgen, 8 Ired. 84.

[3] Douglass *v.* State, 6 Yerg. 525.

[4] Com. Dig. Forc. Ent. & D. 3; 1 Hawk. c. 64, s. 26.

[5] 1 Hawk. c. 64, s. 58; Burt *v.* State, 2 Tr. Con. R. 489.

[6] *Infra*, §§ 1102, 1103.

[7] People *v.* Rickert, 8 Cow. 226; People *v.* Godfrey, 1 Hall, 240; People *v.* Anthony, 4 Johns. 198.

[8] Com. *v.* Wisner, 8 Phila. 612.

[9] Com. *v.* McNeile, 8 Phila. 438; Com. *v.* Haxton, Lewis C. L. 282.

§ 1098. Where a party having a right, enters or makes claim, and the other party afterwards continues to hold possession by force, this is considered a forcible entry in the party so holding; because his estate is defeated by the entry or claim, and his continuance in possession is deemed a new entry.[1]

Forcible continuance by wrongful occupier is forcible entry.

§ 1099. Where the party entering has in fact no right of entry, all persons in his company, as well those who do not use violence as those who do, are equally guilty; but if he have a right of entry, then those only who use or threaten violence,[2] or who actually abet those who do, are guilty.

When there is right of entry, violence is essential to offence.

§ 1100. A landlord has no right to expel by violence even a tenant at will, and, as will be noticed more fully under another head, should he attempt it, he will be criminally responsible for the intrusion.[3] "If the landlord," said Lord Kenyon, "had entered with a strong hand to dis-

Tenant at will cannot be expelled by force.

[1] 1 Hawk. c. 64, ss. 22, 34; Co. Lit. 251; Burt *v.* State, 2 Tr. Con. R. 489. *Supra*, § 1087; *infra*, § 1101.

If, when the owner is out of his house, the defendant forcibly withhold him from returning to it, and in the mean time send persons to take possession of it peaceably, this is said to be a forcible entry. R. *v.* Smyth, 5 C. & P. 201.

[2] 3 Bac. Abr. Forc. Ent. (B.)

[3] *Supra*, § 97 *a*. 1 Hawk. 274; 4 Bac. Com. 148; Taylor *v.* Cole, 3 T. R. 292; Newton *v.* Harland, 1 Man. & Gr. 644, 956; 1 Scott N. R. 474; Beddall *v.* Maitland, 44 L. T. (N. S.) 248; Sampson *v.* Henry, 13 Pick. 36; Langdon *v.* Potter, 3 Mass. 215; Com. *v.* Kensey, 5 Penn. L. J. 119; 2 Pars. 401; though see Overdeer *v.* Lewis, 1 W. & S. 90; State *v.* Elliot, 11 N. H. 540. V., having been in possession of a house from May to October, the defendants called there, and insisting that V. had no title, proceeded to take the keys out of the room doors. Upon their doing so, V. gave them into custody for stealing the keys, but the magistrate refused to detain them. They then returned to the house, and having procured a sledge-hammer, forced the inner door of the hall, and some having entered that way, and some by a staircase window, they overpowered the prosecutor's opposition, and furnished with a hatchet and other weapons, after a struggle which caused a disorderly crowd to assemble, ejected the prosecutor and his servants. From the commencement of the proceedings till the conclusion, a female servant of the prosecutor's was in the kitchen: it was held, assuming the title of the prosecutor to have been bad, and that the defendants had acted by the order of those who had a good title to the premises, that the evidence was sufficient to support a conviction of the defendants for a forcible entry and riot. R. *v.* Studd, 14 W. R. 806; 14 L. T. N. S. 633. C. C. R. *Infra*, § 1105. *Cf.* article in Am. Law Reg. for November, 1883, p. 719 *et seq.*

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

[1] Taunton *v.* Costar, 7 T. R. 431.

[2] R. *v.* Wilson, 8 T. R. 357.

[3] 1 Russ. on Cr. 9th Am. ed. 421. Newton *v.* Harland, 1 Man. & Gr. 664; 1 Scott N. R. 474; Butcher *v.* Butcher, 7 B. & C. 399; 1 M. & R. 220; Hilary *v.* Gray, 6 C. & P. 248; Turner *v.* Meymott, 7 Moore, 574; 1 Bing. 158; Pollin *v.* Brewer, 7 C. B. (N. S.) 371.

[4] Newton *v.* Harland, *supra*.

[5] Overdeer *v.* Lewis, 1 W. & S. 90. S. P., Rich *v.* Keyser, 54 Penn. St. 86. See R. *v.* Smyth, 1 M. & Rob. 156; 5 C. & P. 201.

constitute or provoke a breach of the peace.[1] The reason of the distinction is this: The dispossessed party cannot complain in a civil suit of his dispossession, unless a personal assault was made on him with undue force, as he had no right to remain on the premises. And though there may have been a riot, he cannot sue civilly for this, which is an offence, not against him, but against the public. The only remedy is a criminal prosecution.[2]

Owner may forcibly enter against a mere intruder.

§ 1101. Yet where the prosecutor is a mere intruder, without color of title, past or present, and has entered by fraud or violence, or on a mere scrambling title, the owner may forcibly enter.[3] This has been seen to be the case when the possession is held by one claiming mere custody under the owner, but refusing entrance to the owner.[4] It was, therefore, rightly ruled by Lord Campbell, C. J., that a person having no possession or title to premises, but fraudulently pretending to have such title, and so allowed by the servant of the true owner to enter, does not acquire actual possession, but may be expelled by force.[5]

Legal right to enter necessary to writ of restitution.

§ 1102. For the purpose of obtaining restitution, it is necessary to prove that the prosecutor is still kept out of possession,[6] and it is plain that this right of possession on the part of the prosecutor must be legal, and that if he has no right to enter he cannot maintain a forcible detainer.[7]

Forcible detainer to be inferred from facts.

§ 1103. As has already been incidentally observed, there may be a forcible detainer, though the entry is peaceable. It is sufficient if it appear from the indictment that the party aggrieved had title, and was forcibly kept out of possession.[8] But where the entry was peaceable and

[1] Com. *v.* Kensey, *ut supra*.

[2] That at common law the owner may take his property by force, see *supra*, §§ 97-8; Penn. *v.* Robinson, Add. 14; Com. *v.* Rees, 2 Brewst. 564. See Aldrich *v.* Wright, 53 N. H. 398.

[3] Com. *v.* Keeper of Prison, 1 Ashm. 140; Com. *v.* Conway, 1 Brewst. 509. See *infra*, § 1104. That it makes no difference that the owner was temporarily absent, having left the house in charge of a member of his family, see State *v.* Shepard, 82 N. C. 614.

[4] *Supra*, § 1087. See Shotwell, *ex parte*, 10 Johns. 304; State *v.* Curtis, 4 Dev. & Bat. 222.

[5] Collins *v.* Thomas, 1 F. & F. 416.

[6] 1 Hawk. c. 64, s. 41; Burd *v.* Com., 6 S. & R. 252.

[7] See *infra*, § 1111.

[8] Com. *v.* Rogers, 1 S. & R. 124; Com. *v.* Wisner, 8 Phila. 612; Burt *v.* State, 3 Brev. 413; 3 Tr. Con. Rep. 489.

Forcible detainer does not lie against a party holding under a writ regular on its face, issued from a court of competent jurisdiction, though the issuing was improvident. Voss *v.* State, 93 Ind. 211.

the continued possession lawful, forcible detainer cannot be maintained.[1]

The same circumstances evincing violence which will make an entry forcible will make a detainer forcible also; and whoever keeps in the house an unusual number of people, or unusual weapons, in a way indicating violence, or threatens in such connection to do some bodily hurt to the former possessor if he dare return, may be adjudged guilty of a forcible detainer, though no attempt be made to reënter.[2] But merely refusing to go out of the house,[3] or denying possession, by a tenant at will, to a lessor, is not a forcible holding within the meaning of the statutes.[4]

As will presently be more fully seen, the offences are divisible.[5]

At common law only possession is necessary to prosecution.

§ 1104. Under 5 Ric. II. the prosecutor must aver a freehold, and under 21 Jac. I. a leasehold; but, it seems, proof that he was in actual occupation of the premises, or in the reception of the rents and profits, is sufficient evidence of seisin.[6] At common law, however, no allegation beyond possession was necessary, when the object was only to obtain punishment for the violent invasion of the prosecutor's rights, and of course mere possession was sufficient to support the prosecution.[7] But a mere scrambling possession will not be enough to sustain an indictment even at common law.[8] Nor is surveying land, building cabins, and leaving them unoccupied, such possession as is necessary.[9]

[1] Com. *v.* McNeile, 8 Phila. 438; State *v.* Godsey, 13 Ired. 348.

[2] People *v.* Rickert, 8 Cow. 226, and cases cited *supra*, § 1096.

[3] 1 Hawk. c. 64, s. 30. See Com. *v.* McNeile, 8 Phila. 438.

[4] See R. *v.* Oakley, 4 B. & Ad. 307; R. *v.* Wilson, 3 Ad. & El. 817.

[5] Burd *v.* Com., 6 S. & R. 252. See *infra*, § 1110.

[6] Jayne *v.* Price, 5 Taunt. 326; 1 Marsh. 68; 4 Bl. Com. 148; 1 Hawk. 274; People *v.* Van Nostrand, 9 Wend. 52.

[7] 1 Hawk. 274; 4 Blac. Com. 148; R. *v.* Wilson, 8 T. R. 357; Taylor *v.* Cole, 3 Ibid. 292; Newton *v.* Harland, 1 Man. & Gr. 654, 926; R. *v.* Child, 2 Cox C. C. 102; Harding's Case, 1 Greenleaf, 31; Langdon *v.* Potter, 3 Mass. 215; People *v.* Leonard, 11 Johns. 504; Com. *v.* Kensey, 5 Penn. Law Jour. 119; State *v.* Anders, 8 Ired. 15; State *v.* Bennett, 4 Dev. & Bat. 43; State *v.* Speirin, 1 Brev. 119.

[8] See cases cited *supra*, § 1101; Shotwell, *ex parte*, 10 Johns. 304.

[9] Penn. *v.* Waddle, Addis. 41. See *supra*, § 1101.

§ 1105. As we have seen, the defendant cannot go into evidence to disprove the title of the complainant,[1] or to establish his own, as the question is not one of civil right, but of public mischief.[2] Even where a tenant holds over beyond the period fixed by his lease, and the landlord makes forcible entry for any purpose, though the tenant cannot maintain a trespass, *quare clausum*, the landlord cannot justify a personal injury committed on the tenant in such entry.[3] If he attempt to dispossess his tenant by undue violence, he is criminally responsible for the consequences, and may be punished for the breach of the peace, though he is at the time merely asserting his civil rights.[4]

Title not at issue.

It must be remembered, however, that the possession must be actual and not constructive. Two persons cannot be in possession of the same land at the same time (*i. e.*, adversely); and whenever the unlawful entry of one with force necessarily dispossesses the other, an indictment for forcible entry may be maintained.[5]

§ 1106. The prosecutor is at common law not a witness to prove anything more than the force used; and he is inadmissible, therefore, to sustain an indictment for the purpose of restitution.[6] The wife, also, of the prosecutor is admissible to prove the force, but only the force.[7] Of course, in States where interest does not disqualify, these rulings do not apply.

Prosecutor may prove force.

II. INDICTMENT.[8]

§ 1107. Greater force must be averred than is expressed by *vi et armis*.[9] The words, "and with strong hand," should not be omitted.[10]

Indictment must contain technical terms.

[1] Dutton *v.* Tracy, 4 Conn. 79.

[2] People *v.* Rickert, 8 Cow. 226; People *v.* Godfrey, 17 Hall, 240; People *v.* Anthony, 4 Johns. 198; Resp. *v.* Schryber, 1 Dall. 68; Bennett *v.* State, 1 Rice S. C. Digest, 340.

[3] Sampson *v.* Henry, 13 Pick. 36; though see Overdeer *v.* Lewis, 1 W. & S. 90. *Supra*, § 1100.

[4] Taylor *v.* Cole, 3 T. R. 292; Taunton *v.* Costar, 7 Ibid. 427; Turner *v.* Meymott, 8 Eng. C. L. 280; 7 Moore, 574; Newton *v.* Harland, 2 Man. & Gr. 654, 956; Com. *v.* Kensey, 5 Penn. L. J. 119; 2 Pars. 401. See *supra*, § 1100.

[5] Burt *v.* State, 2 Tr. Con. R. 489.

[6] R. *v.* Beavan, R. & M. (N. P.) 242; R. *v.* Williams, 4 M. & Ry. 471; 9 B. & C. 549; Resp. *v.* Schryber, 1 Dall. 68; State *v.* Fellows, 2 Hayw. 340.

[7] Resp. *v.* Schryber, 1 Dall. 68.

[8] As to indictment generally, see Whart. Prec. 489 *et seq.*

[9] R. *v.* Wilson, 8 T. R. 357. See Harding's Case, 1 Greenl. 27.

[10] Whart. Cr. Pl. & Pr. § 270; R. *v.* Baker, 11 Mod. 235; Com. *v.* Shattuck, 4 Cush. 141; State *v.* Whitfield, 8 Ired. 315. Yet for the mere common law offence convertible terms may be used. R. *v.* Bake, 3 Burr. 1731.

§ 1108. It is necessary, as has been stated, under the English statutes, to aver either a leasehold or a freehold in the prosecutor;[1] though proof of actual possession is sufficient to support the allegation in the indictment that the complainant was possessed in fee simple.[2] At common law, as we have also noticed, mere possession is all that need be laid.[3] But, as is elsewhere seen, an indictment stating a naked possession merely in the prosecutor, without laying any estate or interest in him, is not sufficient to authorize an award of restitution.[4] Such an allegation, however, will be sufficient to support an indictment for the forcible entry at common law as a breach of the peace;[5] though it has been said that as a forcible detainer is not an offence at common law, an indictment for that offence should always aver the prosecutor's estate in the premises.[6]

For common law offence possession only need be averred.

An allegation in the indictment that the prosecutor was disseised, necessarily implies a previous seisin.[7]

§ 1109. The indictment must describe the premises entered with the same particularity as in ejectment. Thus, an indictment of for-

[1] Archbold's C. P. 566. So in New Hampshire. State *v.* Pearson, 2 N. H. 550.

The proof as to the application of force must correspond with the indictment. Thus where an indictment laid the force against the seisin of A., it was ruled that evidence was not admissible of an entry on land leased by A. and B. to C., and of force against C. Resp. *v.* Sloane, 2 Yeates, 229; Penn. *v.* Grier, 1 Smith's Laws, 3. And as to other cases of variance, see *infra*, § 1009.

[2] 4 Bl. Com. 148; 1 Hawk. 274; People *v.* Van Nostrand, 9 Wend. 50.

[3] *Supra*, § 1104.

[4] *Infra*, § 1111.

[5] Com. *v.* Taylor, 5 Binn. 277; Com. *v.* Kensey, 5 Penn. L. J. 119; 2 Pars. 114.

[6] Com. *v.* Toram, 6 Penn. L. J. 296; 2 Pars. 411.

An indictment charging that A. was "peaceably possessed in his demesne, as of fee," of certain lands, "and continued so seised and possessed" until B. "thereof disseised" him, and "him so disseised and expelled," did keep out, etc., was held good on error; Fitch *v.* Remp., 3 Yeates, 49; 4 Dall. 212; and so where the indictment stated that the prosecutor was seised in his demesne as of fee, and that his "peaceable possession thereof, as aforesaid, continued until," etc., the latter words being rejected as surplusage. Resp. *v.* Schryber, 1 Dall. 68.

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

[7] Com. *v.* Fitch, 4 Dall. 212.

Premises must be described as in ejectment.

cible entry into a messuage, tenement, and tract of land, without mentioning the number of acres, was held bad after conviction.[1]

Certainty to a reasonable intent is all that is required in the description.[2]

Entry and detainer are divisible.

§ 1110. Although a forcible entry and forcible detainer are charged in the same indictment, they are nevertheless distinct offences, and the defendant may be acquitted of one and convicted of the other. If one be defectively set out, he may be convicted of that which is well set out.[3]

§ 1111. To enable the court to award restitution on a conviction for forcible detainer, it is necessary that there should be an estate,

[1] M'Naire *v.* Remp., 4 Yeates, 326; Dean *v.* Com., 3 S. & R. 418.

[2] Torrence *v.* Com., 9 Barr, 184.

Where the indictment was for forcible entry and detainer of a messuage in possession of A. for a term of years, and the evidence was of forcible entry into a field, and no lease was produced, it was held that the indictment could not be supported. Penn. *v.* Elder, 1 Smith's Laws, 3. And so where the indictment averred forcible entry on a *field*, and it was proved that the attack was on a house. State *v.* Smith, 2 Ired. 127; and see Resp. *v.* Sloane, 2 Yeates, 229.

Where the words were, "a certain messuage with the appurtenances for a term of years, in the district of Spartanburg," it was adjudged that the place where was not described with sufficient legal certainty. State *v.* Walker, Brev. MS.

It is sufficient to describe the premises as "a certain close of two acres of arable land, situate in S. township, in the county of H., being a part of a larger tract of land adjoining lands of A. and B." Bean *v.* Com., 3 S. & R. 418.

"A certain tavern stand, with the appurtenances, including about five acres of land adjacent thereto, at the M. and U. cross-roads in E. township in A. county," is, it seems, a sufficient description of the premises to support an award of restitution in forcible entry and detainer. Torrence *v.* Com., 9 Barr, 184.

And so as to "all that piece of land containing seventy-six acres and one hundred and fifty perches, and the allowance of six per cent., it being part of a large tract known as the Peter Jackson improvement, adjoining lands of David Henderson on the east." Van Pool *v.* Com., 13 Penn. St. 391. See R. *v.* Studd, 14 W. R. 806; Atwood *v.* Joliffe, 3 New Sess. Cas. Q. B. 116.

When restitution is not claimed, it is enough to aver possession alone. That such is the case has been already stated, as here the defendant proceeds merely for the offence at common law. *Supra*, § 1108.

[3] People *v.* Rickert, 8 Cow. 226; People *v.* Godfrey, 1 Hall, 240; People *v.* Anthony, 4 Johns. 198; Com. *v.* Rogers, 1 S. & R. 124; Burd *v.* Com., 6 Ibid. 252; State *v.* Ward, 1 Jones (N. C.), 290. See Whart. Cr. Pl. & Pr. §§ 736 *et seq.*; Whart. Crim. Ev. § 129.

either freehold or leasehold, averred in the prosecutor.[1] Thus where an indictment stated that A. "was lawfully and peaceably seised" of the premises, and that B., son of A., "was lawfully in possession of the same," and that "the defendant entered and expelled the said B. from possession of the premises, and forcibly disseised the said A. of the same, and the said B. so expelled and held out," etc., it was held that it was error to award restitution to A.[2] Yet it has in England been held sufficient for the purposes of restitution to aver that the estate was "in the possession of W. P., he, W. P., then and there being also seised thereof."[3]

Title is necessary to restitution.

§ 1112. Indictments for forcible trespass on personalty are rare at common law, since it is much simpler to indict for an assault, which, as has been seen,[4] is a usual ingredient in a forcible trespass. If, however, an indictment of this kind should be framed, it is necessary to aver actual possession in the prosecutor, and violence offered to him, or violent wresting of the chattel from him, so as to constitute a breach of the peace.[5] Yet, it is enough to say that the defendant, "with strong hand," and against his will, took, etc., the chattel from the possession of the prosecutor, in whose possession it then and there was.[6] If sufficient violence to constitute a robbery be alleged, then the prosecution must try, not for forcible trespass, but for robbery. Under these circumstances, common law indictments for a forcible trespass have been rarely attempted.[7] It must be kept in mind, in considering this question, that a party has at common law the right to rescue even by force (if such force be not excessive) his property from the hands of another.[8] If, however, in doing this, he

Indictment for forcible trespass on personalty must aver violence.

[1] R. *v.* Bowser, 8 D. P. C. 128; 1 Wil., W. & H. 345; R. *v.* Taylor, 7 Mod. 123; Resp. *v.* Campbell, 1 Dall. 354; State *v.* Speirin, 1 Brev. 119.

[2] Burd *v.* Com., 6 S. & R. 252. See R. *v.* Depnke, 11 Mod. 273; Com. *v.* Toram, 5 Penn. L. J. 297; 2 Pars. 411; Torrence *v.* Com., 9 Barr, 184; Van Pool *v.* Com., 13 Penn. St. 391; State *v.* Bennett, 4 Dev. & Bat. 43; State *v.* Anders, 8 Ired. 15. See 1 Russ. on Cr. 9th Am. ed. 431.

[3] R. *v.* Hoare, 6 M. & S. 266; R. *v.* Dillon, 2 Chit. 314.

[4] See *supra*, § 1092.

[5] State *v.* Mills, 2 Dev. 420: State *v.* Watkins, 4 Humph. 256.

[6] State *v.* Mills, *ut supra*.

[7] For a recent instance, where a prosecution of this class was sustained, see State *v.* McAdden, 71 N. C. 207.

[8] *Supra*, § 100. 1 Russ. on Cr. *ut sup.* 421; Blades *v.* Higgs, 10 C. B. (N. S.) 713; See State *v.* Covington, 70 N. C. 71.

use unnecessary force, or stimulate a riotous demonstration, he is indictable.[1]

Practice to sustain summary convictions.

§ 1113. Of summary convictions by justices under 15 Ric. II. c. 2; and 8 Hen. VI. c. 9, there are no reported American cases. In England it is held that to sustain the procedure there must be alleged and proved an unlawful entry as well as a forcible detainer.[2] Where a conviction stated that justices had convicted A. of forcible detainer upon their own view, and that afterwards a complaint was made to the justices that A. forcibly entered the premises, and that notice of such complaint was given to A., who received it, but said nothing, and then went on to allege that the justices received evidence on oath of the unlawful entry; it was held that the conviction was bad, for not showing that A. had been summoned to answer the charge of the unlawful entry, or that he had had an opportunity afforded him of defending himself against such charge.[3]

[1] State *v.* Armfield, 5 Ired. 207; State *v.* McCanless, 9 Ired. 375; State *v.* Simpson, 1 Dev. 504. *Supra*, § 1100. See Mr. Henry Wharton's note to Blades *v.* Higgs, 10 C. B. N. S. 713 (100 Eng. Com. L.)

[2] Atwood *v.* Joliffe, 3 New. Ses. Cas. Q. B. 116; R. *v.* Oakley, 4 B. & Ad. 307; 1 N. & M. 58; R. *v.* Wilson, 5 Ibid. 164; 3 Ad. & El. 817. As to procedure, see R. *v.* Wilson, 3 N. & M. 753; 1 Ad. & El. 627.

[3] Atwood *v.* Joliffe, *ut supra*. See R. *v.* Studd, 14 W. R. 806.

CHAPTER XVIII.

CHEATS.

I. CHEATS AT COMMON LAW.[1]

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

[1] See, for forms of indictment, Whart. Prec. tit. CHEATS.

or tokens which may affect the public at large and against which common prudence could not have guarded.[1]

Cheats affecting public justice indictable.

§ 1117. Cheats affecting public justice, thus executed, have always been held misdemeanors. Thus where a person committed to jail under an attachment for a contempt in a civil cause counterfeited a pretended release, as from his creditor, to the sheriff and jailer, under which he obtained his discharge, he was held guilty of an offence at common law, in thus effecting an interruption of public justice; although the attachment not being for non-payment, the order was, in itself, a mere nullity, and no warrant to the sheriff for the discharge.[2] Obtaining the queen's bounty for enlisting as a soldier, by an apprentice reclaimable by his master, is also an offence at common law.[3] And so where a person, pretending that he had power to discharge soldiers, took money of another to discharge him as a soldier.[4]

And so of cheats by false tokens

§ 1118. Independently, however, of cheats affecting the administration of public justice, frauds effected by any general false device or token, calculated to affect the public, are punishable at common law.[5] Thus, selling unwholesome

[1] 2 East P. C. c. 18, s. 4, p. 821; 2 Hawk. P. C. c. 22, s. 1; 2 Russ. on Cr. 6 Am. ed. 275; U. S. *v.* Watkins, 3 Cranch C. C. 441; Cross *v.* Peters, 1 Greenl. 387; Com. *v.* Hearsey, 1 Mass. 137; Com. *v.* Morse, 2 Mass. 139; Com. *v.* Warren, 6 Mass. 72; People *v.* Babcock, 7 Johns. 201; People *v.* Miller, 14 Johns. 371; Lambert *v.* People, 9 Cow. 588; People *v.* Stone, 9 Wend. 187; State *v.* Wilson, 2 Mill's Rep. Con. Ct. 135; State *v.* Vaughan, 1 Bay, 282; Hill *v.* State, 1 Yerg. 76; Com. *v.* Speer, 2 Va. Cas. 65; State *v.* Stroll, 1 Rich. 244; State *v.* Patillo, 4 Hawks, 348.

As to Texas statute against "swindling," see Popinaux *v.* State, 12 Tex. Ap. 140; Davison *v.* State, Ibid. 214.

The subject is discussed with much ability in Lord Macaulay's report on the Indian Code, title "Cheats."

[2] R. *v.* Fawcett, 2 East P. C. 862; and see O'Mealy *v.* Newell, 8 East, 364; 1 Russ. on Cr. 275, 6th ed.; and see, as to falsely personating bail, 1 Burn's, J. P. 330.

[3] R. *v.* Jones, 2 East P. C. 822; 1 Leach, 174.

[4] Serlestead's Case, 1 Latch, 202.

[5] Sir J. F. Stephen's definition, Dig. C. L. art. 338, is as follows:—

"Every one commits the misdemeanor called cheating who fraudulently obtains the property of another by any deceitful practice, not amounting to felony, which practice is of such a nature that it directly affects, or may directly affect the public at large. But it is not cheating, within the meaning

And devices calculated to affect public.

provisions, without notice, has been held a misdemeanor, though perhaps the reason of this may be that such an act is a nuisance as well as a cheat.[1] So the defendant being indicted for changing corn given to be ground, and returning bad, the indictment was held good; for "being a cheat in the way of trade, it concerned the public."[2]

But not by short measure without false token.

§ 1119. It is not, however, an offence at common law to sell provisions with short measure, where no false weight or token is used.[3] In an early case in Pennsylvania, it is true, an indictment was sustained against a baker, in the employ of the United States army, for baking two hundred and nineteen barrels of bread, and marking them as weighing eighty-eight pounds each, when in fact they severally weighed but sixty-eight pounds;[4] but here there was a false token placed by the defendant upon the barrels as a mass, and this false token was equivalent to a false measure. In 1855 the whole subject of selling under weight, to a public institution, was under consideration before the English Court of Appeals, and it was then held, that though

of this article, to deceive any person in any contract or private dealing by lies, unaccompanied by such practices as aforesaid."

The following are among the illustrations given by him:—

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

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

"Selling a picture by means of an imitation of the name of a well-known artist inscribed upon it. R. *v.* Closs, D. & B. 460.

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

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

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

"Receiving barley to grind, and delivering a mixture of oat and barley meal. R. *v.* Haynes, 4 M. & S. 214.

"Selling as a Winchester bushel a sack of corn which is not a Winchester bushel, but greatly deficient. Pinkney's Case, 2 East P. C. 818."

In State *v.* Phifer, 65 N. C. 321, the distinctions in the text are supported with much clearness by Reade, J., criticizing State *v.* Simpson, 3 Hawks, 620. See, also, State *v.* Jones, 70 N. C. 78.

[1] 4 Blac. Com. 162; 2 East P. C. 822. *Infra*, § 1434.

[2] R. *v.* Wood, 1 Sess. Cas. 217. See *infra*, § 1127.

[3] R. *v.* Wheatly, 2 Burr. 1125; R. *v.* Eagleton, 33 Eng. L. & Eq. 545; 6 Cox C. C. 559; R. *v.* Young, 3 T. R. 104; Hartman *v.* Com., 5 Barr, 60; State *v.* Justice, 2 Dev. 199. See *infra*, § 1127.

[4] Resp. *v.* Powell, 1 Dall. 47. See 3 Rep. Con. Ct. 139; 2 Rus. on Cr. 9th Am. ed. 605 *et seq.*

such a sale is indictable as a false pretence, it is not cognizable at common law unless a false measure is used.[1]

Adulterations, to be indictable, must be latent, directed to the public generally.

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

Yet it is otherwise where an adulteration is latent, so that no suspicion is aroused by it, and is diffused, so as to address the public as such. Thus it has been held an indictable offence at common law for a baker to sell bread containing alum, which renders it noxious, although he gave directions to his servants to mix the alum in a manner that would have rendered it harmless.[4] And even

[1] R. v. Eagleton, 33 Eng. L. & Eq. 545; 6 Cox C. C. 559; S. P. Hartman v. Com., 5 Barr, 60. See *infra*, § 1127.

[2] R. v. Haynes, 4 M. & S. 214. See, also, R. v. Eagleton, 33 Eng. L. & Eq. 545; 6 Cox C. C. 559.

[3] Weierbach v. Trone, 2 W. & S. 408. See Com. v. Warren, 6 Mass. 72; 2 Russ. on Crimes, 6th Am. ed. 276.

[4] R. v. Dixon, 4 Camp. 122; 3 M. & S. 11. *Infra*, § 1126.

latency is not a necessary requisite when the use of the adulterated product is compulsory. Thus an indictment will lie for wilfully, deceitfully, and maliciously supplying prisoners of war with unwholesome food, not fit to be eaten by man.[1]

Cheats by public false news may be indictable.

§ 1121. Writers of false news are indictable for its publication, as an offence at common law, when such publication is likely to affect injuriously the public, or to provoke a breach of the peace; and it may also be held that the fabrication of false news, calculated to produce any public detriment, is an indictable offence.[2] Yet here again must we apply the tests already given. The falsity must be *latent* (*e. g.*, got up in such a way as not to manifestly excite the suspicions of the public), and it must be addressed to the public at large. In this way, the false but skilful dissemination of a report of the loss of a steamer, so as to make money out of the depression of the stock, would be a cheat at common law.

And so of false dice.

§ 1122. As long as there is no statute giving an illicit taint to the use of dice in public places, and hence nothing to legitimately throw suspicion upon those offering to play with dice, it is indictable at common law to employ false dice, offering to play with whomsoever may come.[3]

And so of false notes calculated to affect public at large.

§ 1123. As to false notes, also, must be invoked the tests of latency and publicity of aim, both of which must exist in an indictable common law cheat. In the case of a person offering to another a cheque on a bank where he has no funds, neither of these ingredients exists. The fraud is not so latent as not to call up inquiry, for the very fact of a man offering his own paper is notice putting the person to whom the paper is offered on his guard. The fraud is not addressed to the public at large, but only to the person invited to take the cheque. Hence, passing such a cheque on an individual is not a cheat at common law.[4]

[1] Treeve's Case, 2 East P. C. 821. *Infra*, § 1434.

[2] See Stark. Libel, 546; 2 Russ. Cr. 278; State v. Williams, 2 Tenn. 108. *Infra*, § 1442. Under 3 Edw. I. c. 34, spreading false news in order to produce disaffection is indictable. Steph. Dig. C. L. art. 95. *Infra*, § 1448.

[3] R. v. Lesser, Cro. Jac. 497; R. v. Madox, 2 Roll. R. 107.

[4] R. v. Jackson, 3 Camp. 370; R. v. Wavell, 1 Moody, 224; R. v. Lara, 6

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

And so of false personation.

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

T. R. 565. See Ranney *v.* People, 22 N. Y. 413; State *v.* Allred, 84 N. C. 749. See, however, R. *v.* Thorn, C. & M. 206, where it was held that false personation, coupled with a false order, is a common law cheat.

[1] Com. *v.* Boynton, 2 Mass. 77.

Thus, in Virginia, it has been held that the procuring goods, etc., by means of a note purporting to be a bank note of the Ohio Exporting and Importing Company, there being no such bank or company, is a cheat, punishable by indictment at common law, if the defendant knew that it was such a false note. It is necessary, in such case, to aver the *scienter* in the indictment. Com. *v.* Speer, 2 Va. Cas. 65; State *v.* Grooms, 5 Strob. 158; *supra*, § 748; but see State *v.* Patillo, 4 Hawks, 348. Where the defendants purchased goods from the prosecutor's clerk, and gave in payment an instrument purporting to be a five dollar bill of the Bank of Tallahassee, in Florida, the blanks of which were filled up, except those opposite the words "Cashier" and "President;" but in these blanks an illegible scrawl was written, which, on careless inspection, might have been mistaken for the names of those officers: and the defendants knew, before they passed the instrument, that it was worthless; it was held, in South Carolina, that they were guilty, at common law, of cheating by a false token. State *v.* Stroll, 1 Rich. 244. And such is the law in Pennsylvania, in respect to a counterfeit bank note of another State. Lewis *v.* Com., 2 S. & R. 551. As to forgery in such cases, see *supra*, § 660.

[2] As to false personation under statutes, see *infra*, §§ 1135, 1139, 1149. As to false pretence of infancy, see *infra*, § 1149.

when really a minor;[1] and when a married woman obtains general credit by pretending to be unmarried.[2] But suppose the pretender goes simply to an individual, and with that individual uses his pretended character as a basis for getting money, while there is nothing about the pretender's appearance or general reputation to sustain such character. In such case, there being no latency, since there is a direct subject tendered to the prosecutor on which to make inquiry, and the fraud being pointed at a single individual, it is not a cheat at common law.[3]

And so of false stamps and trade-marks, and authors' names.

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

But not cheats whose falsity is not latent, and addressed to the public at large; False pretences not cheats.

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

[1] See 1 Gab. Cr. L. 204.

[2] R. *v.* Hanson, Say. 229; 2 East P. C. 821; Trem. P. C. 101, 102.

[3] See 1 East P. C. 1010.

[4] See 2 East P. C. 820; Whart. Confl. of Laws, § 326.

[5] R. *v.* Closs, Dears. & B. C. C. 460.

[6] R. *v.* Wheatley, 1 W. Bl. 273, Burr. 1125; U. S. *v.* Porter, 2 Cranch C. C. 60; U. S. *v.* Hale, 4 Ibid. 83; U. S. *v.* Watkins, 3 Ibid. 441; Ranney *v.* People, 22 N. Y. 413; Wright *v.* People, Breese, 66; State *v.* Stroll, 1 Rich. 244.

[7] R. *v.* Young, 3 T. R. 104; R. *v.* Eagleton, 33 Eng. L. & Eq. 540; 6 Cox C. C. 559; Hartman *v.* Com., 5 Barr, 60; State *v.* Justice, 2 Dev. 199. *Supra*, § 1121.

to be otherwise, is no offence at common law, unless there be a conspiracy to defraud, and then an indictment might stand for a conspiracy.[1] Nor is it an offence to cause an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it is written, unless there be a conspiracy.[2]

On the same reasoning, the deceitful receiving of money from one man for the use of another, upon a false pretence of having a message and order to that purpose, is not an offence at common law in a private transaction, because it is accompanied with no manner of artful contrivance, but only depends on a bare naked lie; and it was supposed to be needless to attach punishment to such mischief, against which common prudence and caution might be a sufficient security.[3] On the same principle, it is not indictable at common law to get possession of a note, under pretence of wishing to look at it, and then to carry it away, and refuse to return it;[4] nor to pretend to have money ready to pay a debt, and thereby obtain a receipt in discharge of the debt, without paying the money;[5] nor to obtain, in violation of an agreement, and by false pretences, possession of a deed lodged in a third person's hand as an escrow;[6] nor to obtain goods on credit by falsely pretending to be in trade, keeping a grocery shop, and by giving a note for the goods in a fictitious name;[7] nor to put a stone into a pound of butter so as to increase

[1] R. v. Pywell, 1 Stark. 402; State v. Delyon, 1 Bay, 353; and see R. v. Codrington, 1 C. & P. 661.

[2] See 2 East P. C. c. 18, s. 5, p. 823; 1 Hawk. c. 71, s. 1; and see R. v. Paris, 1 Sid. 431; Com. v. Sankey, 22 Penn. St. 390; Wright v. People, 1 Breese, 66; State v. Justice, 2 Dev. 199; *per contra*, State v. M'Leran, 1 Aiken, 311; Hill v. State, 1 Yerg. 76, where the ignorance of writing of the party defrauded was held to constitute the cheat. See comments on these cases, 1 Ben. & H. Lead. Cas. 16; and see *supra*, §§ 674, 676, 702.

Where two persons pretended, the one to be a merchant, the other a broker, and, as such, bartered bad wine for hats, it was considered that they were guilty of the offence of a conspiracy to cheat, but not of the offence of cheating. R. v. Mackarty, 2 Ld. Raym. 1179, 1184; 3 Ibid. 325; 2 Burr. 1129; 2 East P. C. 824. It has been held, however, indictable to get a person to lay money on a race, and to prevail with the party to run booty; yet the ground of the decision appears to have been that the offence amounted to conspiracy. 6 Mod. 42. c.

[3] 1 Hawk. c. 71, s. 2; 2 East P. C. 818.

[4] People v. Miller, 14 Johns. 371.

[5] People v. Babcock, 7 Johns. 201.

[6] U. S. v. Carico, 2 Cranch C. C. 446; Com. v. Hearsey, 1 Mass. 137.

[7] Com. v. Warren, 6 Mass. 72. See People v. Gales, 13 Wend. 311.

its weight;[1] nor to obtain money by falsely representing a spurious note of hand to be genuine;[2] nor to obtain goods by falsely pretending to be sent by a third person.[3] Undoubtedly there are old cases which seem to give a wider scope to common law cheats. These cases, however, were before the statutes making false pretences indictable, and thereby settling on a clear and permanent basis the distinction between cheats at common law and statutory cheats by false pretences.[4]

§ 1127. The reasons for the distinction between public and private cheats are thus given by Lord Mansfield in a case where the defendant was convicted of selling beer short of the due and just measure, to wit, sixteen gallons as and for eighteen. This "is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor upon receiving it, to see whether it held the just measure or not. The offence that is indictable must be such as affects the public. As if a man use false weights and measures and sell by them to all or to many of his customers, or use them in the general course of his dealing; so if a man defrauds another, under false tokens, for these are deceptions that common care and prudence are not sufficient to guard against. So if there be a conspiracy to cheat: for ordinary care and caution is no guard against this. These cases are much more than private injuries; they are public offences. But here it is a mere private imposition or deception; no false weights or measures are used; no false tokens given; no conspiracy; only an imposition on the

Nature of distinction between public and private cheats.

[1] Weierbach v. Trone, 2 W. & S. 408. *Supra*, § 1120.

[2] State v. Patillo, 4 Hawks. 348. See Com. v. Speer, 2 Va. Cas. 65; State v. Stroll, 1 Rich. 244.

[3] In a case where this was decided the court said: "We are not to indict one man for making a fool of another; let him bring his actions." R. v. Jones, 2 Ld. Raym. 1013; 1 Salk. 379; 6 Mod. 105, S. C.; and see R. v. Bryan, 2 Strange, 866; R. v. Gibbs, 1 East, 173. That this may be larceny, see *supra*, § 916. "It seems the same doctrine will hold good, though the defendant made use of an apparent token, which in reality was, upon the very face of it, of no more credit than his own assertion, and was not of a public nature. 2 East P. C. c. 18, s. 2; 2 Russ. C. & M. 3d ed. 283. See State v. Sumner, 10 Vt. 587; People v. Miller, 14 Johns. 371." The indictment in any case must allege a false token or device. R. v. Lara, 6 T. R. 565; and see R. v. Flint, R. & R. 460. *Supra*, § 1120.

[4] See R. v. Searlestead, 1 Latch, 202; R. v. Jones, 2 East P. C. 822; R. v. Mawbey, 6 T. R. 619; People v. Gates, 13 Wend. 311.

person he was dealing with, in delivering him a less quantity instead of a greater, which the other carelessly accepted. It is only a non-performance of his contract; for which non-performance the other may bring his action. The selling an unsound horse for a sound one is not indictable; the buyer should be more upon his guard."[1] The distinction which is laid down as proper to be attended to in all cases of this kind is this: that in impositions or deceits where common prudence may guard persons against their suffering from them, the offence is not indictable; but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive, as people cannot by any ordinary care or prudence be guarded against, then it is an offence indictable. The same position has since been repeatedly reaffirmed.[2]

When only possession is obtained offence may be larceny.

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

Indictment for public cheat need not name party cheated.

§ 1128. It has been said in Tennessee, under a statute, that an indictment for selling by false weights must specify the person to whom the sale was made.[4] But this, as a common law rule, is not only inconsistent with authority,[5] but with sound reason, if it means anything more than that when an overt act of cheating has been executed the person cheated is to be named, or averred to be unknown. For it is the essence of the common law cheat that it should be addressed to the public generally. The true course is to aver that the cheat was devised to defraud the public generally, and then to aver that it was operative in the particular case,[6] supposing that the cheat was consummated.

§ 1129. Where the fraud has been effected by false tokens, and the offence is so charged, the false tokens must be specified and set forth, and it must appear that by them the goods were obtained.[8]

[1] R. *v.* Wheatly, 2 Burr. 1125; 1 W. Bl. 273.

[2] *Supra*, §§ 1117–9.

[3] *Supra*, § 964; *infra*, § 1344.

[4] State *v.* Woodson, 5 Humph. 55.

[5] R. *v.* Gibbs, 8 Mod. 58.

[6] R. *v.* Closs, Dears. & B. 460.

[7] See State *v.* Corbett, 1 Jones (N. C.), 264, which case simply holds that when a cheat is executed the execution must be set forth.

[8] R. *v.* Closs, Dears. & B. 460.

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

Mode of cheating should be specified.

II. STATUTORY CHEATS BY FALSE PRETENCES.

1, *General Rules of Construction.*

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

[1] 2 East P. C. c. 18, s. 13, p. 837.

[2] Ibid. p. 838. *Infra*, §§ 1213 *et seq.*

[3] State *v.* Johnson, 1 Chipm. 129.

[4] The statute of 30 Geo. II. c. 24, the original from which most of our statutes are drawn, after reciting that divers evil-disposed persons had, by various subtle stratagems, etc., fraudulently obtained divers sums of money, etc., to the great injury of industrious families, and to the manifest prejudice of trade and credit, enacts:—

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

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

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

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

law definition of cheats, but to create a new offence which that definition, when properly stated, did not cover. The distinction is this: No cheat is indictable at common law unless effected by conspiracy, or unless it be marked by latency, subtlety, and generality of operation, as to affect all likely to come within its range; whereas, under the statutes now before us it is made indictable to obtain money or goods from individuals by any designedly false

chandise;" by the 7 & 8 Geo. IV. c. 29, s. 53, it comprises "any chattels, money, or *valuable security*." In the second place, what constitutes the main point of difference, and what the preamble of the latter statute indicates when it states that a failure of justice frequently arises from the subtle distinction between larceny and fraud, is, that under the 30 Geo. II. c. 24, whenever the offence on trial proved to amount to constructive larceny, the common law, by merging the misdemeanor in the felony, worked the acquittal of the defendant; whereas, by the 7 & 8 Geo. IV. c. 29, s. 53, it is provided that by reason of such merger, he shall not be entitled to acquittal.

By 24 & 25 Vict. c. 96, those statutes are modified in modes hereafter noticed.

Sir J. F. Stephen thus summarizes the English law on this topic:—

DIG. CR. L., ART. 329.

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

"(*a*) [1] By any false pretence obtains from any other person any chattel, money, or valuable security, with intent to defraud; or who,

"(*b*) [2] With intent to defraud or injure any other person by any false pretence, fraudulently causes or induces any other person to [3] execute any valuable security, or to write, impress, or affix his name, or the name of any other person,[4] upon any paper or parchment, in order that the same may afterwards be made or converted into, or used or dealt with as, a valuable security.

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

"It is not an offence to obtain credit in a partnership account by false pretence as to the amount which a partner is entitled to charge against the partnership funds." To this is cited R. *v.* Evans, L. & C. 755, of which case Sir J. F. Stephen says he is "unable to follow the reasoning of this judgment."

As to Maine, see State *v.* Mills, 17

[1] 24 & 25 Vict. c. 96, s. 88, S. as explained by the cases.

[2] Ibid. s. 90, S. This section was meant to cover such cases as R. *v.* Danger, D. & B. 307, and greatly extends the old law on the subject. See Mr. Greaves's note to the section in his edition of the Acts.

[3] Make, accept, indorse, or destroy the whole or any part of.

[4] Or of any company, firm, or copartnership, or the seal of any body corporate, company, or society.

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

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

Me. 211. In Connecticut, the statute (title 21, § 114, ed. 1835) embraces the provisions of 33 Hen. VIII., 32 Geo. II. and 52 Geo. III.; and the English decisions are there adopted. State *v.* Rowley, 12 Conn. 101.

By the N. Y. Penal Code of 1882, § 541, larceny, embezzlement, and obtaining goods by false pretences are made a common offence, under the title of larceny. (See *supra*, §§ 888, 1009, 1029.) For prior statutes, see Fay's Dig. 272; People *v.* Crissie, 4 Denio, 525; People *v.* Galloway, 17 Wend. 540. But while obtaining goods by false pretences is thus called larceny, its former characteristics are retained.

Under the Virginia statute an indictment for the offence may be either in the form of indictment for larceny at common law, or by charging the specific facts which the act declares shall be deemed larceny. Leftwich *v.* Com., 20 Grat. 716.

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

But an indictment was held good which alleged the obtaining from the Bank of Virginia, by false pretence, of "fifty dollars in money, current in the Commonwealth of Virginia, although it was contended that, as the preamble of the statute recited a preëxisting evil, etc., as the cause of its enactment, it could not extend to banks which did not exist in Virginia until many years after the date of the statute. Com. *v.* Swinney, 1 Va. Cas. 150, 151. See, also, State *v.* Patillo, 4 Hawks, 348.

In Vermont, under a statute limited to false tokens, it was held that fraudulent and false representations of a man's property and resources were not indictable; the language of the statute being narrower than that of 30 Geo. II. State *v.* Sumner, 10 Vt. 599. Subsequently, however, the statute was amended by introducing the words "false pretences."

The statute 33 Hen. VIII. has been recognized in New York, 12 Johnson, 293; 9 Wend. 188; in Massachusetts, Com. *v.* Warren, 6 Mass. 72; though not in Pennsylvania, Resp. *v.* Powell, 1 Dall. 47.

Under the South Carolina Act of 1791, an indictment was held bad which merely alleged that the defendant falsely, fraudulently, etc., pretending that a certain mulatto was a slave, did falsely, etc., cheat and defraud one A., by selling said mulatto to him for a slave, when said mulatto was free. State *v.* Wilson, Rep. Con. Ct. 135. But it is swindling, within the purview of this statute, to obtain horses from an ignorant man, by threats of a criminal prosecution, and also by threats of his life. State *v.* Vaughan, 1 Bay, 282. The same rule, however, does not apply when a blind horse is sold as a sound one. State *v.* Delyon, 1 Bay, 353; Code, 1849, c. 192, § 30.

[1] *Supra*, §§ 1126–1127; *infra*, § 1186. For English statutes see 2 Russ. on Cr. 9th Am. ed. 619 *et seq.*

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

Statutes are to be construed in accordance with object.

[1] Young v. R., 3 T. R. 98.

If the intent be made out, and the false pretence used in order to effect it, it brings the case within the statute."[1]

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

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

[1] See, also, the interesting and well-digested opinion of Recorder Vaux, in Hutchinson and Turner's Cases, which are, in fact, the first instances in Pennsylvania in which the law was settled. Recorder's Decisions, 47, 75.

[2] People v. Haynes, 14 Wend. 546, 559.

liar weight, "that the term 'false pretence' is of great latitude, and may be made to embrace any and every false representation made by a party fraudulently obtaining property from another which a prosecutor will swear has induced him to part with such property. Is this act to have a range so wide and sweeping as this, or is it to be limited in its operation? and in what does such limitation consist? Although in ethics every misrepresentation is morally wrong, yet if so severe a standard of conduct is to be introduced into our criminal code, it is plainly to be seen that breach of contract and crime will be scarcely divided by an appreciable line, and that criminal tribunals will hereafter be employed in punishing infamously acts which have heretofore been understood as only creating civil liabilities. A rule of such extreme urgency might, in some instances, justly chastise a bad man; but it could not fail to be terribly abused by exasperated or reckless creditors, smarting under losses, and stimulated by the fierce spirit of revenge, for wrongs supposed or real."[1]

§ 1134. To the same effect remarks Rogers, J., of the Supreme Court of Pennsylvania, in a case of malicious prosecution: "The act is intended to punish a criminal offence, not to be used as a means of collecting debts, however just; and to suffer it to be perverted for that purpose will necessarily lead to great injustice and oppression. We are not without reason for believing that it has been already used as an instrument to wring money from the sympathy and fear of friends, as well as a means of extortion from the timid on pretended demands. A stranger from another or distant State may or has been compelled to pay unjust, or at least contested demands, rather than encounter the risk, expenses, and mortification of attending a prosecution for fraud, knowing that the charge may be supported by the oath of the prosecutor himself. When, therefore, we find that the creditor, instead of pursuing the supposed criminal to judgment, stops short on receiving the amount of his demand, and discharges the accused from any other proceeding, what is the rational inference? What are we to conclude but that his design was to collect his debt, rather than punish the offender in promotion (violation?) of the very object and intention of the act."[2]

[1] King, J., Com. *v.* Hutchinson, 2 Pars. 309; 2 Penn. L. J. 242.

[2] Prough *v.* Entriken, 11 Penn. St. 84—Rogers, J.

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

2. *Character of the Pretences.*

§ 1135. Hence the rule may be broadly stated, that any designed misrepresentation of an existing condition, by which a party obtains goods of another, is a false pretence under the statute.[1] Pretence that defendant was a person of wealth and credit is within statute.

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

[1] See Com. *v.* Drew, 19 Pick. 179; State *v.* Phifer, 65 N. C. 321. As to distinction between false pretences and larceny, see Zink *v.* People, 77 N. Y. 114.

[2] R. *v.* Henderson, C. & M. 328. See Pasley *v.* Freeman, 3 T. R. 51.

[3] People *v.* Conger, 1 Wheel. Cr. Cas. 449; approved by Nelson, J., in People *v.* Haynes, *infra*.

[4] People *v.* Haynes, 11 Wend. 565.

[5] Ibid.

[6] Ibid.; People *v.* Kendall, 25 Wend. 399; Abbott *v.* People, 75 N. Y. 602; Clifford *v.* State, 56 Ind. 245; State *v.* Timmons, 58 Ind. 98. See, however, Com. *v.* Stevenson, 127 Mass. 446.

Where the defendant, then a minor, fraudulently obtained goods by falsely representing himself to be a joint owner with his father of a number of cows and other stock on a neighboring farm, it was held this was within the statute, and his minority did not avail in a criminal action, although it would have in a civil. People *v.* Kendall, 25 Wend. 399. In Vermont a more restricted view is taken, based mainly on the distinctive limitations of the Vermont statute. State *v.* Sumner, 10 Vt. 587; see Dyer *v.* Tilton, 23 Vt. 313. That this view is peculiar to Vermont, see Bigelow on Fraud, 25.

In New York, by the Penal Code of 1882, § 544, it is essential to sustain a

§ 1136. Whatever we may think on the last point, we may hold it settled that it is a false pretence under the statute to falsely claim the ownership of specified assets on which credit is given.[1] Thus in one of the earliest cases under the Pennsylvania statute,[2] two distinct false pretences were averred: one, that the defendant had in the hands of his guardians in New York an estate equal to two thousand dollars a year; the other that he would procure and bring on from New York money from his mother to pay the prosecutor. The first of these was held to be a false pretence under the statute.[3]

And so that defendant possessed certain specified assets.

§ 1137. The same rule applies when the object is to obtain negotiable paper.[4] Thus where an indictment charged that N. represented to O. that he possessed certain specified valuable property, which he would sell him for four bills of exchange on Philadelphia, and that in consequence of this representation the bills were drawn by O., and that this representation was made knowingly and designedly, and with intent to cheat O. of his drafts, and that in fact N. possessed no such property as he pretended to have, this was held to present a false pretence under the statute.[5]

Same rule applies when object is to obtain negotiable paper.

§ 1138. It has further been held that a false representation that the defendant had money in the hands of a third person, absent at

prosecution based on the purchaser's statement of his means, that such statement should be in writing and signed.

[1] See cases under § 1138.

[2] Com. *v.* Burdock, 2 Barr, 163, citing Mitchell's Case, 2 East P. C. 936; R. *v.* Goodhall, R. & R. 461; R. *v.* Douglas, 1 Mood. C. C. 262; R. *v.* Jackson, 3 Camp. 370; R. *v.* Parker, 7 C. & P. 825; R. *v.* Henderson, 1 C. & M. 138. See, to same effect, R. *v.* Cooper, L. R. 2 Q. B. D. 510; 36 L. T. 671; 13 Cox C. C. 617; State *v.* Tomlin, 5 Dutch. 13.

In Pierce *v.* People, 81 Ill. 98, it was held that a false exhibition of business cards and of drafts on a bank was a false pretence.

When the false pretence is in writing the meaning of any ambiguous terms is for the jury, while the construction is for the court.

[3] Com. *v.* Hutchinson, 2 Penn. L. J. 244; 2 Parsons, 309.

Where the pretence was that the defendant owned real estate on Passyunk Road worth seven thousand dollars, and that he had personal property and other means to meet his liabilities, and that he was in good credit at the Philadelphia Bank, the case was held within the statute. Com. *v.* McCrossin, 3 Penn. L. J. 219.

[4] *Infra*, § 1195.

[5] State *v.* Newell, 1 Mo. 177.

the time, sufficient to take up a note, to which, by means of the representation thus made, the prosecutor's signature was obtained, is within the statute.[1]

So when indorsement is thus obtained.

§ 1139. It is clear that a false representation of the *status* of the defendant brings him within the statute;[2] although where there is an original felonious intent the case may be larceny.[3] That this is the case when an infant falsely pretends to be of full age will be hereafter seen.[4]

So generally as to defendant's *status*.

§ 1140. A person who falsely makes claim to supernatural powers, and thereby obtains money or goods (*e. g.*, as in case of gypsy fortune telling), is indictable for false pretences, when the party defrauded is thereby really imposed upon.[5] And in Philadelphia, in 1884, the same position was taken in respect to frauds by an alleged "spiritual medium."[6]

So as to pretension to supernatural powers.

§ 1141. False representations of delivery of goods are within the statute.[7] Where a carrier, falsely pretending that he had carried certain goods to A. B., demanded and thereupon obtained from the consignor sixteen shillings for carriage of them, it was held within the statute.[8] In another case, where the carrier falsely pretended that goods given to him for carriage had been delivered, but that he had left at home the receipt, the same rule was applied.[9]

So as to pretence that defendant had delivered certain goods or money.

False representations of payment for the prosecutor fall under this head.[10] It has been held, on this principle, that a false state-

[1] People *v.* Herrick, 13 Wend. 87. *Infra*, § 1195.

It has been held an indictable pretence for a party falsely to represent that he had a capital of two thousand dollars, and thus obtain the property of the prosecutor. Com. *v.* Poulson, 6 Penn. L. J. 272; S. P., State *v.* Penley, 27 Conn. 587. See, also, State *v.* Reidel, 26 Iowa, 430; State *v.* Pryor, 30 Ind. 350; State *v.* Monday, 78 N. C. 460.

[2] R. *v.* Bull, 13 Cox C. C. 608; R. *v.* Burnsides, Bell C. C. 282; 8 Cox C. C. 370; Com. *v.* Drew, 19 Pick. 179; Com. *v.* Stevenson, 127 Mass. 446; State *v.* Tomlin, 5 Dutch. 13; Higler *v.* People, 44 Mich. 299; State *v.* Kube, 20 Wis. 217; and this where a spurious order is used. Tyler *v.* State, 2 Humph. 37.

[3] *Supra*, § 888.

[4] *Infra*, § 1149.

[5] R. *v.* Giles, L. & C. 508; 10 Cox C. C. 44. See *infra*, § 1155; State *v.* Phifer, 65 N. C. 321; Brown *v.* State, 9 Baxt. 45. In R. *v.* Bunce, 1 F. & F. 523, thus obtaining money was held larceny. See *supra*, § 964.

[6] Gordon's Case, 15 Weekly Notes, 282.

[7] See People *v.* Genet, 19 Hun, 91.

[8] R. *v.* Coleman, 2 East P. C. 672.

[9] R. *v.* Airey, 2 East R. 30.

[10] R. *v.* Barnes, T. & M. 387; 2 Den. C. C. 59. *Infra*, § 1181.

ment by the agent of an insurance company that he had paid over to the company certain premiums paid him by the defendant, thus preventing its lapsing, is a false pretence.[1] And where it was the duty of C., a servant, to ascertain daily the amount of dock dues payable by his master, and, having ascertained it, to apply to his master's cashier for the amount, and then to pay it in discharge of the dues, but where, by representing falsely to the cashier that the amount was larger than it really was, as he well knew, he obtained from the cashier the sum he stated it to be, and then paid the real amount due, and appropriated the difference, it was held that the case was one of false pretences.[2]

So as to pretence that defendant was sent for certain goods.

§ 1142. Where a person obtains goods under the false pretence that he is employed by A. B., who sent him for them, he is within the statute, supposing the intention of the owner was to pass property to the defendant, or supposing the statute covers cases where only *possession* is obtained.[3] And this may be extended to all false pretences of agency, supposing that property passed to the defendant. If, however, there was no property passed to the defendant, but the goods were given to him as the servant of A. B., then the offence is not false pretences but larceny.[4]

So as to pretence of being a certain physician.

§ 1143. A false pretence that the party is a practising physician is within the statute.[5] The same view is taken of a false pretence, for the purpose of selling an alleged medicine, that the defendant had effected with it certain cures.[6]

§ 1144. A false allegation, also, that the defendant represented a principal of means is within the statute;[7] and so of a false pre-

[1] R. *v.* Powell, 51 L. T. N. S. 713.

[2] R. *v.* Thompson, L. & C. 233; 9 Cox C. C. 222. *Supra*, §§ 956–960. See Bonnell *v.* State, 64 Ind. 498.

[3] R. *v.* Bulmer, L. & C. 476; 9 Cox C. C. 492; R. *v.* Davis, 11 Ibid. 181; Com. *v.* Hulbert, 12 Met. 446; People *v.* Johnson, 12 Johns. 292; People *v.* Miller, 14 Ibid. 371; McCorkle *v.* State, 1 Cold. (Tenn.) 333; Mack *v.* State, 63 Ala. 138. In Chapman *v.* State, 2 Head, 36, it was held that to obtain a quart of whiskey on the pretence that the defendant was sent for it by another was, under the circumstances, not within the statute; but this was on the ground of the triviality of the act. *Contra*, R. *v.* Butcher, 8 Cox C. C. 77. If possession only be obtained, it may be larceny. *Supra*, § 888.

[4] *Supra*, § 888.

[5] Brown *v.* State, 9 Baxt. 45.

[6] R. *v.* Bloomfield, C. & M. 537.

[7] R. *v.* Archer, Dears. C. C. 449; 6 Cox C. C. 515; 33 Eng. L. & Eq. 528. As to exhibiting false business cards,

tence that the defendant could secure a place for the prosecutor.[1]

So as to pretence that the defendant represented a principal of means or influence.

So as to pretence that the defendant was an auctioneer in search of a clerk or was a storekeeper.

§ 1145. The same result was reached when the evidence was that the defendant obtained a sum of money from the prosecutor by pretending that he carried on an extensive business as an auctioneer and a house agent, and that he wanted a clerk, and that the money was to be deposited as security for the prosecutor's honesty as such clerk; the jury finding that the prisoner was not carrying on any such business at all.[2] That the defendant was a storekeeper may be also a false pretence.[3]

So as to pretence that defendant was a certain attorney.

§ 1146. On the same principle an indictment was sustained which alleged that the defendant obtained money by pretending falsely that he was an attorney who had got a third party out of a difficulty such as that in which the prosecutor was placed.[4]

So that defendant was a certain payee.

§ 1147. Where a man assumes the name of another to whom money is required to be paid, this is a pretence within the meaning of the act.[5]

So that defendant was unmarried, thereby obtaining money.

§ 1148. Where the prisoner paid his addresses to the prosecutrix, and obtained a promise of marriage from her, which promise she had refused to ratify, in consequence of which he threatened her with an action, and thus obtained money from her; and where, during the whole transaction, it appeared he had a wife; the indictment presented two pretences: 1st. That he was unmarried. 2d. That he was entitled to bring an action against her for a breach of promise. It was held (Lord Denman, C. J., and Maule, J.) that the case was within the statute, and that the fact of the prisoner paying his addresses to the prosecutrix was sufficient evidence to prove the first pretence.[6] It has been held an indictable offence for

see Jones *v.* State, 50 Ind. 473. As to falsely pretending to represent a reliable firm getting up a directory, see R. *v.* Speed, 15 Cox C. C. 24; 46 L. T. N. S. 174. As to a pretence that the defendant had authority to indorse for a reliable principal, see *supra*, §§ 657, 669.

[1] People *v.* Winslow, 39 Mich. 505. See Com. *v.* Howe, 132 Mass. 250.

[2] R. *v.* Crab, 11 Cox C. C. 85—C. C. R.

[3] See R. *v.* Barnard, 7 C. & P. 784; R. *v.* Hamilton, 9 Ad. & El. 276; R. *v.* Archer, *ut supra*; Com. *v.* Drew, 19 Pick. 179; Com. *v.* Daniels, 2 Parsons, 332.

[4] R. *v.* Asterley, 7 C. & P. 191.

[5] R. *v.* Story, R. & R. 81.

[6] R. *v.* Copeland, C. & M. 517.

a married man to pretend he was unmarried, and thus to obtain from a woman he courted money to furnish a house.[1] But a mere promise to marry is insufficient.[2]

So that defendant had certain legal rights which he did not possess.

§ 1149. That the defendant was, as to personal *status*, *e. g.*, infancy or coverture, invested with rights which he did not in fact possess,[3] is a pretence under the statute. This principle, which has been elsewhere noticed in other relations,[4] leads to the conclusion that a minor, having nothing in his appearance or otherwise to put parties dealing with him on their guard, who pretends to be of full age, and hence legally responsible, is liable to be prosecuted for false pretences,[5] and that the same rule applies to a married woman passing herself off as unmarried, or the converse.[6]

[1] R. *v.* Jennison, 9 Cox C. C. 158; L. & C. 157.

[2] R. *v.* Johnston, 2 Mood. C. C. 254.

[3] R. *v.* Simmonds, 4 Cox C. C. 277.

[4] See *supra*, § 1124; and, also, Whart. Conf. of L. §§ 113, 119.

[5] People *v.* Kendall, 25 Wend. 399, and comments, *supra*, § 1135. See, however, Price *v.* Hewett, 8 Exch. 146; Liverpool Loan. Ass. *v.* Fairhurst, 9 Ibid. 422; Wright *v.* Leonard, 11 C. B. (N. S.) 258; Goode *v.* Harrison, 5 B. & Ald. 147, where it is argued that no action on the case lies against a minor under similar circumstances. In Gabbett's Cr. Law, 204, it is declared to be a common law cheat for an infant to impose generally on the community under the pretence of being of full age.

[6] There are, indeed, no direct adjudications on these points, but the following is on the same principle:—

An indictment charged that the prisoner was living separately from her husband, and receiving an income from him for her separate maintenance under a deed of separation, which stipulated that he should not be liable for her debts; and that she falsely pretended to U., a servant of W., that she was living under the protection of her husband, and was authorized to apply to W. for goods on the credit of her husband, and that he was willing to pay for them; and that she wanted them to furnish a house in his occupation. It was proved that on the 4th of August she called at W.'s shop, and on being served by U., selected certain goods, and being asked for a deposit, said it was a cash transaction, that her husband would give a cheque as soon as the goods were delivered. The deed was proved, and it was also shown that the annuity covenanted to be paid by the husband was duly paid, and that the house which she gave as her address, and which was found shut up after the goods had been sent to it, had been taken by her whilst in company with a man with whom she had been living as his wife from the middle of July till the end of August. It was held that there was sufficient evidence to support a conviction. R. *v.* Davis, 11 Cox C. C. 181—C. C. R. *Supra*, § 71. See, also, R. *v.* Jennison, *supra*, § 1148.

So that defendant had certain claims against prosecutor.

§ 1150. It has been frequently held that to present a false claim of indebtedness may be a false pretence.[1] Thus, where the secretary of an Odd Fellows' Society falsely pretended to a member of the society that the sum of 13*s.* 9*d.* was due by him to the society for fines incurred by him as a member, by means of which such secretary fraudulently obtained from him such sum of money, it was held to be a false pretence within the statute 7 & 8 Geo. IV. c. 29.[2]

So that the defendant could settle a prosecution falsely pretended to be pending against prosecutor.

§ 1151. To extort money by a false statement of an existing prosecution is within the statute.[3] Thus it was held a false pretence to extort money by pretending falsely to the prosecutor that his daughter had committed a public offence, that a warrant had been issued for her, and that the defendant had come with the warrant.[4] But it has been said to be otherwise when the payment is made to illegally compound the offence.[5]

And so of assumption that defendant was an "Oxford student," or "clergyman," or "officer."

§ 1152. The unauthorized assumption of the dress of an Oxford student, thereby obtaining money, is a false pretence under the statute.[6] And so of the assertions that the defendant was a clergyman of standing,[7] or an officer of the dragoons,[8] or an officer of a charitable institution.[9] At the same time it should be remembered that there must be in such case an intent to defraud; and that no indictment will hold for a misstatement based on an honest mistake of law.[10]

False begging letters may be within statute.

§ 1153. An indictment, it has been ruled in New York, will not lie when the money is parted with as a charitable donation, although the pretences moving the gift are false and fraudulent;[11] and a statute was passed

[1] R. *v.* Cooke, L. R. 1 C. C. 295; 12 Cox C. C. 11; R. *v.* Leonard, 3 Ibid. 284; R. *v.* Bull, 13 Ibid. 608.

[2] R. *v.* Woolley, 1 Den. C. C. 559; 4 Cox C. C. 193. See R. *v.* Byrne, 10 Ibid. 369.

[3] See Perkins *v.* State, 67 Ind. 270, and see *infra*, § 1189, note.

[4] Com. *v.* Henry, 22 Penn. St. 253. *Infra*, §§ 1164–5.

[5] *Infra*, § 1189, *sed quære*.

[6] *Infra*, § 1170.

[7] Thomas *v.* People, 34 N. Y. 351; Bowler *v.* State, 41 Miss. 570.

[8] R. *v.* Hamilton, 9 Ad. & El. (N. S.) 271. See R. *v.* Jennison, 9 Cox C. C. 158; L. & C. C. C. 157; People *v.* Cooke, 6 Parker C. R. 31.

[9] Com. *v.* Howe, 132 Mass. 250.

[10] Beattie *v.* Lord Ebury, L. R. 7 Ch. Ap. 777.

[11] People *v.* Clough, 17 Wend. 351; and see explanation in McCord *v.* People, 46 N. Y. 470.

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

A false pretence to be distinguished from a puff.

§ 1154. Assuming a "puff" to mean a loose exaggeration of value, to make it an indictable false pretence would bring almost every sale within the statute, for there are few sales about which there is not some affirmation, either express or implied, that is not exactly true.[2] Some features must be specified, therefore, which distinguish the mere *puff* from the false pretence.[3] And the first to be here noticed is that the *puff* is a general estimate, loosely given as a matter of opinion for which there may be probable grounds, whereas a false pretence is a false statement of a fact known to be false. Thus it is a mere puff, and not indictable, to say of a flock, "This is a first-rate flock;" but to say that a certain lameness, observed by a purchaser, is not disease, but the result of an accident, which statement the defendant knows to be untrue, is a false pretence.[4] So it is a mere puff, and not indictable, to say lumpingly of an article in gross, that it is of a certain weight; but to pretend to have weighed it, and to have found it to be of a particular weight greater than it actually is, is a false pretence.[5]

Mere exaggerated praise not a false pretence.

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

[1] Com. *v.* Whitcomb, 107 Mass. 486; R. *v.* Jones, 14 Jur. 533; 1 Eng. L. & Eq. 533; T. & M. 270; 4 Cox C. C. 198; R. *v.* Hensler, 11 Ibid. 570. See, to same effect, Strong *v.* State, 86 Ind. 208.

[2] See State *v.* Estes, 46 Me. 150; State *v.* Webb, 26 Iowa, 262.

[3] See *infra*, § 1193.

[4] People *v.* Crissie, 4 Denio, 525; State *v.* Lambeth, 80 N. C. 393; State *v.* Hefner, 84 Ibid. 751; State *v.* Webb, 26 Iowa, 262. As to "brag," and loose talk, see *infra*, § 1170.

[5] R. *v.* Ridgway, 3 F. & F. 838. *Infra*, § 1159.

[6] People *v.* Jacobs, 35 Mich. 36; State *v.* Holmes, 82 N. C. 607. *Infra*, § 1193.

Illusiveness has been laid down as the test of the falsity of the pretence. Is the thing offered, by means of which the deceit operates, illusory? If it be an equivalent to the thing obtained,

specific false statement as to soundness;[1] and when he falsely pretends to the prosecutor that a certain horse is the famous horse "Charley," which it is not.[2] And it is a mere "puff" to say of a mixture that it is "good," or "first class;" but it is an indictable false pretence to declare falsely that it is a non-explosive burning fluid.[3]

But otherwise as to false sample.

§ 1156. But while it is not indictable to say of a particular article that it is "good;" to sell it by a false sample is indictable.[4] Thus, A. bought cheese of B. at a fair, and paid for it. Before he bought it, B., offering cheese for sale there, bored two of the cheeses with an iron scoop, and produced a piece of cheese, called a taster, at the end of the scoop, for A. to taste; he did so, believing it to have been taken from the cheese, but it had not, and was from a superior kind of cheese, and fraudulently put by B. into the scoop, the cheese bought by A. being very inferior to it. It was held that B. was indictable for obtaining the price of the cheese from A. by false pretences.[5]

Opinions are not always pretences.

§ 1157. As to false quality, more difficult questions arise.[6] In an English case, the prisoner induced a pawnbroker to advance him money on some spoons, which he represented as silver-plated spoons, which had as much silver on them as "Elkington's A." (a known class of plated spoon),

and if it be that which the party taking it practically calls for, then an indictment cannot be sustained. Cases, also, may happen when proof of a *real* equivalent obtained will work an acquittal, though the equivalent *named* would be illusory. Thus Barnum, to adopt an illustration of Merkel, for a series of years announced "Washington's nurse" as among his curiosities on exhibition, and the part was personated by an old negress named Joyce Heth. She was not really Washington's nurse, and a person paying money to see her, if he paid money for nothing else, paid money without a true equivalent. But was the money truly paid for seeing Washington's nurse? Was it not really paid for the excitement of the show, with a consciousness that each particular item in the show—the "nurse," the mermaid, the woolly horse—might be a deception? If so, though the particular items were illusory, there was a real equivalent, and no indictment could be sustained for obtaining the admission money on false pretences.

[1] R. *v.* Keighley, Dears. & B. 145; Watson *v.* People, 87 N. Y. 561; 26 Hun, 76; State *v.* Lambeth, 80 N. C. 393. But see State *v.* Holmes, 82 Ibid. 607. *Cf.* other cases cited *infra*, § 1160.

[2] State *v.* Mills, 17 Me. 211.

[3] Greenough, *in re*, 31 Vt. 279. See *infra*, § 1192.

[4] Cowles *v.* State, 50 Ala. 454.

[5] R. *v.* Abbott, 2 C. & K. 630; 1 Den. C. C. 273; R. *v.* Goss, 8 Cox C. C. 262; Bell C. C. 208.

[6] As to value, see R. *v.* Williamson, 11 Cox C. C. 328; Wallace *v.* State, 11 Lea, 542.

and that the foundations were of the best material. The spoons were plated with silver, but were, to the prisoner's knowledge, of very inferior quality, and not worth the money advanced on them. It was held by the court (Willes, J. dissenting, and Bramwell, B., doubting) that obtaining the money by the false representation as to the quality of the spoons was not an indictable offence within the statute against false pretences, as the article the prisoner delivered to the pawnbroker was the same in specie as he had professed it to be, though of inferior quality to what he had stated.[1] This decision may be justified on the ground that the statement as to "Elkington's A." was regarded on both sides as only a conjectural estimate, and that "best" material is a term which might be interpreted in several ways. Much less defensible is a decision by Chambers, C. S., that pretending a chain to be gold, when in fact it was only a cheap amalgam, is not within the statute.[2] This, however, is now practically overruled.[3] And it is now settled that selling with a false affirmation of quality may be a false pretence.[4] But a mere opinion or estimate, given as conjectural, is not a false pretence.[5]

§ 1158. The use of a false brand or trade-mark is indictable. Thus, a false representation that a stamp on a watch was the hall-mark of the Goldsmith's Company, and that the number 18, part thereof, indicated that the watch was made of 18-carat gold, is within the statute, and is not the less so because accompanied by a representation that the watch was a gold one, and some gold was proved to have been contained in its composition.[6]

But use of false brand is within statute.

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

[1] R. *v.* Bryan, 40 Eng. L. & Eq. 589; Dears. and B. C. C. 265; 7 Cox C. C. 312.

[2] R. *v.* Lee, 8 Cox C. C. 233.

[3] R. *v.* Suter, 10 Cox C. C. 577; R. *v.* Roebuck, 36 Eng. L. & Eq. 631; D. & B. 24; 7 Cox C. C. 126; and see R. *v.* Ball, C. & M. 249.

[4] R. *v.* Ardley, L. R. 1 C. C. 301; R. *v.* Foster, 13 Cox C. C. 393.

[5] Scott *v.* People, 62 Barb. 62.

[6] R. *v.* Suter, 10 Cox C. C. 577 — C. C. R. See *supra*, §§ 1116 *et seq.*

In R. *v.* Ardley, L. R. 1 C. C. 301, 40 L. J. M. C. 85, it was noticed that if the defendant, in R. *v.* Bryan, had represented the spoons as being in fact Elkington's manufacture when he knew they were not, he would have been rightly convicted; and in R. *v.* Suter, *supra*, where the jury had found that the prisoner represented a chain as in fact 18-carat gold, when he knew in fact that it was nothing of the sort, he was held rightly convicted. Roscoe's Cr. Ev. p. 487.

wrapped in printed wrappers, entitled "B.'s Baking Powders," and having his printed signature at the end, and the prisoner had printed a quantity of wrappers in imitation of those of B., only leaving out B.s signature, and sold spurious powders wrapped up in these labels as B.'s powders.[1]

§ 1159. On the question of false weight, we again encounter the distinction already noticed. If a man, selling an article by weight, falsely represent the weight to be greater than it is, and thereby obtain payment for a quantity greater than that delivered, he is indictable for obtaining money by false pretences.[2] It is otherwise, however, if he is selling the article for a lump sum, and merely makes the false representation as a loose conjectural estimate of the value of the aggregate.[3] The test is, is the article *sold by weight*, and is a deliberate false statement made that it is of a particular weight? If so, there is a false pretence. Thus, the prisoner having contracted to sell and deliver to the prosecutrix a load of coals at 7*d.* per cwt., delivered to her a load of coals which he knew weighed only 14 cwt., but which he stated to her contained 18 cwt., and produced a ticket showing such to be the weight, which he said he had made out himself when the coals were weighed. She thereupon paid him the price as for 18 cwt., which was 2*s.* 4*d.* more than was his due. It was held that the prisoner was indictable for obtaining the 2*s.* 4*d.* by false pretences.[4] And the same result was reached in a case where the defendant declared that he sold a parcel as 14 tons of coal, when in fact it was but 8 tons, heaping it so as to swell its bulk.[5]

False statement as to specific weight is within the statute.

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

[1] R. *v.* Smith, Dears. & B. C. C. 566; 8 Cox C. C. 32; 4 Jur. (N. S.) 1003; see *supra*, § 690.

[2] R. *v.* Goss, 8 Cox C. C. 263; Bell C. C. 208; R. *v.* Ragg, Ibid. 215; 8 Cox C. C. 262; R. *v.* Kerrigan, L. & C. 383; 9 Cox C. C. 441.

[3] R. *v.* Ridgway, 3 F. & F. 838 — Bramwell.

[4] R. *v.* Sherwood, 40 Eng. L. & Eq. 584; Dears. & B. C. C. 251; R. *v.* Lee, L. & C. C. C. 449; 9 Cox C. C. 460; R. *v.* Ridgway, 3 F. & F. 838.

[5] R. *v.* Goss, *supra*; R. *v.* Ragg, *supra*.

week, with a statement of the amount of the loaves, to the relieving officer, who would give him credit in his account for the amount. The baker was to be paid by the guardians some months later; and by a clause in the contract the guardians had the power, in case of a breach of contract by the baker, of deducting any damages caused by such breach from the amount to be ultimately paid. The baker supplied the poor people who presented tickets with loaves short of the contract weight. It was held that though this was not a fraud indictable at common law, the baker, by returning the tickets for these loaves to the relieving officer, was guilty of falsely pretending that the loaves were of full weight; and though he only obtained credit for their amount in the books of the relieving officer (as the time of payment had not arrived before detection), yet that the baker might be indicted for attempting to obtain money by the false pretence, as the making the false pretence was an act done with the intent of obtaining the money, and was sufficiently proximate to the obtaining it to be considered an attempt, since no other act remained to be done by the baker to entitle him to receive the money.[1]

False statement as to property offered for loan or sale may be within statute.

§ 1160. When we come to false statements as to property on which money is to be raised, we apply the same test. Is the statement of value a mere conjectural opinion? If so, it is not a false pretence.[2] Is it an exact statement as to some particular fact about such property, essential in determining its value? Then it may be a false pretence.[3] Hence a false statement as to the soundness of a horse may be a false pretence.[4] The principle was extended to real estate in a case where A. applied to B. for a loan upon the

[1] R. *v.* Eagleton, 33 Eng. L. & Eq. R. 540; Dears. C. C. 515; 6 Cox C. C. 559. *Infra*, § 1231. *Supra*, §§ 180, 1119.

[2] *Supra*, § 1192; Tuck *v.* Downing, 76 Ill. 71; Holbrook *v.* Connor, 60 Me. 531; Medbury *v.* Watson, 6 Met. 246; Davis *v.* Meeker, 5 Johns. 354; Noetting *v.* Wright, 72 Ill. 390.

[3] Simar *v.* Canaday, 53 N. Y. 298; Kost *v.* Bender, 25 Mich. 515; Neil *v.* Cummings, 75 Ill. 170; Cruess *v.* Fessler, 39 Cal. 336; State *v.* McConkey, 49 Iowa, 499.

[4] R. *v.* Keighley, D. & B. 145; Watson *v.* People, 87 N. Y. 561; 26 Hun, 76; State *v.* Stanley, 64 Me. 157; Com. *v.* Jackson, 132 Mass. 16; People *v.* Crissie, 4 Denio, 525. But see *supra*, § 1155. In State *v.* Heffner, 84 N. C. 751, it was held that while to say that the eyes of a horse were sound was a mere opinion, not within the statute, it is otherwise with the statement that there has never been anything the matter with the horse's eyes.

security of a piece of land, and falsely and fraudulently represented that a house was built upon it. B. advanced the money upon A.'s signing an agreement for a mortgage, depositing his lease and executing a bond as collateral security. It was held that A. was properly convicted of obtaining money by false pretences.[1] And the same distinction applies to the mortgage of personal property to which the defendant has no title,[2] and to a false allegation that a particular mortgage was a first lien.[3] The same limitations are applicable generally to the pretence that certain land is unincumbered;[4] and this although the prosecutor might on further inquiry have learned the truth.[5] To sell land already sold to another is also an indictable offence, unless the vendor is acting under mistake, and without intent to defraud.[6]

And so of false warranty when not a mere matter of opinion.

§ 1161. But a warranty when it is a mere statement as to matters transparently open to the vendee, or when it is an engagement to assume certain risks of title, is not a false pretence.[7] Thus where the prisoner sold to the prosecutor a reversionary interest which he had previously sold to another, and the prosecutor took a regular assignment of it with the usual covenant of title, Littledale, J., held that he could not be convicted for obtaining money by false pretences; for if this were within the statute, every breach of warranty or false assertion at the time of a bargain might be treated as a false pretence.[8] Such warranties, in fact, are mere matters of form, and considered as such; or, if they are inducements to purchase, are only so because they are promises by the vendor to hold the vendee harmless.[9] But if a warranty is couched in the shape of a positive false statement of a material latent fact, which statement leads to

[1] R. *v.* Burgon, 36 Eng. L. & Eq. 615; Dears. & B. C. C. 11; 7 Cox C. C. 131. See State *v.* Hill, 72 Me. 238.

[2] Com. *v.* Lincoln, 11 Allen, 233; State *v.* Newell, 1 Mo. 248. This and the following case are in some States (*e. g.*, Massachusetts) specifically indictable by statute. See Nixon *v.* State, 35 Ala. 120.

[3] People *v.* Sully, 5 Parker C. R. 142. But see under California statute, People *v.* Cox, 45 Cal. 343.

[4] State *v.* Dorr, 33 Me. 498; State *v.* Hill, 72 Me. 238; Com. *v.* Grady, 13 Bush, 285.

[5] *Infra*, § 1186; People *v.* Sully, *ut sup.*; though see Com. *v.* Brady, 13 Bush, 285.

[6] People *v.* Garnett, 35 Cal. 470.

[7] *Infra*, § 1192; State *v.* Young, 76 N. C. 258; State *v.* Chunn, 19 Mo. 233.

[8] R. *v.* Codrington, 1 C. & P. 661.

[9] R. *v.* Codrington, *ut supra*; State *v.* Chunn, 19 Mo. 233.

the purchase, it is a false pretence.[1] Nor is it any defence to a charge of a false pretence that it was backed up by a written warranty as to the future.[2]

§ 1162. Obtaining goods by giving in payment a cheque upon a banker with whom the party keeps no account, and which he knows will not be paid, is clearly within the statute.[3] So where one in a fictitious name delivered to a person, to sell on commission, spurious lottery tickets purporting to be signed by himself, and received from the agent the proceeds of the sale, he was held liable to indictment for obtaining such agent's goods by false pretences.[4] And so generally as to the passing of spurious notes or coin if goods or money be obtained thereby.[5] But where the prisoner passed the note of a country

And so of negotiating worthless or spurious paper.

[1] R. *v.* Kenrick, 5 Q. B. 49; Dav. & M. 208; R. *v.* Abbott, *infra;* State *v.* Dorr, 33 Me. 498; State *v.* Stanley, 64 Ibid. 157; State *v.* Jones, 70 N. C. 75; State *v.* Munday, 78 Ibid. 460; State *v.* Newell, 1 Mo. 248. See *infra*, § 1180.

[2] Watson *v.* People, 87 N. Y. 561; 26 Hun, 76.

[3] R. *v.* Freeth, R. & R. 127; R. *v.* Jackson, 3 Camp. 370; 2 East P. C. 940; R. *v.* Parker, 2 Mood. C. C. 1; 8 C. & P. 825; Smith *v.* People, 47 N. Y. 303; Foote *v.* People, 17 Hun, 218; Com. *v.* Collins, 8 Phila. 609; Maley *v.* State, 31 Ind. 192.

In R. *v.* Hazelton, L. R. 2 C. C. 134; 13 Cox C. C. 1, the prisoner was indicted for obtaining goods by (amongst others) the false pretence that certain cheques were good and valid orders for the payment of their amount. It was proved that the prisoner ordered goods of the prosecutors, and said he wished to pay ready money for them. He gave cheques on a bank for the price, and took away the goods. The prisoner had shortly before opened an account at the bank, but had drawn out the amount deposited, except a few shillings. Various cheques of his had been refused payment, and he would not have been permitted to overdraw. He did not intend when he gavethe cheques to the prosecutor to meet them, but intended to defraud. It was ruled that there was evidence of the false pretence that the cheques were good and valid orders for the payment of their amount.

On this case Sir J. F. Stephen (Dig. C. L. art. 330) comments as follows: "There was some slight difference of opinion (or rather of expression) amongst the judges in this case. The judges were anxious to point out that to give a cheque on a bank where the drawer has no balance is not, necessarily, an offence, as he may have a right to overdraw or a reasonable expectation that, if he does, his drafts will be honored. These considerations would seem to affect not the falseness of the pretence, but the defendant's knowledge of its falsehood, and his intent to defraud."

[4] Com. *v.* Wilgus, 4 Pick. 177. *Infra*, § 1170.

[5] R. *v.* Coulson, T. & M. 332; 1 Den. C. C. 592; 4 Cox C. C. 227; R. *v.* Freeth, R. & R. 127; R. *v.* Jarman, 38 L. T. (N. S.) 460; 14 Cox C. C. 111;

bank which he knew had stopped payment, it appearing that one of the partners was solvent, Gaselee, J., held that he could not be convicted for obtaining money under false pretences, there being no proof that the note had lost its value.[1] Whether the note is valueless is to be determined on all the evidence in the case;[2] and evidence that the bank has paid a dividend is of weight, as showing the note is of some value.[3] Generally, however, it is enough to prove in such case that the bank was broken, and unable to pay; and that these facts the defendant knew.[4] Nor does it make any difference that the note was on its face defective, and that the prosecutor could read.[5] On the other hand, the mere passing of a note, or other business paper on its nominal value, is an affirmation of its value.[6]

For A. falsely to sign his name as agent for B. and thereby obtain goods, is a false pretence in A.;[7] and so for A. falsely to declare that a signature of a non-existent person made by him is good.[8]

§ 1163. Even a post-dated cheque is within the statute, if the defendant falsely declares or implies that the cheque is genuine and good.[9] Thus where the prisoner was charged with falsely pretending that a post-dated cheque, drawn by himself, was a good and genuine order for £25, and

And so of uttering post-dated cheque.

R. *v.* Dowey, 11 Ibid. 115; Com. *v.* Hulbert, 12 Met. 446; Com. *v.* Nason, 9 Gray, 125; Maley *v.* State, 31 Ind. 192; Cheek *v.* State, 1 Cold. 172, and cases cited *infra*, § 1164. See State *v.* Allred, 84 N. C. 749.

[1] R. *v.* Spencer, 3 C. & P. 420.

[2] *Supra*, § 1165.

[3] R. *v.* Evans, Bell C. C. 187; 8 Cox C. C. 257.

[4] See *infra*, § 1165.

[5] R. *v.* Jessop, Dears. & B. C. C. 442. *Infra*, § 1189.

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

[7] *Supra*, §§ 657, 669.

[8] *Supra*, §§ 659, 660.

[9] Lesser *v.* People, 73 N. Y. 78; S C., 12 Hun, 668.

In this case the facts were as follows: On the 28th of August the prisoner, having bargained for goods of complainant, sent out from complainant's residence, where he was, a friend who was with him to get, as he said, the money to pay for the goods. The friend soon after returned with a cheque on a bank, purporting to be drawn by one Steinbach, and dated August 29. This, prisoner represented to be a valid security, and attention being called to the fact that it was dated the 29th, stated that this was done because it was so late in the day and the bank was closed. No account was kept at the bank by any Steinbach, and the cheque was worthless. The cheque was taken and prisoner and his friend took away the goods. It was held by the Court of Appeals, affirming the judgment of the court below, that the offence constituted a false pretence, and the fact that the cheque was post-dated would not be ground to set aside a conviction for obtaining goods under false pretences.

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

Obtaining money by forged paper not larceny but false pretences.

§ 1164. As the person who advances money or goods on a forged cheque parts absolutely with his property in the thing passed, it is not larceny but false pretences so to obtain money or goods.[2]

Such has been held to be the law in a case where a servant, who had authority to buy goods, and was to be repaid on producing a ticket containing a statement of the purchase, produced such a ticket, and obtained the amount stated therein, no purchase having been in fact made.[3]

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

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

False claims to government a statutory offence.

§ 1164*a*. By the Revised Statutes of the United States (§ 5438), it is made an indictable offence to present a false claim to the government, knowing it to be false.[6]

[1] R. *v.* Parker, 7 C. & P. 825; 2 Mood. C. C. 1. See *infra*, § 1174. That passing half a bank note may be a false pretence, see R. *v.* Murphy, 13 Cox C. C. 298.

[2] R. *v.* Prince, L. R. 1 C. C. 150; 11 Cox C. C. 173; so as to obtaining goods by forged or flash notes or coin; R. *v.* Coulson, T. & M. 332; 1 Den. C. C. 592; 4 Cox C. C. 227; R. *v.* Byrne, 10 Ibid. 369; Com. *v.* Hulbert, 12 Met. 446; Com. *v.* Stone, 4 Met. 43; Com. *v.* Nason, 9 Gray, 125; Tyler *v.* State, 2 Humph. 37; though see R. *v.* Evans, 5 C. & P. 553; Cheek *v.* State, 1 Cold. (Tenn.) 172.

[3] R. *v.* Barnes, 2 Den. C. C. 59.

[4] *Supra*, § 964.

[5] *Infra*, § 1344.

[6] See U. S. *v.* Hull, 14 Fed. Rep. 324; U. S *v.* Snyder, Ibid. 554; 4 McCr. 618; U. S. *v.* Stroback, 4 Woods, 592.

3 *Falsity of the Pretences.*

Only strong probability of falsity need be shown.

§ 1165. It is generally impossible to prove an absolute negative, and it is sufficient, therefore, for the prosecution to approximate, as far as is in its power, to such negative, leaving it to the defendant, if he can, to break this down by proving the affirmative fact.[1] This may be illustrated by cases where the note of a broken bank is passed. The prosecution must, as has been seen,[2] prove that the bank is broken; and if it appear that, though the bank has stopped, there are still solvent parties who are liable for its paper, there can be no conviction on a count alleging the note to be worthless.[3] Yet where the pretence is that a note is worth its nominal value, or that it is good, it is not necessary for the prosecution, where the bank is insolvent, to negative every possibility of payment by showing that all the stockholders of the bank had paid in their stock.[4]

The same position, *i. e.*, that proximate proof is enough, was reached where the allegation was that B. obtained twenty yards of carpet by falsely pretending that "a certain person who lived in a large house down the street, and had had a daughter married some time back, had been at him about some carpet, and had asked him to procure a piece of carpet, whereas no such person had been at him about any carpet, or had any such person asked him to procure any piece of carpet." The evidence was that B. obtained twenty yards of carpet by stating to the prosecutor, who was a shopkeeper in a village, that he wanted some carpeting for a family living in a

[1] See Whart. on Ev. § 356; Whart. on Cr. Ev. § 321.

P., the prosecutor, lent money to C. at interest, on the security of a bill of sale on furniture, a promissory note of C. and another person, and a declaration made by C. that the furniture was unincumbered. The declaration was untrue at the time it was handed to P., C. having, a few hours before, given a bill of sale for the furniture to another person, but not to its full value. It was held that there was evidence to support the prosecution. R. *v.* Meakin, 11 Cox C. C. 270.

But where it appeared that C., on engaging an assistant from whom he received a deposit, represented to him that he was doing a good business, and that he had sold a good business for a certain large sum, whereas the business was worthless, and he had been bankrupt, it was ruled that the indictment could not be sustained upon either of the representations. R. *v.* Williamson, 21 L. T. N. S. 444—Byles.

[2] See *supra*, § 1162.

[3] R. *v.* Spencer, 3 C. & P. 420; R. *v.* Evans, Bell C. C. 187; 8 Cox C. C. 257.

[4] Com. *v.* Stone, 4 Met. 43.

large house in the village, who had had a daughter lately married; that B. afterwards sold the carpeting so obtained to two different persons, and a lady was called, who lived in the village, whose daughter was married about a year previously, and who stated that she had not sent B. to the prosecutor's shop for the carpet. It was held, that there was a sufficient false pretence proved and negatived, and the case of the prosecution was made out.[1] And where a postman falsely pretended that the sum of 2*s.* was payable on a post letter intrusted to him for delivery, whereas 1*s.* only was payable, it was held that the offence was complete when he made the pretence, and that the absence of any evidence to show positively that he did not pay over the extra 1*s.* to the superior officer was immaterial to his guilt or innocence.[2] That the defendant knew the statement to be false, is also to be inferentially shown.[3]

Burden of negative is on prosecution.

§ 1166. The burden of approximating a negative is on the prosecution, though when this is done, any matter peculiarly within the defendant's knowledge is to be supplied by the defence.[4] In other words, while the prosecution must make out all the elements of its case, this is to be done inferentially as closely as possible; and when a reasonable certainty is reached, it is for the defendant to produce the affirmative proof requisite to break down the prosecution's approximate negative.[5] Thus, in a Mississippi case, it was correctly held error, on an indictment against a person for pretending to be a Baptist minister in good standing, to charge the jury "that if the accused made the false representations as stated, and thereby obtained the money, they will find him guilty, unless the accused has shown the truth of these representations."[6] Yet it would have been sound law to have told the jury, that if, from the evidence of the prosecution, it was to be inferred with reasonable certainty that the defendant was not a Baptist minister, the burden was on him, by producing his license, or proving his authority, to show that he was what he thus pretended to be.

[1] R. *v.* Burnsides, Bell C. C. 282; 8 Cox C. C. 370.

[2] R. *v.* Byrne, 10 Cox C. C. 369.

[3] Whart. on Ev. §§ 39, 725. As to *scienter*, see *infra*, § 1185. As to ignorance as a defence, see *supra*, §§ 84 *et seq.*

[4] See Whart. Crim. Ev. § 321; State *v.* Wilbourne, 87 N. C. 529.

[5] See Whart. Crim. Ev. §§ 321–2, 329, 341.

[6] Bowler *v.* State, 41 Miss. 570. See as to license, *infra*, §§ 1499 *et seq.*

But pretence must be squarely negatived.

§ 1167. The pretence must be squarely negatived.[1] Thus it is not enough, in order to prove the insolvency of a partnership, to show the private indebtedness of particular partners.[2]

Sufficient to disprove one pretence.

§ 1168. While each particular pretence on which conviction is sought must be thus negatived, it is not necessary to negative *all* the pretences. Any one proved and negatived, if it supplied a preponderating motive, is sufficient to convict.[3]

Expecting to pay no negation.

§ 1169. When the pretence is false, it is no defence that the defendant expected to pay when he should be able.[4]

4. *Pretences need not be in Words.*

Conduct is a sufficient pretence.

§ 1170. The conduct and acts of the party will be sufficient, without any verbal assertion,[5] and words, written or spoken, imperfectly setting forth a pretence may be supplemented by proof of facts completing the false pretence.[6] Where a man assumes the name of another to whom money is due on a genuine instrument, this by itself is indictable.[7] Where, as we have already seen, a person at Oxford, who was not a member of the University, went to a shop for the purpose of fraud, wearing a commoner's cap and gown, and obtained goods, this was held within the act, though not a word passed as to his *status*.[8] And so where the defendant, an employé in a hospital, wrote to a manager for linen, not saying in words that it was for the hospital, but knowingly creating

[1] R. *v.* Kelleher, 14 Cox C. C. 48; State *v.* Alphin, 84 N. C. 745; State *v.* Alfred, Ibid. 749.

[2] Com. *v.* Davidson, 1 Cush. 33.

[3] *Infra*, §§ 1176, 1218; Whart. Crim. Ev. § 131; Com. *v.* Stevenson, 127 Mass. 446; Webster *v.* People, 92 N. Y. 422; Beasley *v.* State, 59 Ala. 20; State *v.* Vorbeck, 66 Mo. 168.

[4] R. *v.* Naylor, L. R. 1 C. C. 4; 10 Cox C. C. 149.

[5] R. *v.* Giles, L. & C. 502; 34 L. J. 50, M. C.; 10 Cox C. C. 44; R. *v.* Hunter, Ibid. 642. That there is no distinction in this respect between written and unwritten words, see Com. *v.* Stevenson, 127 Mass. 446.

[6] R. *v.* Cooper, L. R. 2 Q. B. D. 510; 36 L. T. 671; R. *v.* Powell, 51 L. T. N. S. 713, citing R. *v.* Giles, *supra*. As to variance, see *infra*, § 1214.

[7] R. *v.* Story, R. & R. 81; R. *v.* Barnard, 7 C. & P. 784. See *supra*, § 1161.

[8] *Supra*, § 1153. See Com. *v.* Daniels, 2 Pars. 332.

that impression in the manager's mind.[1] The mere passing business paper, also, at its nominal value, is an affirmation that such value is real.[2] But to make silence a pretence, it must be part of conduct or acquiescence involving an affirmation.[3]

Silence in acquiescing in another's statements may amount to a false pretence.[4] But the silence must be of a character to imply an affirmation of such statements.[5]

[1] R. *v.* Franklin, 4 F. & F. 94.

In an English case determined in 1877, the prisoner, on entering the service of a railway company, signed a book of rules, a copy of which was given to him. One of the rules was, "No servant of the company shall be entitled to claim payment of any wages due to him on leaving the company's service until he shall have delivered up his uniform clothing." On leaving the service he knowingly and fraudulently delivered up, as part of his uniform, to an officer of the company, a great-coat belonging to a fellow-servant, and so obtained the wages due to him. It was ruled that he was properly convicted of obtaining the money by false pretences. R. *v.* Bull, 36 L. T. (N. S.) 376; 13 Cox C. C. 608.

[2] *Supra*, § 1162.

[3] People *v.* Baker, 96 N. Y. 340.

[4] Young *v.* R., 3 T. R. 98. See Whart. Cr. Ev. § 679; People *v.* Cline, 44 Mich. 290. The fact that I stand by while B. is lending money to A., who I know is insolvent, will not make me liable to B. unless I do something to corroborate A.'s statements of his solvency. There is no causal relation between my silence and B.'s loan. It is otherwise with my silence when such silence is in any way an affirmation of A.'s statements. But to action, in this sense, words are not necessary. As we have seen, the man who buys goods in a military uniform, which he is not entitled to wear, and who gets these goods on the credit of the uniform, under circumstances which make credit of this kind reasonable, is as responsible as if he said, "I am a military man."

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

[5] *Supra*, § 211 *d*.

5. *They need not be by the Defendant personally.*

§ 1171. Where two persons are jointly indicted for obtaining goods by false pretences, made designedly and with intent to defraud, evidence that one of them, with the knowledge, approbation, concurrence, and direction of the other, made the false pretences charged, warrants the conviction of both.[1]

Pretence by one confederate is pretence by all.

ing on any business, examines all the attainable facts, to deliver to the other contracting party a lecture which, if nothing were suppressed, might occupy days. It would make every one the guardian, in business, of every one else. See Merkel's Criminalistische Abhandlungen, and see 5 South. Law Rev. 374.

A mere use of another's error will not make a false pretence, unless there is something done by the deceiving party to confirm such error. Otherwise, a person selling stock in the market, he possessing exclusive information (honorably acquired) of circumstances calculated to make the stock less valuable, would be indictable. In no case, in fact, where there is a sale, is the information of the parties the same; hence, if the concealing of information is a false pretence, there is no sale which would not be open to an indictment for false pretences. Whart. on Cont. §§ 232 *et seq.*

Yet there are, as we have seen, cases in which suppression of a fact by a vendor is an indictable false pretence. A jeweller, for instance, sells a spurious ring as of true metal. He may not say, "This is gold," but he asks for it the price of gold, and from his whole conduct the assertion that it is gold is implied. He is as much indictable for false pretences as if he had actually said, "This is gold." Suppose, however, that the sale is not of a gold ring, but of a mass of bullion, at a time when specie payments are suspended. If the bullion be sold as gold, but is of base metal, then an indictment lies. But an indictment does not lie because it turns out that the vendor has secret information from which he has reason to conclude that gold will materially fall in value soon after the sale. The distinction is this: By the usage of trade, he who sells an article as of a particular class warrants it to be of that class, so that he becomes responsible if it is spurious; but if the article be genuine, there is no warranty as to its value.

In interpreting words when used as false pretences, we must take them in the sense in which they are understood by the person deceived. The deceiver cannot shelter himself by the pretext that the words had a double meaning, and that they might, in one sense, be truthful, though not in the sense in which they were accepted. Ibid. §§ 627 *et seq.*

He who enters into a bargain of any kind implies:—

I. The existence of all conditions essential to the validity of the transaction on his part, so far as such con-

[1] R. *v.* Moland, 2 Mood. C. C. 271; Com. *v.* Harley, 7 Met. 462; Cowen *v.* People, 14 Ill. 348; Whart. Cr. Ev. § 102. *Infra*, §§ 1202, 1211–2.

An allegation in an indictment that the defendants obtained goods of A., B., and C., partners in trade, by false pretences made to them, is supported by proof that the defendants made the alleged false pretences to their clerk and salesman, who communicated them to B., and that the goods were delivered to the defendants in consequence of those false pretences.[1] And it is not necessary, in

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

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

III. A bargaining party also implies the existence of the conditions on which the other party depended when entering into the transaction. Thus, the manufacturer who delivers to his customers particular articles implies the existence of qualities which go to make up the value of the goods when ordered. The grocer who delivers a package to a purchaser calling for a pound of coffee implies that the package contains the article called for, in the required quantity. Of this kind of implicit assertion Mittermaier gives us the following illustration: "A customer sees an ornament, exquisitely elaborated, set with cut stones; he supposes they are jewels, and offers $100 for the ornament; the vendor sees the error of the purchaser, but does not undeceive him, and takes the money." This is a case of obtaining money on false pretences. The offering of $100 for an ornament which would not be worth one-tenth that sum if the stones were not jewels, is equivalent to a statement by the purchaser that they were jewels, and to a silent admission by the vendor to the same effect. At the same time, it must be remembered that a bare entrance into a particular transaction is not in itself such an affirmation of the opinion of the other contracting party as to amount to a false pretence, even though the transaction be entered into fraudulently. It is possible to take an attitude of absolute "non-committalism" as to such expressions, and it would be absurd to treat a refusal to affirm as an affirmation. A.—to take another of Mittermaier's cases—imagines that he has made a large sum in a speculation in which he was engaged; exhilarated with his supposed good fortune, he pays a debt of 500 florins; the creditor takes the money, knowing at the time that the debtor is in error as to the success of the speculation, but without undeceiving him. Putting aside the fact that obtaining payment of a debt cannot be made, by itself, indictable, there is in this case no assent by the party receiving the money to assumptions by the other party which are essential incidents of the bargain. Whart. on Cont. §§ 232 *et seq.*

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

order to convict the defendants in such case, to prove that they, or either of them, obtained the goods on their own account, or derived, or expected to derive, personally, any pecuniary benefit therefrom.[1] And, generally, the delivery of goods or money to a third person on account of the defendant, is a delivery to the defendant.[2]

§ 1172. The prosecutor, however, cannot prove false pretences made by a third person, alleged to have been made by the procurement of the defendant, without first showing that the defendant instigated such person to make them;[3] nor can the defendant, who fraudulently negotiates spurious paper, be convicted under the statute for the subsequent act of the purchaser of such spurious paper, done innocently and without the defendant's knowledge or instigation, in obtaining money on such paper.[4]

Confederacy must be first shown.

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

§ 1173. A false pretence, under the statute, must relate to a past event or existing fact. Any representation with regard to a future transaction is excluded.[5] Thus, for instance, a false statement, that a draft, which the defendant exhibits to the prosecutor, has been received

Promises or predictions are not false pretences.

made. It was held, that the acts of P. were the acts of K., and admissible against him upon the indictment. R. *v.* Kerrigan, 9 Cox C. C. 441.

[1] *Infra*, § 1184; Com. *v.* Harley, 7 Met. 462; R. *v.* Moland, 2 Mood. C. C. 271; Cowen *v.* People, 14 Ill. 348; but see *infra*, § 1202.

An indictment charged the prisoner with attempting, by false pretences made to J. B. and others, to defraud the said J. B. and others of certain goods, the property of the said J. B. and others. On the trial, it was proved that the prisoner made the false pretences set forth in the indictment to J. B. only, with intent to defraud J. B. and others, his partners, of property belonging to the firm; and it was held that there was no variance between the indictment and the proof, as the words, "and others," in the allegation that the false pretence was made "to J. B. and others," might be rejected as surplusage. R. *v.* Kealey, 1 Eng. L. & Eq. 585; 2 Den. C. C. 68.

[2] Sandy *v.* State, 60 Ala. 58. *Infra*, § 1227.

[3] Per Bronson, C. J., People *v.* Parish, 4 Denio, 153.

[4] *Infra*, § 1202.

[5] R. *v.* Lee, L. & C. C. C. 309; R. *v.* Goodhall, R. & R. 461; R. *v.* Woodman, 14 Cox C. C. 179; R. *v.* Burgon, D. & B. 11; Burrell, *ex parte*, L. R. 1 Ch. D. 552; Sawyer *v.* Prickett, 19 Wal. 146; Long *v.* Woodman, 58 Me. 49; Com. *v.* Stevenson, 127 Mass. 446; Com. *v.* Drew, 19 Pick. 179; People *v.* Blanchard, 90 N. Y. 314; Com. *v.* Moore, 99 Penn. St. 570; Dillingham *v.* State, 5 Ohio St. 280; Colly *v.* State, 55 Ala.

from a house of good credit abroad, and is for a valuable consideration, on the faith of which he obtains the prosecutor's goods, is within the law; a promise to deposit with him such a draft at some future time, though wilfully and intentionally false, and the means of the prosecutor's parting possession with his property, is not. So a pretence that the party would do an act that he did not mean to do (as a pretence that he would pay for goods on delivery) was ruled by all the judges not to be a false pretence, within the statute of Geo. II.;[1] and the same rule is distinctly recognized in this country,[2] it being held that the statement of an intention is not a statement of an existing fact.[3] Thus, to take as an illustration an English case, on an indictment for obtaining goods in a market by falsely pretending that a room had been taken at which to pay the market people for their goods, the jury found that the well-known practice was for buyers to engage a room at a public house, and that the prisoner conveyed to the minds of the market people that she had engaged such a room, and that they parted with their goods on such belief. It was held, there being no evidence that the prisoner knew of such a practice, and the case being consistent with a promise only on her part to engage such a room and pay for the goods there, that a conviction could not be sustained.[4]

§ 1174. But a concurrent promise does not neutralize an accompanying false pretence.[5] If there be the false statement of an existing

85; State *v.* Evers, 49 Mo. 542; Ryan *v.* State, 45 Ga. 128; Keller *v.* State, 51 Ind. 111.; Gage *v.* Lewis, 68 Ill. 604; Canter *v.* State, 7 Lea, 349; Snyder, *in re*, 17 Kans. 542; McKenzie *v.* State, 6 Eng. (Ark.) 594; Johnson *v.* State, 41 Tex. 65. See, as conflicting with this rule, State *v.* Nichols, 1 Houst. C. C. 114.

[1] R. *v.* Goodhall, R. & R. 461; R. *v.* Wakeling, Ibid. 504; R. *v.* Oates, Dears. C. C. 459; 29 Eng. L. & Eq. 552. See Glackan *v.* Com., 3 Metc. (Ky.) 232.

[2] Com. *v.* Drew, 19 Pick. 179; Com. *v.* Lincoln, 11 Allen, 233; People *v.* Haynes, 11 Wend. 565; 14 Ibid. 546; Com. *v.* Burdick, 2 Barr, 163; Burrow *v.* State, 7 Eng. (Ark.) 65; Glackan *v.* Com., 3 Metc. (Ky.) 232. *Supra*, § 1136.

[3] Ibid.; People *v.* Blanchard, 90 N. Y. 314.

[4] R. *v.* Burrows, 11 Cox C. C. 258.

Where the prosecutor lent £10 to the prisoner, induced by his false pretence that he was going to pay his rent, and the proof was that if the prisoner had not told him that he was going to pay his rent the prosecutor would not have lent the money; it was held that this was not such a false pretence of an existing fact as to warrant a conviction. R. *v.* Lee, 9 Cox C. C. 304.

[5] See R. *v.* Burgon, D. & B. 11; 7 Cox C. C. 131; State *v.* Hill, 72 Me. 238; State *v.* Cowdin, 28 Kan. 269.

fact, the adding to this of false promises does not take the case out of the statute, when the false pretence was the decisive influence.[1] And this holds, even though the prosecutor would not have yielded to the pretence without the promise.[2] And it is even said by Crompton, J., that the pretence need not necessarily be of some alleged existing fact, capable of being disproved by positive testimony, but may depend on the *bonâ fide* intention and capacity of the defendant at the time of entering into a contract to perform it, or to do some act at a future period.[3] Hence, as we have seen,[4] it may be a false pretence to utter a post-dated cheque.

But false pretence is not neutralized by concurrent promise.

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

§ 1175. Where, in Massachusetts, one of the representations proved was that the defendant gave a false name, and where the prosecutor testified that this misrepresentation had no influence in inducing him to part with his goods, it was held to have been the duty of the court, either at the time or in the charge, to instruct the jury that such misrepresentation was not, upon the evidence, proved to have been an inducing motive to the obtaining of the goods by the defendant.[5] The same view generally obtains, it being held that there must be causal relation between the pretence and the transfer.[6]

Unless operative, not within statute.

[1] R. *v.* Jennison, Leigh & Cave, 157; 9 Cox C. C. 158; R. *v.* West, 8 Ibid. 12; R. *v.* Asterley, 7 C. & P. 191; Com. *v.* Lincoln, 11 Allen, 233; State *v.* Rowley, 12 Conn. 101. Of this principle a striking illustration is given, *supra*, § 1163; and as to promises to marry, see *supra*, § 1148.

[2] R. *v.* West, 8 Cox C. C. 12; R. *v.* Fry, 7 Ibid. 394; D. & B. 449.

[3] R. *v.* Jones, 6 Cox C. C. 467.

[4] *Supra*, § 1162.

[5] R. *v.* Dale, 7 C. & P. 352; Com. *v.* Davidson, 1 Cush. 33; Clark *v.* People, 2 Lans. 329. See R. *v.* Gardner, 7 Cox C. C. 136; D. & B. 40; Com. *v.* Drew, 19 Pick. 179; Com. *v.* Herschell, Thacher's C. C. 70; Schleisinger *v.* State, 11 Ohio St. 669.

[6] R. *v.* Dale, 7 C. & P. 352; Horsfall *v.* Thomas, 1 H. & C. 90; People *v.* Miller, 2 Parker C. R. 197; R. *v.* Larner, 14 Cox C. C. 497; Therasson *v.* People, 82 N. Y. 238; People *v.* Baker, 96 Ibid. 340; State *v.* Tomlin, 5 Dutch. 14; State *v.* Timmons, 58 Ind. 98; People *v.* McAllister, 49 Mich. 12. *Infra*, § 1227.

The cases usually given on this point are those where the prosecutor was, at the time when the false pretence was uttered, fully aware of its falsity. Suppose, however, he was firmly convinced, before the utterance, of the truth of the statements of which the false pretence consisted, and that the false pretence in no way confirmed or strengthened him in this belief; can it

§ 1176. But it is not necessary to a conviction that the false pretence alleged should have been the sole inducement by which the property in question is parted with, if it had a preponderating influence sufficient to turn the scale, although other considerations operated upon the mind of the party.[1] And this is true even though the prosecutor would not have surrendered the goods solely on the pretence alleged. To require that the belief should be the exclusive motive would exclude conviction in any case; for in no case is any motive exclusive.[1]

Yet it need not be the sole motive.

be said that he parted with his goods on the faith of the false pretence? Or, to put the case in the concrete: A. is firmly of the belief that B. is a rich man, worth $100,000. B. comes to A., and says, "Lend me $10,000; I am worth that sum." B.'s statement that he is worth $10,000 has no effect on A., who is already convinced of B.'s great wealth, outside of this declaration. A. lends B. the money. Supposing that B.'s statement was knowingly false, can he be convicted of obtaining money on false pretences? Certainly not, if A. declare he lent the money solely from what he knew by himself.

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

[1] *Supra*, § 153; R. *v.* Hewgill, Dears. 315; 24 Eng. Law & Eq. 556; R. *v.* English, 12 Cox C. C. 171; R. *v.* Eagleton, Dears. 515; R. *v.* Lince, 12 Cox C. C. 451; Turner, J., Nichol's Case, 1 D. & J. 387; Clarke *v.* Dixon, 7 H. L. C. 750; State *v.* Mills, 17 Me. 211; State *v.* Dunlap, 24 Ibid. 77; Com. *v.* Coe, 115 Mass. 481; People *v.* Haynes, 14 Wend. 546; People *v.* Herrick, 13 Ibid. 87; Thomas *v.* People, 34 N. Y. 351; People *v.* Baker, 96 Ibid. 390; Morgan *v.* Skiddy, 62 Ibid. 319. See People *v.* Stetson, 4 Barb. 151; State *v.* Thatcher, 35 N. J. 445; Fay *v.* Com., 28 Grat. 912; Smith *v.* State, 55 Miss. 513; Snyder, *in re*, 17 Kans. 542; State *v.* Tessier, 32 La. An. 1227; Bowler *v.* State, 41 Miss. 570; and *infra*, § 1218.

In R. *v.* Steels, 11 Cox C. C. 5, a conviction was sustained on an indictment which alleged that C., the prisoner, obtained a coat from P. by falsely pretending that a bill of parcels of a coat, value 14*s.* 6*d.*, of which 4*s.* 6*d.* had been paid on account, and that 10*s.* only was due, was a bill of parcels of another coat of the value of 22*s.* The evidence was that C.'s wife had selected the 14*s.* 6*d.* coat for him, subject to its fitting him, and had paid 4*s.* 6*d.* on account, for which she received a bill of parcels giving credit for that amount. On trying on the coat it was found to be too small, and C. was then measured for one to cost 22*s.* When that was made it was tried on by P., who was not privy to the former part of the transaction. C., when the coat was given to him, handed the bill of parcels for the 14*s.* 6*d.* and 10*s.*, saying, "There is 10*s.* to pay." The bill was receipted, and the prisoner took the 22*s.* coat away with him. P. stated that believing the bill of parcels to refer to the 22*s.* coat, he parted with that coat on payment of 10*s.*, otherwise he should not have done so. R. *v.* Steels, 17 L. T. N. S. 666; 11 Cox C. C. 5 — C. C. R.

§ 1177. If the pretences were not made use of until after the bargain was consummated, it cannot be said, with truth, that it was by force of them the property was obtained.[2] Thus, in a New York case, a purchase of merchandise was made, the goods selected, put in a box, and the name of the purchaser and his place of residence marked thereon, and the box containing the goods put on board a steamboat designated by the purchaser, to be forwarded to his residence: it was held that the sale was complete at this point, and the goods became the property of the purchaser. Hence, where, after such delivery, the vendor, on receiving information inducing him to suspect the solvency of the purchaser, expressed an intention to reclaim the goods, and the purchaser thereupon made representations in respect to his ability to pay, by means of which the vendor abandoned his intention, and the purchaser was then indicted, charged with the offence of having obtained the goods by false pretences, these representations being the alleged false pretences; it was ruled that the sale being complete before the representations were made, the defendant could not be considered guilty of the crime charged against him.[3] So where a carrier, having ordered a cask of ale, said, after he had possession of it, "This is for W.:" it was held that an indictment for obtaining it by falsely pretending that he was sent for it by W. could not be sustained.[4]

Must have been before bargain closed.

Until the bargain is closed and property passed no goods are obtained.[5]

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

Verification by prosecutor may be a defence.

[1] *Supra*, § 119.

[2] R. *v.* Jones, 15 Cox C. C. 475; 50 L. T. (N. S.) 726; State *v.* Church, 43 Conn. 471; State *v.* Vanderbelt, 3 Dutch. 328; State *v.* Tomlin, 5 Ibid. 14.

[3] People *v.* Haynes, 11 Wend. 565; 14 Ibid. 546. See R. *v.* Dale, 7 C. & P. 352. *Infra*, § 1227.

[4] R. *v.* Brooks, 1 F. & F. 502.

[5] See Whart. on Cont. §§ 5 *et seq.*

and not placing any reliance upon the prisoner's statement, lent the prisoner ten shillings, the sum he asked, and took the chain as a pledge. It was held, that if the money had been obtained on the statement made by the prisoner, he might have been convicted of obtaining it by false pretences; but that, as the prosecutor relied entirely upon his own examination, and not upon the false statement, the prisoner was properly found guilty of only an attempt to commit that offence.[1] Yet this result would not be reached if the parties be reversed: a jeweller making the false pretence as to material, and an ignorant purchaser resorting to some imperfect verification of his own. In the last case the inference would be that the vendor's false pretence would be operative; in the first case, the contrary.

Pretence must have been direct cause, and property must have been transferred.

§ 1179. The pretence must operate as the direct cause of the transfer; and therefore, where it does not, the statute does not apply.[2] This was the reasoning in an English case where the prisoner, by falsely pretending that he was a naval officer, induced the prosecutrix to enter into a contract to lodge and board him at a guinea a week, and under this contract he was lodged and supplied with various articles of food. It was held that a conviction for obtaining the articles of food by false pretences could not be sustained, as the obtaining of the food was too remotely the result of the false pretence.[3] Hence, as we have seen, the prosecution fails when it is shown that the pretences were made after the goods were obtained.[4]

When statements were made on different occasions, it is for the jury to say whether they were so connected as to form one transaction.[5]

The prosecutor must have intended to part with his right of property in the goods, and not merely with his possession.[6]

When a judgment by consent is obtained by false pretences, and

[1] R. v. Roebuck, 36 Eng. L. & Eq. 631; D. & B. 24; 7 Cox C. C. 126. *Infra*, § 1182.

[2] See R. v. Jones, 50 L. T. (N. S.) 725; 15 Cox C. C. 475; Therasson v. People, 82 N. Y. 238.

[3] R. v. Gardner, 36 Eng. L. & Eq. 640; 7 Cox C. C. 136; D. & B. 40; R. v. Hamilton, 9 Ad. & L. (N. S.) 271; and see *infra*, § 1202.

[4] *Supra*, § 1177.

[5] R. v. Welman, 20 Eng. L. & Eq. 588; Dears. C. C. 188; 6 Cox C. C. 153; R. v. Greathead, 14 Ibid. 108; 38 L. T. (N. S.) 691; Beasley v. State, 59 Ala. 20.

[6] *Infra*, § 1203; *supra*, § 888.

the money collected under such judgment, this, it has been held by the Supreme Court of Massachusetts, is not an obtaining of money by false pretences.[1]

No defence that the goods were obtained mediately through a contract.

§ 1180. As will be hereafter seen,[2] the goods must have been obtained for defendant, and in accordance with his directions; if so, it is no defence that they were obtained mediately through a contract which the defendant's false pretence induced the prosecutor to make. At this point it is to be observed that the cases are plain to the effect that it matters not whether the goods were obtained immediately by the false pretence, or mediately by a contract to which the false pretence induced the prosecutor to consent, provided there be a causal relation between the contract and the false pretence.[3] But it must appear that when a sale is averred, a sale on some sort of consideration must be proved.[4]

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

[1] Com. v. Harkins, 128 Mass. 79; Gray, C. J., Ames and Soule, JJ., diss.

[2] *Infra*, § 1202.

[3] R. v. Abbott, 1 Den. C. C. 273; 2 C. & K. 630; R. v. Dark, 1 Den. C. C. 276; R. v. Kenrick, 1 D. & M. 208; 5 Q. B. 49; R. v. Greathead, 14 Cox C. C. 108; Com. v. Davidson, 1 Cush. 33; Com. v. Hooper, 104 Mass. 549; Com. v. Hutchison, 114 Ibid. 325; Com. v. Jeffries, 7 Allen, 549; State v. Newell, 1 Mo. 248. *Infra*, § 1229. Thus, to obtain a "trade" by a false pretence is indictable. State v. Stanley, 64 Me. 157. See State v. Hill, 72 Ibid. 238. It is otherwise when only credit on account was obtained, which was afterwards made operative by a distinct transaction. R. v. Wavell, 1 Mood. C. C. 224. *Infra*, § 1198.

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

"A. draws a bill upon B. in London, and gets it discounted by C. in Russia, by falsely pretending, by means of a forged authority, that he is authorized to draw upon B. for the amount of the bill. A. does not attempt to obtain money by false pretences from B., though he meant that C. should forward the draft to B., and should obtain payment of the amount, and though his act, if done in England, would have been an obtaining by false pretences from C. R. v. Kilham, L. R. 1 C. C. 261." *Supra*, § 878; *infra* § 1203.

"A., by falsely pretending to be a naval officer, induces B. to enter into a contract to board and lodge him at a guinea a week, and under this contract is supplied with food for a week. This is not obtaining food by false pretences, as the supply of food in consequence of the contract is too remotely the result of the false pretence to become the subject of an indictment. R. v. Gardner, D. & B. 40." *Supra*, §§ 1175, 1179.

[4] Wagoner v. State, 90 Ind. 504; Baker v. State, 14 Tex. Ap. 332.

habit of receiving from his master money to pay the workmen, obtained from him by means of false written accounts, more than he had really paid them, or they had earned, it was held within the statute; and all the judges, after much deliberation, agreed that *if the false pretence created the credit*, the case was within the statute; and they considered that, in this case, the defendant would not have obtained the credit but for the false account which he had delivered, and therefore that he was properly convicted.[1]

False accounts of payments may be a pretence.

§ 1182. The prosecutor in a trial for obtaining an indorsement by false pretences, may testify to the influence of the defendant's representations in inducing him to indorse.[2] The causal relationship in such cases is a matter of inference.[3]

Prosecutor witness to prove preponderating influence.

§ 1183. It is an essential ingredient of the offence that the party alleged to have been defrauded should have believed the false representations to be true, for if he knew them to be false, he cannot claim that he was influenced by them.[4]

Necessary that prosecutor should have believed the representations.

8. *Intent*

§ 1184. While an intention to defraud is inferable from all the facts of the case, and need not be substantively proved,[5] such an intention is necessary to the offence.[6] Thus, a surveyor of highways, having authority to order gravel for the roads, in ordering gravel as usual, and applying it to his

Intent to be inferred from facts.

[1] R. *v.* Witchell, 2 East P. C. 830; Bonnell *v.* State, 64 Ind. 498. *Supra*, § 1141, but see *infra*, § 1215.

[2] People *v.* Miller, 2 Parker C. R. 197.

[3] Therasson *v.* People, 82 N. Y. 238. *Supra*, § 1179.

[4] R. *v.* Dale, 7 C. & P. 352; R. *v.* Mills, 40 Eng. L. & Eq. 562; 7 Cox C. C. 263; D. & B. 205; Com. *v.* Hulbert, 12 Met. 446; People *v.* Stetson, 4 Barb. 151. *Supra*, §§ 1176–7.

[5] See *infra*, § 1226; R. *v.* Hamilton, 9 Ad. & El. (N. S.) 271. See, also, R. *v.* Bloomfield, C. & M. 537; People *v.* Herrick, 13 Wend. 87; People *v.* Baker, 96 N. Y. 340; Bowler *v.* State, 41 Miss. 570. As to proof of intent, see *supra*, §§ 101–122; Whart. Crim. Ev. §§ 53, 734. That knowledge of falsity is not to be inferred from independent and detached false statements to others, see People *v.* Spielman, 20 Alb. L. J. 96; S. C., under name of People *v.* Schulman, 14 Hun, 516; 76 N. Y. 624; referred to in 80 Ibid. 373 *n*; Whart. Cr. Ev. § 48.

[6] State *v.* Norton, 76 Mo. 180; Fay *v.* Com., 28 Grat. 912.

own use, is not liable to a charge of obtaining it by false pretences, nor of larceny, unless it appear that he did not mean to pay for it.[1]

§ 1184 *a*. That the pretence was used honestly to collect a just debt has been ruled to be a defence.[2]

To compel payment of debt.

§ 1184 *b*. As has been already fully seen, whenever a guilty act is deliberately performed, we may logically infer a guilty intent,[3] and it is always admissible to fortify this presumption by showing guilty preparations, or other acts from which the intent may be gathered, even though the latter acts constitute independent offences, provided they are part of a system with that on trial.[4] Thus, upon an indictment for obtaining goods by falsely pretending that the buyer owed but little, and had ample means to pay all his debts, and that his note for $250 was good, it is competent for the State to prove, that within three days after, he mortgaged the greater part of his personal property to another, as bearing upon his intent in making such representations.[5]

Proof of system admissible.

But such proof is inadmissible if relating to a disconnected transaction. Thus when C. was indicted for obtaining a specific sum of money from P. by false pretences, and the evidence was that he was employed by his master to take orders, but not to receive moneys, and he was proved to have obtained the specific sum from P. by representing that he was authorized by his master to receive it; proof of his having, within a week afterwards, obtained another sum from another person by a similar false pretence, such obtaining not being in any way connected with the transaction under trial, was held inadmissible for the purpose of proving the intent when he committed the acts charged in the indictment.[6]

§ 1184 *c*. It does not negative the intent to defraud, that the defendant intended to pay for the articles obtained when able,[7] or that he paid in part, at the time, for the articles

Intent to indemnify no defence.

[1] R. *v.* Richardson, 1 F. & F. 488—Wightman.

[2] *Infra*, § 1197; State *v.* Hurst, 11 W. Va. 54.

[3] See *supra*, § 122; Whart. Crim. Ev. § 734; People *v.* Winslow, 39 Mich. 505.

[4] See Whart. Crim. Ev. §§ 53 *et seq.*, 734, 753; Com. *v.* Jackson, 132 Mass. 16; Com. *v.* Howe, 132 Mass. 250.

[5] State *v.* Call, 48 N. H. 126; Trogden *v.* Com., 31 Grat. 862. See Whart. Crim. Ev. § 53.

[6] R. *v.* Holt, 8 Cox C. C. 411; Bell C. C. 280.

[7] R. *v.* Bowen, 13 Q. B. 790; State *v.* Thatcher, 35 N. J. 445.

In Com. *v.* Coe, 115 Mass. 481, Wells, J., said:—

"The offence consists in obtaining

obtained,[1] or that a trap was laid for him by the prosecutor,[2] or that the article obtained was not that which it was his principal motive to secure.[3] Nor is it essential that the pretence should have been made *lucri causa*.[4]

9. *Scienter*.

Defendant must be shown to have known the falsity.

§ 1185. Falsity, in the sense of the statutes, must be subjective as well as objective; the statement must not only be false in fact, but false to the knowledge of its utterer.[5] It should be remembered, however, that proof of knowledge of a negative is circumstantial and inferential. In what way this proof is constituted has been already partially considered.[6] And proof that the defendant was ignorant of a fact that he stated, sustains a charge of false statement.[7]

10. *Prosecutor's Negligence or Misconduct*.

Prosecutor not required to show prudence beyond his opportunities.

§ 1186. We have seen that to a cheat at common law it is essential that the fraud should be latent.[8] It was in part to meet this difficulty that the statute of false pretences was passed, and under this statute it has been repeatedly held that it matters not how patent the falsity of a pretence may be if it succeed in defrauding. Thus, in a leading case, Lord Denman, C. J., said, in answer to the

property from another by false pretences. The intent to defraud is the intent, by the use of such false means, to induce another to part with his possession and confide it to the defendant, when he would not otherwise have done so. Neither the promise to repay, nor the intention to do so, will deprive the false and fraudulent act in obtaining it of its criminality. Com. *v.* Tenney, 97 Mass. 50; Com. *v.* Mason, 105 Mass. 163. The offence is complete when the property or money has been obtained by such means, and would not be purged by subsequent restoration or repayment. Evidence of ability to make the repayment is therefore immaterial and inadmissible. The possession of the means of payment is entirely consistent with the fraud charged. The evidence offered on this point did not touch the question of falsity and fraud of the means by which the loan was obtained, and was properly rejected." *Supra*, § 887.

[1] R. *v.* Eagleton, Dears. 515; 33 Eng. L. & Eq. 540.

[2] *Infra*, § 1190; *supra*, § 149.

[3] Todd *v.* State, 31 Ind. 514.

[4] See R. *v.* Moland, 2 Moody, 271; Com. *v.* Harley, 7 Met. 462; Cowen *v.* People, 14 Ill. 348. *Supra*, § 895.

[5] R. *v.* Philpotts, 1 C. & K. 112; R. *v.* Henderson, 2 Mood. C. C. 192.

[6] See *supra*, §§ 1165–6.

[7] Reese *v.* Mining Co., L. R. 4 H. L. 79. *Infra*, §§ 1225, 1246.

[8] See *supra*, § 1120.

statement that the false pretences, to become the subject of indictment, should be such as would deceive a man of average intelligence, "I never could see why that should be. Suppose a man had just enough (fraud) to impose upon a very simple person, and defraud him; how is it to be determined whether the degree of fraud is such as will amount to a misdemeanor?"[1] Hence, the fact that the prosecutor did not possess or apply peculiar prudence is no defence when the prosecutor was really imposed upon.[2] Nor is it any defence that the prosecutor, by searching the records of the courts, might have discovered the falsity of the statement.[3]

Exceptions to above rule.

§ 1187. To this rule, however, some exception has been taken. Thus, in New York, it was once laid down that a representation, though false, is not within the statute unless calculated to deceive persons of ordinary prudence and discretion.[4] So, in Pennsylvania, it was said: "Broad, however, as is the phrase 'for any false pretence whatever,' it still has a legal limit beyond which it cannot be carried in this or any other case. It extends no farther than to a case where a party has obtained money or property by falsely representing himself to be in a situation in which he is not, or any occurrence which has not happened, *to which persons of ordinary caution might give credit*. Where the pretence is absurd or irrational, or such as the party injured had at the very time the means of detecting at hand, it is not within the act."[5] And the same opinion has been expressed in Arkansas.[6] In Pennsylvania, however, this exception has been qualified, it being now held that "it is no less a false pretence that

[1] R. *v.* Wickham, 10 Ad. & El. 34. Mr. Greaves (2 Rus. on Cr. 9th ed. 628) objects to this ruling, on the ground the question was for the jury.

[2] *Supra*, § 1156; R. *v.* Woolley, 1 Den. C. C. 559; R. *v.* Ball., 2 Russ. on Cr. 289; C. & M. 249; R. *v.* English, 12 Cox C. C. 171; Com. *v.* Henry, 22 Penn. St. 253; Miller *v.* State, 73 Ind. 88; Woodbury *v.* State, 69 Ala. 242; Smith *v.* State, 55 Miss. 513; Colbert *v.* State, 1 Tex. Ap. 314; though see Com. *v.* Wilgus, 4 Pick. 177; State *v.* Simpson, 3 Hawks. 620. See opinion of Wells, J., in Com. *v.* Coe, 115 Mass. 481. That in Tennessee, under statute, "common prudence" must be shown, see Delaney *v.* State, 7 Baxt. 28.

[3] State *v.* Hill, 72 Me. 238; and cases cited *supra*, § 1160.

[4] People *v.* Williams, 4 Hill, 9.

[5] Com. *v.* Hutchinson, 2 Penn. L. J. 242. See, also, State *v.* Estes, 46 Me. 150; Com. *v.* Spring, 5 Clarke (Penn.), 89; Com. *v.* Haughey, 3 Metc. (Ky.) 223; State *v.* De Hart, 6 Bax. 222.

[6] Burrow *v.* State, 7 Eng. (Ark.) 65.

the party imposed upon might, by common prudence, have avoided the imposition."[1] And in New York the position first taken has been somewhat modified. "Though the language of the statute, 'by any other false pretence,' is exceedingly broad," says Jewett, J., in a later case, "and in its general acceptation would include every kind of false pretence, and though it may be difficult to draw a line which would exclude cases where common prudence would be a sufficient protection, still I do not think it should be so interpreted as to include cases where the representation was absurd or irrational, or where the party alleged to be defrauded had the means of detection at hand. The object of the statute, it is true, was to protect the weak and credulous against the wiles and stratagems of the artful and cunning. But this may be accomplished under an interpretation which should require the representation to be an artfully contrived story, which would naturally have an effect upon the mind of the person addressed—one which would be equal to a false token or false writing—an ingenious contrivance or unusual artifice, against which common sagacity and the exercise of ordinary caution would not be a sufficient guard."[2]

His contributory negligence to be determined by his lights.

§ 1188. It is submitted, however, that whether the prosecutor "had the means of detection at hand," or whether "the pretences were of such a character as to impose upon him," are questions of fact, to be left to the jury, as they must necessarily vary with the particular case. If fraudulent and false pretences were used, and goods obtained by them, the prosecutor's capacity and opportunities must be considered in determining his culpability.[3] It must also be remembered that the statute assumes some defect in caution, for if there were perfect caution no false pretences could take effect.[4] With this

[1] Com. v. Henry, 22 Penn. St. 256—Woodward, J.

[2] People v. Crissie, 4 Denio, 529. See R. v. Roebuck, *supra*, § 1158; R. v. Mills, *supra*, § 1183; People v. Stetson, 4 Barb. 151; *infra*, § 1189; and see People v. Sully, 5 Parker C. R. 142. *Supra*, § 1160.

[3] See *supra*, § 147; Savage v. Stevens, 126 Mass. 207.

[4] R. v. Hamilton, 9 Ad. & El. (N. S.) 271; R. v. Woolley, 1 Den. C. C. 559; T. & M. 280; R. v. Jessop, 7 Cox C. C. 399; D. & B. 422; State v. Mills, 17 Me. 211; Greenough, *in re*, 31 Vt. 279; People v. Haynes, 14 Wend. 546; Smith v. People, 47 N. Y. 303; Cowen v. People, 14 Ill. 348; People v. Pray, 1 Mich. N. P. 69. Gross carelessness is to be determined by the capacity of the prosecutor. The weaker the mind, the less stringent the rule. Ibid.; R. v. Woolley, 1 Den. C. C. 559; Temp. & M. 280.

view accords a well considered English case, in which it was held that the offence was made out where the defendant fraudulently offered a £1 Irish bank note as a note for £5, and obtained change as for a £5 note, even though the person from whom the change was obtained could read, and the note itself upon the face of it clearly afforded the means of detecting the fraud.[1] And it must be remembered that the question of carelessness is to be determined from the prosecutor's stand-point. To obtain from a jeweller money, by exhibiting a spurious jewel, might not be within the statute, while it would be within the statute for the jeweller to offer the same spurious stone to an ignorant customer.[2] The simple and credulous are as much under the shelter of the law as are the astute.[3]

Carelessness amounting to consent estops prosecutor.

§ 1189. Yet, on the other hand, carelessness so gross as to amount to a submission to fraud, estops the prosecutor from maintaining a prosecution.[4] Thus, in Massachusetts, in 1865, it was held that obtaining money from the prosecutor on the ground that on a former occasion he had not given due change, was not within the statute.[5] And in North Carolina, in 1877, a pretence that "certain cotton was good middling," was held not within the statute, in a case where the prosecutor, an expert, had on hand the means of detection.[6]

[1] R. v. Jessop, D. & B. 442; 7 Cox C. C. 399.

[2] See *supra*, § 1178.

[3] Bowen v. State, 9 Baxt. 45. See, however, Com. v. Grady, 13 Bush, 285; *supra*, § 1160.

Cf. Criticism in 26 Alb. L. J. 105.

[4] See Bonnell v. State, 64 Ind. 498; State v. De Hart, 6 Bast. 222; Buckalew v. State, 11 Tex. Ap. 352. *Supra*, §§ 143–9.

[5] Com. v. Norton, 11 Allen, 266.

[6] State v. Young, 76 N. C. 258.

It was held in New York, on a demurrer, that an indictment for obtaining a watch from a person, upon the false representation that the defendant was a constable and had a warrant against such person, issued by a justice of the peace, for the crime of rape, and that he would settle the same if the person defrauded would give the defendant the watch, could not be sustained. The reasoning of the court seems to have been, that if the prosecutor was guilty of rape, he was in some degree "*particeps criminis*" with the prisoner, and hence could make out no case; and if he was not guilty, the pretences were not sufficiently reasonable to impose upon a prudent man of average intelligence. People v. Stetson, 4 Barb. 151, 152; S. P., McCord v. People, 46 N. Y. 470. See *contra*, Perkins v. State, 67 Ind. 270. *Cf.* People v. Williams, 4 Hill (N. Y.), 9. But this is not law where the prosecutor is simply the victim of ignorant terror, and endeavors under its influence to buy off a supposititious prosecution. Com. v. Henry, 22 Penn. St. 253. *Supra*, § 1151; R. v. Asterley, 7 C. & P. 191.

§ 1190. If the defendant obtain the money by a false pretence, knowing it to be false, it is no answer that by third parties he had been entrapped into the commission of the offence, if the prosecutor waived none of his legal rights.[1] It is otherwise, of course, when the prosecutor is aware of the falsity of the pretences, and does not *bonâ fide* part with the goods. And carelessness or complicity amounting to consent, as we have just seen, estops the prosecutor.[2]

Trap set by prosecutor is no defence.

§ 1191. There may be cases where both parties employed false representations; but if so, while each can be convicted on an independent prosecution, neither can set up the other's guilt as a defence to an indictment against himself if the transactions are disconnected.[3] It may be otherwise when the transaction is one of fraud against fraud.[4]

That prosecutor made false representations is no bar.

§ 1192. That gross credulity is no defence is illustrated by the prosecutions sustained against conjurors and fortune tellers. Nothing but gross credulity could be imposed on by such pretenders; yet on behalf of those thus imposed on prosecutions have been sustained.[5]

Nor is prosecutor's gross credulity.

§ 1193. While a false affirmation may be within the statute, such is not the case with loose talk,[6] or the statement of vague conjectural opinion.[7] Thus, where a servant went into the prosecutor's store, and said he wanted some money for his master to buy some wheat, and the prosecutor gave him ten pounds, this was held not within the statute.[8] And so where the indictment alleged that the defendant falsely pre-

But "brag" and loose talk are not within statute.

[1] R. *v.* Ady, 7 C. & P. 140. See *supra*, §§ 149, 917, 1039.

[2] *Supra*, § 149.

[3] Com. *v.* Morrill, 8 Cush. 571; though see *contra*, McCord *v.* People, 46 N. Y. 470; People *v.* Stetson, 4 Barb. 151.

[4] *Supra*, § 140.

[5] R. *v.* Giles, L. & C. 502; 10 Cox C. C. 44. See State *v.* Phifer, 65 N. C. 321; Miller *v.* State, 73 Ind. 88; Bowen *v.* State, 9 Baxt. 45; State *v.* Montgomery, 56 Iowa, 195; Johnson *v.* State, 36 Ark. 242; and *supra*, § 1140.

[6] *Supra*, § 1154; R. *v.* Hamilton, 9 Adol. & El. (N. S.) 271; Com. *v.* Henry, 22 Penn. St. 253; State *v.* Phifer, 65 N. C. 321; Johnson *v.* State, 41 Tex. 65.

[7] R. *v.* Williamson, 11 Cox C. C. 328. See State *v.* Tomlin, 5 Dutch. 14; People *v.* Jacobs, 35 Mich. 36. See *supra*, §§ 1154, 1160, as to "puffs." The question of how far an erroneous opinion is a false statement is discussed at large in Whart. on Contracts, §§ 215, 259–63.

[8] R. *v.* Smith, 2 Russ. on Cr. 312; Com. *v.* Barker, 8 Phil. 613.

tended that a sum of money, parcel of a certain larger sum, was "due and owing" to him for work which he had executed for the prosecutors, this was held not to be an allegation of a false pretence of an existing fact, as the allegation in the indictment might be satisfied by evidence of a mere matter of opinion, either as regarded fact or law, and that therefore the indictment was bad.[1] A loose statement, also, that a third person owed the defendant, without saying how much, has been held not to be an adequate pretence.[2]

§ 1194. That the prosecutor was indebted to the defendant for an amount equal to the value of a chattel obtained by the false pretences is no defence.[3] But it is otherwise when money is paid in satisfaction of a debt actually due.[4]

Indebtedness of prosecutor to defendant no defence.

11. *Property included by Statutes.*

§ 1195. As will be hereafter seen, under the statutes as first drafted, only larcenous property is protected. By the statutes now existing in most jurisdictions, however, this limit is obliterated, and the obtaining by false pretences, both of land[5] and of written securities,[6] is made indictable.

Negotiable paper within statute.

Under the New York statute, making it indictable to obtain by false pretences "signatures to a written instrument," it is necessary, to constitute the offence, that the instrument should be of such a character as likely to work a prejudice to the signer, though the fact that it would have been void for fraud will be no defence.[7]

An indorsement of a negotiable promissory note is, in many jurisdictions, within the terms of the statute, and so is the signature to contracts binding the signer.[8]

A cheque on a bank is a "thing of value" under the statute.[9]

[1] R. *v.* Oates, 29 Eng. L. & Eq. 552; Dears. C. C. 459; and see, also, R. *v.* Wakeling, R. & R. 504, where the defendant, as an excuse for not working, said he had "no shoes," upon which a pair was given to him.

[2] State *v.* Magee, 11 Ind. 154.

[3] People *v.* Smith, 5 Parker C. R. 490. See *supra*, § 884.

[4] *Infra*, § 1197.

[5] State *v.* Burrows, 11 Ired. 477.

[6] See *supra*, §§ 1130, 1137; Baker *v.* State, 14 Tex. Ap. 332.

[7] People *v.* Crissie, 4 Denio, 525; People *v.* Galloway, 17 Wend. 540. See State *v.* Layman, 8 Blackf. 330.

[8] Ibid.; People *v.* Gates, 13 Wend. 311; People *v.* Chapman, 4 Parker C.

[9] Tarbox *v.* State, 38 Ohio St. 581.

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

Thing obtained must be of some value.

§ 1196. Value, however, is a necessary essential of the article, in order to bring it within the statute. Thus in Pennsylvania it was held that obtaining a receipt in discharge of a debt, by means of a worthless note of a broken bank, is not within the 21st section of the Act of 12th July, 1842, the reasoning of the court being apparently that the receipt was a thing of no account, not being an extinguishment of the debt.[2]

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

§ 1197. A false representation, as has been already incidentally noticed, used to induce a party to pay an honest lawful debt, is not within the statute.[5] And where an indictment charged that T.,

R. 56; State *v.* Thatcher, 35 N. J. L. 445; State *v.* Blauvelt, 38 Ibid. 306; Ellars *v.* State, 25 Ohio St. 385. But see R. *v.* Danger, D. & B. 307; 7 Cox C. C. 303, where it was held that the English statute does not cover the cases of inducing another party to indorse a note. And see R. *v.* Brady, 26 Up. Can. Q. B. 13. *Infra*, § 1838.

[1] State *v.* Pryor, 30 Ind. 350. *Infra*, § 1200.

[2] Moore *v.* Com., 8 Barr, 260.

G., secretary of a burial society, was indicted for falsely pretending that a death had occurred, and so obtaining from the president an order on the treasurer as follows :—

"Bolton United Burial Society, No. 23.

"Bolton, September 1st, 1853.

"Mr. A. Entwistle, Treasurer,—Please pay the bearer £2 10s., Greenhalgh, and charge the same to the above society.

"Robert Lord.

"Benjamin Beswick, President."

It was held that this was a valuable security under the 7 & 8 Geo. IV. c. 29, s. 53, as explained by the 5th section of the same statute. R. *v.* Greenhalgh, 25 Eng. L. & Eq. 570; Dears. C. C. 267; 6 Cox C. C. 257.

A railway ticket is a "chattel," and the obtaining it by false pretence from a servant of the company, so as to enable the holder to travel on the line, is an obtaining a chattel by false pretence, within the stat. 7 & 8 Geo. IV. c. 29, s. 53. R. *v.* Boulton, 2 C. & K. 917; S. C., 1 Den. C. C. 508. But see as to this point, *supra*, § 878.

[3] Com. *v.* Coe, 115 Mass. 481. See *supra*, § 955.

[4] *Infra*, § 1221.

[5] *Supra*, § 1184; R. *v.* Williams, 7 C. & P. 354; Com. *v.* McDuffy, 126 Mass. 467; Com. *v.* Henry, 22 Penn. St. 253; People *v.* Thomas, 3 Hill, 169; State *v.* Hurst, 11 W. Va. 54.

In Com. *v.* McDuffy, Lord, J., said: "We are not aware that the precise question now presented has ever been considered by this court; and we have not been able to find any decision in any court of last resort that a party may be convicted of the crime of obtaining property by false pretences when he has obtained nothing in value which he would not be entitled to as of right. Com. *v.* Drew, 19 Pick. 179; Com. *v.*

Money paid in satisfaction of debt not within statute.

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

Credit on account will not sustain indictment.

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

Jeffries, 7 Allen, 568; Rex *v.* Williams, 7 C. & P. 354; People *v.* Thomas, 3 Hill, 169; Com. *v.* Henry, 22 Penn. St. 253; People *v.* Getchell, 6 Mich. 496; Com. *v.* Thompson, 3 Penn. Law Jour. 250; People *v.* Genning, 11 Wend. 18; 2 Russ. on Cr. 312; 1 Bishop's Crim. Law, § 525; 2 Ibid. § 442. We are, of course, not to be understood as deciding that a mere pretence of indebtedness, by the person from whom the property is obtained, is sufficient; nor is anything which we decide to be construed as in conflict with the well established rule of law, that a party is to be presumed to intend all the natural and ordinary consequences of his acts, and fraud and falsehood are always evidence tending to show that the party had a dishonest purpose; and the question for the jury to decide is, whether, upon all the facts and circumstances, the defendant had an intent to defraud and effected that purpose, and whether, in order to accomplish it, he made use of fraudulent representations and succeeded by means of such representations. We think, therefore, that the defendant should have been allowed to offer evidence in support of the facts upon which his prayers are predicated, and the jury should have been instructed that, if proved, the defendant was entitled to an acquittal, and for this reason the exceptions must be sustained." S. P., Com. *v.* Thompson, Lewis C. L. 197; Com. *v.* Henry, 22 Penn. St. 253; State *v.* Hurst, 11 W. Va. 54; State *v.* Gillespie, 80 N. C. 396. And see Moulden *v.* State, 5 Lea, 577; Jamison *v.* State, 37 Ark. 445.

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

[1] People *v.* Thomas, 3 Hill (N. Y.), 169.

[2] R. *v.* Eagleton, Dears. C. C. 515; 6 Cox C. C. 559.

[3] R. *v.* Wavell, 1 Mood. C. C. 224. See R. *v.* Bryan, 2 F. & F. 567.

pass on the credit so obtained, the statutory offence is consummated,[1] and even for the credit, the defendant may be convicted of an attempt.[2]

Goods not at the time in existence are within statute.

§ 1199. The statute includes the obtaining of a chattel not in existence when the pretence was made, if the pretence is continuous.[3] Thus where the defendant, by false pretences, induced the prosecutor to enter into a contract to build and deliver a van for a certain sum of money, and the prosecutor, on the faith of those pretences, built and delivered the van in pursuance of the original order, although there was a question as to countermanding the order after the building, and before the delivery, the offence was held to be made out. It was ruled that, to bring the case within the statute, it is not necessary that the chattel should be in existence when the false pretence is made, if the pretence is a continuing one, so that the chattel is made and delivered in pursuance of the pretence; that the question whether the pretence is or is not such a continuing one is one of fact for the jury, and that in this case there was evidence from which the jury might infer that the pretence was continuous.[4]

Actual injury to owner need not be proved.

§ 1200. When the goods have been obtained, only an intent to defraud need be proved, and not an actual defrauding;[5] and hence it is not necessary to charge loss or damage to the prosecutor, the offence being complete when the goods are obtained by false pretences, with intent to cheat and defraud.[6]

Goods must not have belonged to the defendant personally, or as a member of a firm; nor taken on a claim of title.

§ 1201. We must, in this relation, recall the doctrine already laid down in respect to larceny, that the prosecution fails if it appear that the goods obtained, at the time of obtaining, belonged to the defendant, either jointly or severally.[7] This rule applies equally to prosecutions for false pretences in all cases involving partnership accounts.[8] The prosecution, also, does not lie when the taking was under honest claim of title.[9]

[1] R. v. Kenrick, 5 Q. B. 49; R. v. Abbott, 1 Den. C. C. 273. *Supra*, § 1180.

[2] *Supra*, §§ 173–199.

[3] R. v. Martin, L. R. 1 C. C. 56; 10 Cox C. C. 383.

[4] Ibid.

[5] R. v. Bloomfield, C. & M. 537.

[6] People v. Herrick, 13 Wend. 87. See parallel rulings in forgery and larceny, *supra*, §§ 696, 714, 739, 887. But see, on the question of *lucri causa*, Com. v. Harley, 7 Met. 462.

[7] See *supra*, § 935.

[8] R. v. Evans, L. & C. 252; 9 Cox C. C. 238.

[9] *Supra*, § 884, and cases cited, § 1197; People v. Getchell, 6 Mich. 496.

Goods must have been obtained for defendant, and in accordance with his directions.

§ 1202. It has been already seen that the pretences need not be made, or the goods obtained, by the defendant personally, but that it is sufficient if he be represented in this respect by agents directed by himself.[1] At the same time, the defendant is not criminally responsible for acts of independent third parties in the subsequent use, without any privity with him, of instruments of fraud constructed by him.[2] And the goods must be obtained "according to the wish or to gain some object of the party who makes the false pretence."[3]

Property must pass, and not mere use of chattel.

§ 1203. While it is immaterial whether the property was obtained by an absolute or a conditional sale,[4] yet the statute does not apply where only the *use* of a chattel passes, as in cases of bailment or hiring,[5] or where possession only passes, not property.[6] And if only *possession* passes and not *property*, and the property is afterwards feloniously appropriated, then the party taking may be guilty of larceny, in which case the cheat ordinarily merges in the felony.[7]

Delivery of property either actual or constructive, to the defendant, must be proved.[8]

Property not larcenous not within statute.

§ 1204. As we have seen, property not larcenous was not at first covered by the statutes, and hence the words "money," "goods," "property," have been held not to include "dogs"[9] or "land."[10] It is otherwise, however, by special statutes in most jurisdictions.[11]

12. *Where the Offence is triable.*

§ 1205. Cheats by false pretences being often, from their very nature, spread over several jurisdictions, it may become important

[1] See *supra*, § 1171.

[2] See *supra*, §§ 160–9, 1179.

[3] Lord Campbell, C. J., R. v. Garrett, 6 Cox C. C. 260; Dears. 232; 22 Eng. L. & Eq. 607; *supra*, § 279; *infra*, § 1207; and see to same effect, People v. Parish, 4 Denio, 153; Willis v. People, 19 Hun, 84.

[4] Com. v. Lincoln, 11 Allen, 233.

[5] R. v. Kilham, L. R. 1 C. C. 261. See R. v. Crossley, 2 M. & Rob. 17; Cline v. State, 43 Tex. 494.

[6] State v. Anderson, 47 Iowa, 142; Perkins v. State, 65 Ind. 320; Canter v. State, 7 Lea, 349.

[7] *Supra*, § 964; State v. Vickery, 19 Tex. 326. As to merger, see R. v. Martin, London Law Times, Dec. 13, 1879, p. 109. *Infra*, § 1344.

[8] See Parker, *ex parte*, 11 Neb. 309; Morgan v. State, 42 Ark. 131.

[9] R. v. Robinson, 8 Cox C. C. 115; Bell C. C. 34.

[10] State v. Burrows, 11 Ired. 477.

[11] *Supra*, § 1195. In Indiana boarding and lodging are within the statute. State v. Snyder, 66 Ind. 203.

to determine before what court the offence is to be tried. In answering this question, the following points will be of use:—

Venue, in cases of conflict, may be laid in any place of offence.

§ 1206. Where a false pretence is uttered in A., and the money obtained in B., the venue may be laid either in A. or B.[1] This, in England, is finally settled by statute, which, however, is in this respect only affirmatory of the common law.[2] In several instances it has been held that the forum that first takes cognizance of the offence, whether it be the forum of the uttering of the pretence, or that of the forwarding of the goods, attaches to itself jurisdiction.[3]

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

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

C., the defendant, in a begging letter, which contained false pretences, and was addressed to P., who resided in Middlesex, requested him to put a letter, containing a post-office order for money, in a post-office in Middlesex, to be forwarded to the defendant's address in Kent. It was ruled that the venue was rightly laid in Middlesex, as C., by directing the money order to be sent by post, constituted the postmaster in Middlesex agent to receive it there for him. R. *v.* Jones, 1 Den. C. C. 551; 4 New Sess. Cas. 353.

See further, R. *v.* Leech, Dears. C. C. 642; 7 Cox C. C. 100; R. *v.* Standbury, 9 Ibid. 94; L. & C. 128. Compare R. *v.* Cooke, 1 F. & F. 64. *Supra*, § 288.

In R. *v.* Holmes, L. R. 12 Q. B. D. 23; 49 L. T. N. S. 540 (cited *supra*, § 288), it was held that the English courts had jurisdiction in a case where the letter containing the false pretence was mailed in England and received in France, the money being sent from France to England.

[2] *Supra*, § 288; Pearson *v.* McGowran, 5 D. & R. 616; 3 B. & C. 700.

[3] *Supra*, § 263. See this ruled as to the forum in which the pretences were uttered in Skiff *v.* People, 2 Parker C. R. 139; R. *v.* Cooke, 1 F. & F. 64; R. *v.* Leech, 36 Eng. L. & Eq. 539; Dears. C. C. 642; 7 Cox C. C. 100; and as to the forum in which the money was obtained in R. *v.* Jones, 1 Den. C. C. 551; 4 Cox C. C. 198, where the county in which money was mailed to the defendant, living in another county, was said to have jurisdiction. In R. *v.* Garret, 22 Eng. L. & Eq. 607; 6 Cox C. C. 260; Dears. C. C. 232; People *v.* Adams, 3 Denio, 190; 1 Comst. 173; Com. *v.* Van Tuyl, 1 Metc. (Ky.) 1, it was held that the place of the receipt of the property has jurisdiction, although the pretence on which the money was obtained was uttered in another State. *Supra*, § 288.

§ 1207. When the pretences were uttered in one place, and the goods obtained by an agent in another place, the principal may be tried in the latter place.[1] Hence, as we have just seen, a non-resident principal, who in a foreign land utters a false pretence, is responsible in the land in which such false pretence is used to obtain goods by an agent under the principal's directions, though such principal was not personally present in the latter land until after the goods were obtained.[2]

Principal indictable in place of agent's act.

§ 1208. Unless made so by statute, the common law doctrine of asportation has no application to cheats by false pretences.[3]

Doctrine of asportation does not apply.

13. *Indictment.*[4]

§ 1209. All the parties concerned in the offence may be joined as co-defendants.[5] And, as has already been seen, evidence under a joint indictment that one of them, with the concurrence and approval of the other, made the false pretences charged, warrants the conviction of all.[6] Parties who have concurred and assisted in the fraud may be convicted as principals, though not present at the time of making the pretence and obtaining the money or goods.[7]

Several defendants may be joined.

§ 1210. An indictment averring that the defendant did "falsely and *feloniously* pretend," etc., is at common law bad.[8] In those States, however, as in New York, where the offence is a felony, the averment is of course essential. "Designedly," when in the statute, must be inserted.[9] The word "pretend" is indispensable, though the word "falsely," according

Technical averments necessary.

[1] *Supra*, § 279.

[2] *Supra*, §§ 248, 279; and also People *v.* Adams, and R. *v.* Garrett, *supra*, § 1203; R. *v.* Jones, 1 Den. C. C. 551; 4 Cox C. C. 198.

[3] R. *v.* Stanbury, L. & C. 128; 9 Cox C. C. 94.

[4] For Forms see Whart. Prec., 528 *et seq.*

[5] 1 Gabbet Cr. Law, 214, 215.

[6] *Supra*, § 1171; Com. *v.* Harley, 7 Met. 462.

[7] R. *v.* Moland, 2 Mood. C. C. 276. See *supra*, § 223. Whart. Cr. Pl. & Pr. §§ 221 *et seq.*

[8] R. *v.* Walker, 6 C. & P. 657.

[9] State *v.* Baggerly, 21 Tex. 757. See Wharton's Precedents, 528 *et seq.*, as to the importance of this averment.

"Knowingly" is essential in Texas. Maranda *v.* State, 44 Tex. 442. See, generally, *infra*, § 1224; Mathena *v.* State, 15 Tex. Ap. 473.

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

Party injured must be described as in larceny.

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

Pretence to agent is pretence to principal.

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

Pretences must be averred specially.

§ 1213. The pretences must be specially averred,[10] though their omission is now in England cured by verdict. But at common law they must be accurately and adequately set forth, so that it may clearly appear that there was a false pretence of an existing fact.[11]

[1] R. *v.* Airey, 2 East, 30.

[2] Hamilton *v.* State, 16 Fla. 288.

[3] See *supra*, § 977.

[4] Whart. Cr. Ev. § 91.

[5] Stoughton *v.* State, 2 Ohio St. 562.

[6] *Supra*, § 1171; Whart. Cr. Ev. § 102; R. *v.* Lara, 1 Leach C. C. 647; 6 T. R. 565; Com. *v.* Call, 21 Pick. 515; Com. *v.* Harley 7 Met. 462. See, also, R. *v.* Keely, 2 Den. C. C. 68; R. *v.* Tully, 9 C. & P. 227; R. *v.* Dewey, 11 Cox C. C. 115; Com. *v.* Bagley, 7 Pick. 279; Com. *v.* Mooar, Thach. C. C. 410; Stoughton *v.* State, 2 Ohio St. 562; Britt *v.* State, 9 Humph. 31; Whart. Cr. Ev. §§ 91 *et seq.*

[7] R. *v.* Dent, 1 C. & K. 249.

The money of a benefit society, whose rules were not enrolled, was kept in a box, of which E., one of the stewards, and two others, had keys; the defendant, on the false pretence that his wife was dead, which pretence he made to the clerk of the society in the hearing of E., obtained from the hands of E., out of the box, five pounds; it was held that in an indictment the pretence might be laid as made to E., and the money as the property of "E. and others," obtained from E. R. *v.* Dent, 1 C. & K. 249.

[8] Whart. Cr. Ev. §§ 94–102.

[9] R. *v.* Moseley, Leigh & C. 92. See R. *v.* Carter, 7 C. & P. 134; Sandy *v.* State, 60 Ala. 58. *Infra*, § 1227.

[10] R. *v.* Mason, 2 T. R. 581; R. *v.* Henshaw, L. & C. 444; R. *v.* Goldsmith, 12 Cox C. C. 479; L. R. 2 C. C. 74; R. *v.* Jarman, 14 Cox C. C. 48; 38 L. T. N. S. 460; State *v.* Jackson, 39 Conn. 229. See People *v.* Cline, 44 Mich. 290.

[11] Ibid.; R. *v.* Henshaw, L. & C. 144;

§ 1214. If the pretences explain themselves, and require no innuendoes,[1] it is enough to state them in the terms in which they

9 Cox C. C. 472; Bonnell *v.* State, 64 Ind. 498. See State *v.* Dickson, 88 N. C. 643; Hirshfield *v.* State, 11 Tex. Ap. 207.

The pretences were held inadequately stated in an indictment in which the first count charged that C. unlawfully did falsely pretend to P. that he, C., was sent by W. for an order to go to T. for a pair of shoes, by means of which false pretence he did obtain from T. a pair of shoes, of the goods and chattels of T., with intent to defraud P. of the price of the said shoes, to wit, nine shillings, of the moneys of P. The second count charged that he falsely pretended to P. that W. had said that P. was to give him, the defendant, an order to go to T. for a pair of shoes, by means of which false pretence he did obtain from T., in the name of P., a pair of shoes of the goods of T., with intent to defraud T. of the same. R. *v.* Tully, 9 C. & P. 227—Gurney; though compare R. *v.* Brown, 2 Cox C. C. 348—per Patteson, J.

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

In a case already cited on the merits, the indictment charged that C., contriving and intending to cheat P., on a day named, did falsely pretend to him that he, C., then was a captain in her Majesty's fifth regiment of dragoons; by means of which false pretence he did obtain of P. a valuable security, to wit, an order for the payment of £500, of the value of £500, the property of P., with intent to cheat P. of the same; whereas in truth he (C., the defendant) was not, at the time of making such false pretence, a captain in her Majesty's regiment; and the defendant, at the time of making such false pretence, well knew that he was not a captain. This was held sufficient after conviction and judgment. It was held not necessary to allege more precisely that the defendant made the particular pretence with the intent of obtaining the security; nor how the particular pretence was calculated to effect, or had effected, the obtaining; and it was further held that the truth of the pretence was well negatived, it appearing sufficiently that the pretence was that the defendant was a captain at the time of his making such pretence, which was the fact denied; and that it was unnecessary to aver expressly that the security was unsatisfied, at any rate since 7 Geo. IV. c. 64, s. 21, the objection being taken after verdict, and the indictment following the words of the statute creating the offence. Hamilton *v.* R. (in error), 9 A. & E. (N. S.) 271; 10 Jur. 1028; 16 L. J. M. C. 9; 2 Cox C. C. 11.

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

[1] See *infra*, §§ 1220, 1303.

were expressed to the prosecutor at the time of the fraud.[1] But verbal exactness is not required, as it is enough if the effect be substantially given;[2] nor need all that was said be stated if the operative pretence is averred.[3] But a variance between the indictment and the evidence as to the effect of the pretences, will be fatal.[4] It is not necessary to set out, as in forgery, the tenor of a bad note by which property is obtained.[5] But if set out, a variance may be fatal.[6]

Substantial variance is fatal.

§ 1215. The relation of the fraud to the bargain, in cases of sale, must appear.[7] Thus it was held insufficient, in an indictment for the sale of a spurious watch as genuine, to aver merely that S., the defendant, falsely pretended to the prosecutor "that a certain watch which he, the said S., then and there had, was a gold watch, by means

In bargains relation of pretence to bargain must be averred.

and said to the treasurer, "I am come for D.'s money:" and D.'s wages were given to him. He took the money to C., who was waiting outside, and who gave the boy the promised penny: it was ruled that C. could not be convicted on the charge of obtaining the money from the treasurer by falsely pretending to the treasurer that he, C., had authority from D. to receive his money, or of obtaining it from the treasurer and the boy, by falsely pretending to the boy that he had such authority, or of obtaining it from the boy by the like false pretences to the boy; though he might be convicted on a count charging him with fraudulently obtaining it from the treasurer by falsely pretending to the treasurer that the boy had this authority. R. v. Butcher, Bell C. C. 6; 8 Cox C. C. 77.

[1] 2 East P. C. c. 18, s. 13, pp. 837, 838. See Com. v. Hulbert, 12 Met. 446; Glackan v. Com., 3 Metc. (Ky.) 232; State v. Webb, 26 Iowa, 262; State v. Eason, 86 N. C. 674. *Infra*, § 1219. If they are not self-explaining, their meaning must be supplied. *Infra*, § 1220.

[2] R. v. Scott, cited in R. v. Parker, 2 Mood. C. C. 1; 8 C. & P. 825; State v. Call, 48 N. H. 126. *Infra*, § 1219. In R. v. Powell, 51 L. T. N. S. 713, Huddleson, B., adopted from R. v. Giles, 34 L. T. 50, M. C., the following from Blackburn, J.: "It is not requisite that the false pretence be made by exact words if the idea be conveyed." As to wordless and obscure pretences see *supra*, § 1170.

[3] R. v. Hewgill, Dears. C. C. 351; Cowen v. People, 14 Ill. 348. See Kirtley v. State, 38 Ark. 543.

[4] Whart. Crim. Ev. § 131; R. v. Plestow, 1 Camp. 494; R. v. Bulmer, L. & C. 476; 9 Cox C. C. 492; R. v. Speed, 46 L. T. N. S. 177; Com. v. Pierce, 130 Mass. 31; State v. Locke, 35 Ind. 419; State v. Anderson, 47 Iowa, 142; Wallace v. State, 11 Lea, 542; Jones v. State, 8 Tex. Ap. 648; Marwilsky v. State, 9 Ibid. 377; Litman v. State, Ibid. 461; Kirtley v. State, 38 Ark. 543.

[5] *Infra*, § 1217.

[6] *Infra*, § 1233.

[7] R. v. Reed, 7 C. & P. 848; R. v. Martin, L. R. 1 C. C. 56; State v. Philbrick, 31 Me. 401; Com. v. Jeffries, 7 Allen, 549; Enders v. People, 20 Mich. 233; State v. Orvis, 13 Ind. 569; State v. Anderson, 47 Iowa, 142. As to causal relations see *supra*, § 1175 *et seq.*

whereof said S. then and there unlawfully, etc., did obtain from said B. (the prosecutor) sundry bank bills, etc., of the value, etc., with intent the said B. then and there to cheat and defraud of the same; whereas in truth and fact said watch was not then and there a gold watch, and said S. then and there well knew that the same was not a gold watch, to the damage," etc.[1] "The indictment," said Dewey, J., "does not allege any bargain nor any colloquies as to a bargain for a watch; nor any propositions of B. to buy, or of the defendant to sell, a watch; nor any delivery of the watch, as to which the false pretences were made, in the possession of B., as a consideration for the money paid the defendant. It seems to us that when money or property is obtained by a sale or exchange of property, effected by means of false pretences, such sale or exchange ought to be set forth in the indictment, and that the false pretence should be alleged to have been with a view to effect such sale or exchange, and that by reason thereof the party was induced to buy or exchange, as the case may be."[2]

In fine, when the case is one of sale or exchange, the indictment should set forth the sale or exchange, and aver that the false pretences were made with a view to effect such sale or exchange, and that by reason thereof the party was induced to part with his property;[3] and when a false token or writing was the pretence, the indictment must aver that the defendant delivered the token or writing, to the prosecutor, who took it in exchange for the goods.[4] In New York the law is less stringent;[5] and where an indictment for obtaining property under false pretences charged that the prisoner, with an intent to defraud one A. G., Jr., did falsely pretend and represent to the said A. G., Jr., for the purpose of inducing the said A. G., Jr., to part with a yoke of oxen, of the goods and chattels of the said A. G., Jr., that," etc., "by which said false pretences he," the prisoner, "then did unlawfully obtain from the said A. G.,

[1] Com. v. Strain, 10 Met. 521; S. P., Com. v. Lannan, 1 Allen, 590.

[2] Com. v. Strain, *supra*. See Com. v. Nason, 9 Gray, 125; Com. v. Jeffries, 7 Allen, 549. As to bad pleading of false agency, see R. v. Henshaw, L. & C. 444.

[3] R. v. Reed, 7 C. & P. 848; State v. Philbrick, 31 Me. 401; Enders v. People, 20 Mich. 233.

[4] Wagoner v. State, 90 Ind. 504. But see Baker v. State, 14 Tex. Ap. 332.

[5] Skiff v. People, 2 Parker, C. R. 139. See R. v. Martin, L. R. 1 C. C. 56; Com. v. Howe, 132 Mass. 250; State v. Jordan, 34 La. An. 1219.

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

[1] Clark *v.* People, 2 Lansing, 330. See to same effect, State *v.* Vanderbilt, 3 Dutch. 328; State *v.* Alphonse, 34 La. An. 9; Baker *v.* State, 14 Tex. Ap. 332. *Infra*, § 1227.

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

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

"The offer of the certificate for such a purpose," said Wells, J., "is a representation that it is what it purports to be upon its face. Cabot Bank *v.* Morton, 4 Gray, 156. Com. *v.* Stone, 4 Met. 43. The indictment sufficiently sets forth in what manner Ferris was defrauded by means of the certificate."

It was further held that the "certificate is an instrument complete in itself, and requires no further allegations to fully set forth the right or contract of which it is a symbol, as was necessary in Commonwealth *v.* Ray, 3 Gray, 441, and Commonwealth *v.* Hinds, 101 Mass. 209. And besides, this offence consists in the use of false tokens, and not the forgery of a written instrument."

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

It may also be considered as settled by the same court that a false pretence is none the less a fraud because obtained in the form of a loan. Commonwealth *v.* Lincoln, 11 Allen, 233; Com. *v.* Coe, 115 Mass. 481.

An indictment alleging that the prisoners falsely pretended to A. that some soot which they then delivered to A. weighed one ton and seventeen cwt., whereas it did not weigh one ton seventeen cwt., but only weighed one ton and thirteen cwt., they well knowing the pretence to be false, by means of which false pretence they obtained from A. 8s., with intent to defraud, is good, and sufficiently describes an indictable false pretence. R. *v.* Lee, L. & C. 418; 9 Cox C. C. 460. See *supra*, § 1159; and see Whart. on Cont. § 232 *et seq.*

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

[2] O'Connor *v.* State, 30 Ala. 9.

[3] *Supra*, §§ 1129, 1162; *infra*, § 1222; R. *v.* Coulson, 1 Den. C. C. 592; 4 Cox C. C. 227; T. & M. 332; State *v.* Boon, 4 Jones (N. C.), 463; State *v.* Dyer, 41 Tex. 520. See Baker *v.* State, 14 Tex. Ap. 332.

[4] R. *v.* Coulston, *ut supra*.

Where it is charged in the indictment that the prisoner obtained the property upon the security of his promissory

§ 1216. The amount of property stated by the defendant to belong to him must be proved as laid. Thus, where the averment was that the defendant represented a firm, of which he was a member, to be then owing not more than three hundred dollars, and evidence was given of a representation by him that the firm did not then owe more than four hundred dollars; this was held to be a fatal variance.[1]

Defendant's allegation of property must be proved as laid.

A pretence that the defendant "had in Macon seven thousand dollars" has been held not sustained by proof of a pretence "that he had seven dollars less than seven thousand in a bank in Macon."[2]

§ 1217. In an indictment setting forth that a bad and spurious note or coin had been passed by the prisoner on the prosecutor, it is not necessary to set forth the note at large or specifically to describe the coin.[3] "When the setting out the instrument in the indictment," said Wilde, C. J., "cannot afford the court information, it is unnecessary that it should be set out. Here it is alleged that a certain piece of paper was unlawfully and falsely represented by the prisoner to be a good and valid promissory note, whereas it was not so. It appears to me that all the cases show that where the instrument has been required to be set out in the indictment, something has turned on the construction of the paper."[4] But the purport or generic desig-

Spurious or bad note or coin need not be set out at large.

nation must be accurately stated.[1] Thus if an indictment for attempting to obtain money under false pretences charge the attempt to have been by means of a paper writing purporting to be an order for money, and the instrument as stated in the indictment cannot be considered to be such an order, it is bad.[2]

When pretences are divisible, only part need be proved.

§ 1218. It is not necessary to prove the whole of the pretences charged; proof of part, and that the property was obtained by force of such part, is enough.[3] And the principle derives support from the practice in the analogous cases of perjury and blasphemy.[4]

Verbal accuracy not required.

§ 1219. As has been already seen, if the effect of the pretences be rightly laid, a variance as to expression is immaterial.[5] But the offence must be substantially averred.[6]

Innuendoes and definitions proper when explanation is required.

§ 1220. When the false pretences consist in words used by the respondent, it has been said to be sufficient to set them out in the indictment as they were uttered, without undertaking to explain their meaning.[7] But this must be taken with some qualification, since, as in perjury and libel, it is proper and necessary that language otherwise

note, through false and fraudulent representations as to his ability to pay the same, an averment of his neglect to make payment of the note is not essential. Clark *v.* People, 2 Lansing, 330.

[1] Com. *v.* Stone, 4 Met. 43; Com. *v.* Coe, *ut supra*. *Infra*, § 1233.

[2] R. *v.* Cartwright, R. & R. 106. See fully, Whart. Cr. Pl. & Pr. §§ 184 *et seq.*

[3] R. *v.* Hill, R. & R. 190; R. *v.* Ady, 7 C. & P. 140; R. *v.* Hewgill, Dears. 315; 24 Eng. L. & Eq. 556; R. *v.* English, 12 Cox C. C. 171; State *v.* Mills, 17 Me. 211; State *v.* Dunlap, 24 Ibid. 77; Com. *v.* Morrill, 8 Cush. 571; People *v.* Stone, 9 Wend. 182; People *v.* Haynes, 11 Ibid. 565; Skiff *v.* People, 2 Parker C. R. 139; People *v.* Oyer & Terminer Court, 83 N. Y. 436; People *v.* Blanchard, 90 Ibid. 314; Com. *v.* Daniel, 2 Pars. 333; Britt *v.* State, 9 Humph. 31; Cowen *v.* People, 14 Ill. 348; Beasley *v.* State, 59 Ala. 20; Smith *v.* State, 55 Miss. 513; State *v.* Vorbeck, 66 Mo 168. *Supra*, § 1168; Whart. Crim. Ev. § 131.

[4] Lord Raym. 886; 2 Camp. 138–9; Cro. C. C. 7th ed. 662; State *v.* Haskall, 6 N. H. 352; Com. *v.* Kneeland, 20 Pick. 206. *Infra*, § 1316.

[5] *Supra*, § 1214; State *v.* Vanderbilt, 3 Dutch. 328; State *v.* Goble, 60 Iowa, 447.

[6] State *v.* Lambeth, 80 N. C. 393.

[7] State *v.* Call, 48 N. H. 126. See Skiff *v.* People, 2 Parker C. R. 139.

In a case already cited to another point, the indictment stated that, by the rules of a benefit society, every free member was entitled to five pounds on the death of his wife, and that the defendant falsely pretended that a paper which he produced was genuine, and contained a true account of his wife's death and burial, and that he *further* falsely pretended that he was

unintelligible should be explained for the instruction of the court.[1] Otherwise a court in error or arrest of judgment could not say that the pretences constitute an indictable offence.

Description of property to be as in larceny.

§ 1221. The description of property obtained is required to be the same as in larceny.[2] But unless required by statute the indictment need not allege that the property was of any particular value.[3] When, however, the punishment depends upon value, some value should be alleged,[4] a variance as to such value being immaterial if within the statute.[5]

If a signature to negotiable paper be obtained, it must be stated as such.[6]

An indictment need not state all the property which the defendant obtained by the false pretences set forth.[7]

Property obtained must be individuated.

§ 1222. The property obtained must be identified so as to protect the defendant in case of a second prosecution.[8] Thus, where an indictment for obtaining the signature of a person to a deed of land did not allege that the grantor in the deed owned or claimed any title to the land conveyed thereby, and a description of the land was in the most general terms, as certain land in the State of Texas and United States of America, and the date of the deed was nowhere averred, so that it would be impossible to identify the instrument; and it did not appear that the deed would tend to the hurt or prejudice of the grantor, and there was no averment that the deed could not be more particularly

entitled to five pounds from the society by virtue of their rule, in consequence of the death of his wife; by means of which "last false pretence" he obtained money; this was held good. R. *v.* Dent, 1 C. & K. 249.

[1] See People *v.* Oyer & Terminer Court, 83 N. Y. 436.

[2] See *supra*, § 977; and see Com. *v.* Howe, 132 Mass. 250; State *v.* Kube, 20 Wis. 217; Treadaway *v.* State, 37 Ark. 443; Jamison *v.* State, Ibid. 445; Ladd *v.* State, 17 Fla. 215. That a description as a "certain lot of dry goods" is inadequate, see Redmond *v.* State, 35 Ohio St. 81.

[3] People *v.* Stetson, 4 Barb. 151–2; State *v.* Gillespie, 80 N. C. 396; Whart. Cr. Pl. & Pr. § 215. See, also, Com. *v.* Lincoln, 11 Allen, 233.

[4] *Supra*, §§ 882, 951 *et seq.*; Whart. Cr. Pl. & Pr. § 215; State *v.* Ladd, 32 N. H. 110.

[5] *Supra*, §§ 951 *et seq.*

[6] State *v.* Blauvelt, 38 N. J. 396. *Supra*, § 1195.

"Cheque for the payment of money" is a sufficient description. Com. *v.* Coe, 115 Mass. 481. But see Bonnell *v.* State, 64 Ind. 498.

[7] Com. *v.* Davidson, 1 Cush. 33; People *v.* Parish, 4 Denio, 153. See Skiff *v.* People, 2 Parker C. R. 139.

[8] Baker *v.* State, 31 Ohio St. 314.

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

Owner must be stated.

§ 1223. It is necessary to state whose the property was at the time.[3] "Of the moneys of B." is a sufficient allegation of ownership.[4] A special property is sufficient to sustain an averment of ownership.[5]

Pretences must be negatived.

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

[1] Dord *v.* People, 9 Barb. 671.

[2] State *v.* Reese, 83 N. C. 637.

[3] R. *v.* Martin, 3 N. & P. 472; 8 Ad. & El. 481; R. *v.* Norton, 8 C. & P. 196; Sill *v.* R., Dears. C. C. 132; 1 El. & Bl. 553. See State *v.* Lathrop, 15 Vt. 279; Halley *v.* State, 43 Ind. 509; State *v.* Levi, 41 Tex. 563.

Under 8 & 9 Vict. c. 109, s. 17, an indictment charging that the prisoner, by fraud in playing at cards, did win from A. a sum of money with intent to cheat A., need not necessarily allege that the money won was the property of A. R. *v.* Moss, Dears. & B. C. C. 104. But an indictment for a conspiracy to obtain goods by false pretences, not stating whose property the goods were which it was the object of the conspiracy to obtain, is bad in arrest of judgment. R. *v.* Parker, 2 G. & D. 709; 3 Q. B. 292.

[4] R. *v.* Godfrey, Dears. & B. 426; 7 Cox C. C. 392.

[5] *Supra*, §§ 932 *et seq.*; Mack *v.* State, 63 Ala. 138.

[6] R. *v.* Perrott, 2 M. & S. 379; Redmond *v.* State, 35 Ohio St. 81; Tyler *v.* State, 2 Humph. 37; Amos *v.* State, 10 Ibid. 117; State *v.* Webb, 26 Iowa, 262. The negation must be specific. Keller *v.* State, 51 Ind. 111; State *v.* Bradley, 68 Mo. 140.

[7] *Supra*, § 1218; R. *v.* Hill, R. & R. 190; Com. *v.* Morrill, 8 Cush. 571; People *v.* Stone, 9 Wend. 182; People *v.* Haynes, 11 Ibid. 565; State *v.* Smith, 8 Blackf. 489.

[8] R. *v.* Perrott, *ut supra*.

[9] See Whart. Crim. Ev. §§ 131–3. *Supra*, § 1218.

Scienter must be averred.

§ 1225. The defendant's knowledge of the falsity of the pretences is material,[1] and hence must be averred, unless the pretences stated are of such a nature as to exclude the possible hypothesis of the defendant's ignorance of their falsity.[2] A reckless statement of a fact of which the narrator is ignorant may be equivalent to a statement he knows to be false.[3]

Intent to defraud must in some way appear.

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

[1] *Supra*, §§ 1165, 1185, 1210. State *v.* Blauvelt, 38 N. J. L. 306.

Thus an indictment for obtaining money under false pretences must allege that the defendant knew the falsehood: "falsely and fraudulently" is not enough. R. *v.* Henderson, 2 M. C. C. 192; Car. & M. 328; State *v.* Bradley, 68 Mo. 140. *Supra*, § 1185. But where the indictment alleged that the defendant "did unlawfully falsely pretend," etc., it was held that the omission of the word "knowingly" was no ground for arresting the judgment. R. *v.* Bowen, 4 New Sess. Cas. 62; 13 Q. B. 790; 3 Cox C. C. 483.

[2] R. *v.* Philpotts, 1 C. & K. 112; R. *v.* Keighley, Dears. & B. 145; 7 Cox C. C. 217; Com. *v.* Speer, 2 Virg. Cases, 65; State *v.* Bradley, 68 Mo. 140; though see Com. *v.* Blumenthal, cited Wharton's Prec. 242; and Com. *v.* Hulbert, 12 Met. 446. See, as to general pleading of *scienter*, Whart. Cr. Pl. & Pr. § 164. That "designedly" implies a *scienter*, see State *v.* Snyder, 63 Ind. 203.

[3] *Supra*, § 1185. See Reese Mining Co. *v.* Smith, L. R. 4 H. L. 79. *Infra*, § 1246.

[4] *Supra*, § 1184; People *v.* Getchell, 6 Mich. 496; Scott *v.* People, 62 Barb. 62.

The intent to defraud is not sufficiently set forth in a statement that A. did unlawfully attempt and endeavor fraudulently, falsely, and unlawfully to obtain from the Agricultural Cattle Insurance Company a large sum of money, to wit, £22 10*s.*, with intent to cheat and defraud the company. R. *v.* Marsh, 1 Den. C. C. 505; T. & M. 192; 3 New Sess. Cas. 699.

[5] R. *v.* Hamilton, 2 Cox C. C. 11; 9 Ad. & El. (N. S.) 276; cited fully *supra*, § 1213. That the omission of the allegation of intent is not fatal after verdict, under statute, see State *v.* Bacon, 7 Vt. 219; Jim *v.* State, 8 Humph. 603. That it is no variance that the proof goes only to a part of the money, to which the intent to defraud relates, see R. *v.* Leonard, 3 Cox C. C. 284; 1 Den. C. C. 304.

Under the English statutes the following rulings have been made, which are applicable to the corresponding statutes in this country.

Under 7 Geo. IV. c. 64, s. 21, an indictment for obtaining goods by means of false pretences, with intent to defraud a specified person, was bad, unless it stated whose property the goods were, and the defect was not aided after verdict. R. *v.* Martin, 3 N. & P. 472; 8 A. & E. 481; S. P., R. *v.* Norton, 8 C. & P. 196.

By 14 & 15 Vict. c. 100, s. 8, it

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

An intent to defraud a firm necessarily includes an intent to defraud each of its members, and hence it is enough, when a firm is defrauded, to aver an intent to defraud a member of the firm.[1]

An intent laid to defraud any one having an interest in the property is enough.[2]

An averment that A. "did receive and obtain the said goods of said B. from said B. by means of the false pretences aforesaid, and with intent to cheat and defraud the said B. of the same goods," has been held a sufficient averment that the goods were designedly obtained.[3] But there must be a specific averment of intent to defraud.[4]

§ 1227. The property must be distinctly averred to have been obtained by means of the pretence.[5] But the process of reasoning

shall be sufficient, in an indictment for obtaining property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person. By sec. 25, every objection to an indictment for any formal defect apparent on the face thereof shall be taken before the jury shall be sworn. It was ruled that sec. 8 did not render it unnecessary, in an indictment for obtaining money by false pretences, to state whose property the money was, and that the omission was not a formal defect within sec. 25. Sill *v.* R., Dears. C. C. 132; 1 El. & Bl. 553. 24 & 25 Vict. c. 96, s. 88, renders an allegation of ownership unnecessary.

[1] Stoughton *v.* State, 2 Ohio St. 562. See *supra*, §§ 743, 1212.

[2] Mack *v.* State, 63 Ala. 138.

[3] Com. *v.* Hooper, 104 Mass. 549. But see *supra*, § 1210.

[4] Com. *v.* Dean, 110 Mass. 64.

In this case it was said by Morton, J.: "The indictment does not charge any offence with the precision requisite in criminal pleadings. There is no sufficient allegation that the defendant obtained the signature of Sears to the note with an intent to defraud. The intent to defraud is an essential element of the crime intended to be charged, and must be distinctly averred by a proper affirmative allegation, and not by way of inference or argument merely. Com. *v.* Lannan, 1 Allen, 590.

"The concluding clause that 'so the jurors aforesaid, upon their oaths aforesaid, do say and present the said Dean' 'in the manner aforesaid, designedly, by a false pretence and with intent to defraud, obtained the signature of said Sears,' is a statement of a legal conclusion from the facts previously charged. The conclusion does not follow from the premises. The only allegation of an intent to defraud is made argumentatively, and as a legal inference from facts stated, and that inference is unsound. Com. *v.* Whitney, 5 Gray, 85; R. *v.* Rushworth, R. & R. 317."

[5] R. *v.* Kelleher, 14 Cox C. C. 48; 2 Ir. L. R. Q. B. D. 11; Ladd *v.* State,

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

Obtaining "by means" of pretence must be averred.

A delivery of the property must be averred, as the result of the false pretences, in all cases in which the prosecution rests upon such delivery.[5]

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

17 Fla. 215; State *v.* Lewis, 26 Kan. 123; Pendry *v.* State, 18 Fla. 191; Cook *v.* State, 83 Ind. 402.

[1] R. *v.* Hamilton, 9 Ad. & El. (N. S.) 271; Com. *v.* Hulbert, 12 Met. 446; Com. *v.* Coe, 115 Mass. 481; State *v.* Hurst, 13 W. Va. 54; Baker *v.* State, 14 Tex. Ap. 332. See *supra*, § 1215.

It is said in Missouri that the phrase, "by color of said false pretence," is bad. State *v.* Chunn, 19 Mo. 233. See R. *v.* Airey, 2 East, 30.

[2] State *v.* Philbrick, 31 Me. 401; Com. *v.* Strain, 10 Met. 521; Norris *v.* State, 25 Ohio St. 219; State *v.* Saunders, 63 Mo. 482. See Com. *v.* Parmenter, 121 Mass. 354; Epperson *v.* State, 42 Tex. 79; State *v.* Green, 7 Wis. 676; State *v.* Orvis, 13 Ind. 569.

[3] *Supra*, §§ 1215, 1216.

[4] *Supra*, § 1215.

In an averment that B. "was induced, by reason of the false pretences so made as aforesaid, to purchase and receive, and did then and there purchase and receive of the said A." certain property, "and to pay and deliver, and did pay and deliver therefor, and as the price thereof," certain goods, sufficiently charges that B. was induced by the false pretences to pay and deliver, and that induced by false pretences he did pay and deliver, and is not defective for not repeating the words "then and there" before the words "to pay and deliver," or before the words "did pay and deliver." Com. *v.* Hooper, 104 Mass. 549.

The allegation of "a sale on credit," is supported by proof of a sale for a note payable in four months. Com. *v.* Davidson, 1 Cush. 33. *Supra*, § 1180.

The indictment need not charge that any false token or counterfeit letter was used, even where false token or writing is alternatively used in the statute. Skiff *v.* People, 2 Parker C. R. 139. *Supra*, § 1179.

[5] State *v.* Philbrick, 31 Me. 401; Com. *v.* Strain, 10 Met. 521; Com. *v.* Lannan, 1 Allen, 590; Com. *v.* Goddard, 4 Ibid. 312. See, also, Com. *v.* Jeffries, 7 Ibid. 549; Com. *v.* Lincoln, 11 Ibid. 233. *Supra*, § 1180.

It is not a fatal error that the obtaining of the signature to a promissory note, and the obtaining the money on the same, are stated to be on two distinct days. Com. *v.* Frey, 50 Penn. St. 245.

ment of obtaining from A.[1] And so obtaining by an agent supports an averment of obtaining by the principal.[2]

Varying counts may be joined.

§ 1228. Counts varying the pretences, and counts varying the parties defrauded, may be joined.[3]

14. *Attempts.*

§ 1229. The general law as to attempts is elsewhere fully discussed.[4] So far as concerns the particular offence now under consideration, one or two special points are to be noticed.

By statute conviction may be had of attempt under indictment for complete offence.

By statute in England and in several of the United States, there may be a conviction of an attempt under indictment for the substantive offence, though at common law this is not permissible. Hence we have a number of reported cases where there was a conviction of the attempt under the ordinary indictment for obtaining goods by false pretences.[5]

Conviction may be had irrespective of prosecutor's prudence.

§ 1230. In attempts, the question of prudence or imprudence of the prosecutor does not arise; and a conviction may be had where there was a fruitless attempt to obtain goods by a false pretence.[6]

Attempt may be sustained where only credit is obtained.

§ 1231. The same distinction applies where only credit on account is shown to have been secured. It has been already seen[7] that an indictment for the consummated offence cannot be sustained when only a credit on account was obtained. But under these circumstances, as is elsewhere more fully noticed, the defendant may be convicted of an attempt.[8]

Question of attempt is for jury.

§ 1232. It is for the jury to determine whether the attempt was really made. Thus, where C., being employed at a hospital, wrote to the prosecutor, as manager, for a small quantity of linen, not saying it was for the hospital, and

[1] R. *v.* Moseley, L. & C. 92.

[2] *Supra*, § 1212; Sandy *v.* State, 60 Ala. 58; Bozier *v.* State, 5 Tex. Ap. 220.

[3] Oliver *v.* State, 37 Ala. 134. Whart. Cr. Pl. & Pr. § 285.

[4] See *supra*, §§ 173 *et seq.*

[5] R. *v.* Roebuck, Dears. & B. 24; 7 Cox C. C. 126; R. *v.* Ball, C. & M. 249; R. *v.* Hensler, 11 Cox C. C. 570; R. *v.* Francis, L. R. 2 C. C. 128; 12 Cox C. C. 612.

[6] R. *v.* Roebuck, *supra*; R. *v.* Ball, *supra*. *Supra*, § 199.

[7] *Supra*, § 1198.

[8] R. *v.* Eagleton, Dears. C. C. 515; 6 Cox C. C. 559. *Supra*, § 1159.

the goods were really ordered for himself, but not sent; on an indictment for an attempt to obtain them, the question left to the jury was, whether he ordered the goods as for and on behalf of the hospital or in his own name, there being no evidence of an intention to pay cash, but evidence of the absence of such intention.[1]

General character of instrument must be designated.

§ 1233. In an indictment for an attempt to obtain by a false written instrument, a variance as to character of the instrument is fatal. Thus, it has been ruled that where the indictment charges the instrument to be a money order, and the proof does not sustain this, a conviction is erroneous.[2] But the instrument need not, if correctly designated, be set out.[3]

Means of attempt must be averred.

§ 1234. Nor is it sufficient baldly to aver an "attempt," without in some way stating the means. Thus, an indictment was held bad which stated that A. did unlawfully attempt and endeavor to obtain from B. a large sum of money (stating it), with intent to cheat and defraud B.[4]

15. *Receiving Goods obtained by False Pretences.*

Receiving goods so obtained is indictable.

§ 1235. At common law, persons receiving goods knowing them to have been fraudulently obtained by false pretences will be indictable as accessaries after the fact, if the obtaining be a statutory felony; or, if participants in the original design, as principals, where the obtaining is a statutory misdemeanor. By statutes in England and elsewhere, however, such receiving is made a substantive offence. To sustain a conviction, in any view, it is necessary to prove that the defendant knew that the goods were obtained by false pretences.[5]

[1] R. *v.* Franklin, 4 F. & F. 94.

[2] R. *v.* Cartwright, R. & R. 106. *Supra*, §§ 190 *et seq.*, 1217.

[3] R. *v.* Coulson, T. & M. 332; 1 Den. C. C. 592. *Supra*, § 1217.

[4] R. *v.* Marsh, 1 Den. C. C. 505; T. & M. 192. *Supra*, §§ 190 *et seq.*

[5] R. *v.* Rymes, 3 C. & K. 327.

CHAPTER XIX.

FRAUDULENT INSOLVENCY.

I. FRAUDULENT CONVEYANCES.

Under statute Eliz. making fraudulent conveyance is indictable.

§ 1238. By the statute 13 Eliz., which makes void all conveyances, etc., with intent to defraud *creditors*, it is provided that the parties to any "such feigned, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions," etc., "which at any time shall wittingly and willingly put in use, avow, maintain, justify, or defend the same, or any part of them as true, simple, and done, had, or made *bonâ fide*, and upon good considerations; or shall aliene or assign any the lands, tenements, goods, leases, or other things before mentioned, to him or them conveyed, as is aforesaid," besides the civil penalty, "being lawfully convicted thereof, shall suffer imprisonment for one half year without bail or mainprise." By statute 27 Eliz. the same provision is extended to those concerned in similar devices to defraud *purchasers*.[1] Similar statutes have been adopted in several States of the American Union.

In a leading case reported under the statute of 13 Eliz.,[2] it was held in arrest of judgment, by Maule, J., delivering the opinion of his brethren, that an indictment lies under the act for a fraudulent alienation of real estate.[3]

[1] See 2 Russ. on Crimes, 315; Roberts's Digest Brit. Stat. 294; 1 Chitty's Stat. 385.

[2] R. *v.* Smith, 6 Cox C. C. 31. As to the English statute on fraudulent bankruptcy, may be consulted Steph. Dig. C. L. art. 388; Brett, *ex parte*, L. R. 1 Ch. D. 151.

[3] See, for form of indictment, Whart. Prec. 518.

II. SECRETING GOODS.

Secreting goods is made indictable by statute.

§ 1239. By statutes in force in many States, the secreting of goods with intent to defraud creditors is an indictable offence. To constitute this offence it is necessary that there should be,—

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

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

Secreting or assigning must be actual.

§ 1240. 1st. *There must be an actual secreting or assigning of the goods.* It is not enough that the debtor, to his creditor's face, refuses to surrender property which the creditor claims. Thus it was held that a refusal of a defendant to deliver up a watch to the sheriff's deputy was not within the statutes.[2] The object of the law is not to make a man indictable who *resists* process, since for this another procedure exists, but to prevent the secret and covinous disposal of property in such a way as to elude the pursuit of the law and baffle an execution. A pointed illustration of this is the case of a trader, who, after obtaining credit by stocking his store with goods, either hides such goods until such time as he may be able, without suspicion or disturbance, to convert their proceeds to his own use, or consigns them to auction under such covers as may enable him to turn them into cash without his creditors' knowledge. It would seem, from analogy to the statutes of Elizabeth, that the offence would continue to be indictable, even if a consideration were received, if the intent to defraud were proved.

[1] See State *v.* Marsh, 36 N. H. 196; Com. *v.* Damon, 105 Mass. 580. Under a recent English statute, see ruling in R. *v.* Rowlands, L. R. 8 Q. B. D. 530; 44 L. T. (N. S.) 286; where it was held that in such cases the questions for the jury were: "(1) Did the defendant, either subsequent to the judgment being obtained against him, or within two months before the date of any unsatisfied judgment, remove or conceal his goods? (2) Did he do so in defraud of the particular creditor who had obtained the judgment? (3) Does the fact of his having done so, coupled with the general evidence in the case, satisfy the jury that his intention was to defraud any and every person to whom he might be indebted?" See London Law Times, May 27, 1882, p. 59.

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

§ 1241. 2d. *An intent must be shown to prevent the property from being made liable for the payment of debts; or, in case of receivers, a guilty knowledge of such intent.*[1] It is not enough that the debtor's object was to give a preference to a particular creditor.[2]

Intent or *scienter* must be shown.

When "all creditors" are protected by the act, as "creditors," it seems, may be classed even those whose debts are not yet due.[3] Under such a statute it is unnecessary that the prosecutors should be judgment creditors.[4]

The fact of indebtedness of some kind, however, on the part of the defendant, must be distinctly averred.[5]

The federal statute, making it indictable to obtain goods by false pretences three months prior to bankruptcy, has been held unconstitutional, as not limited to acts in contemplation of bankruptcy.[6]

[1] See Com. *v.* Brown, 15 Gray, 189; Com. *v.* Strangford, 112 Mass. 289. Selling property with intent to defraud the lien holder is, in some States, made indictable. Nixon *v.* State, 55 Ala. 120; Robberson *v.* State, 3 Tex. Ap. 502.

[2] Com. *v.* Hickey, 2 Parsons, 317.

[3] Johnes *v.* Potter, 5 S. & R. 519.

[4] People *v.* Underwood, 16 Wend. 546, citing Wiggins *v.* Armstrong, 2 John. Ch. 144.

Thus, in New York, Bronson, J., said:—

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

[5] State *v.* Robinson, 9 Foster, 274.

[6] U. S. *v.* Fox, 95 U. S. 670.

PART III.

OFFENCES AGAINST SOCIETY.

CHAPTER XX.

PERJURY.

§ 1244. Perjury, as the offence, modified by statute, is now generally defined, is the corrupt assertion of a falsehood, Definition. under oath, or affirmation, and by legal authority, for the purpose of influencing the course of law. Or, to give a definition drawn from the older common law authorities, it is the wilful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding.[1] Perjury is at common law a misdemeanor.[2]

[1] This definition is substantially that given by the English Commissioners in their draft report made in 1879, and to sustain it may be cited: 1 Hawk. c. 69, s. 1; 3 Inst. 164; Bac. Ab. tit. "Perjury;" Burn's Justice, tit. "Perjury;" Step. Dig. C. L. art. 135; 2 Russ. on Cr. 5th Am. ed. 596; State *v.* Tappan, 1 Foster, 56; Pickering's Case, 8 Grat. 628; State *v.* Brown, 79 N. C. 642; State *v.* Dodd, 3 Murph. 226; State *v.* Ammon, 3 Murph. 123; Martin *v.* Miller, 4 Mo. 47; Pankey *v.* People, 1 Scam. 80; De Bernie *v.* State, 19 Ala. 23; Jackson *v.* State, 1 Carter (Ind.), 184; McGregor *v.* State, Ibid. 232; People *v.* Collier, 1 Mich. 137; Nelson *v.* State, 32 Ark. 193.

[2] 3 Inst. 163-5; R. *v.* Johnson, 2 Show. 1; Steph. C. L. note vii. In R. *v.* Hodgkiss, L. R. 1 C. C. 212, Kelly, C. B., held that false statutory affidavits made as a prerequisite to obtaining a legal status, as distinguished from false

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

I. WILFUL.

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

Offence must be wilful.

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

oaths in court, are not "perjury," and the court consequently struck out from the indictment the averments of perjury, and sentenced for a misdemeanor at common law. But in this country such false statutory oaths are commonly treated as perjury. *Infra*, § 1270.

[1] R. *v.* Chapman, 1 Den. C. C. 432; T. & M. 90; R. *v.* Hodgkiss, L. R. 1 C. C. 212. See R. *v.* O'Brian, 2 Stra. 1143; R. *v.* De Beauvoir, 7 C. & P. 17; and cases cited *infra*, §§ 1271, 1274.

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

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

[4] 1 Sid. 419; Com. Dig. Jus. of Peace (B.), 102.

[5] *Supra*, § 89, and cases there cited. R. *v.* Stephens, 5 B. & C. 246; U. S. *v.* Moore, 2 Low. 232; Resp. *v.* Newell, 3 Yeates, 407; Thomas *v.* Com., 2 Rob. (Va.) 795; Com. *v.* Cook, 1 Ibid. 729; State *v.* Garland, 3 Dev. 114; Green *v.* State, 41 Ala. 419; Miller *v.* State, 15 Fla. 577; Cothran *v.* State, 39 Miss. 541. See as to indictment, *infra*, § 1286.

[6] U. S. *v.* Shellmire, 1 Bald. 370; Com. *v.* Brady, 5 Gray, 78; Case *v.* People, 6 Abb. (N. Y.) N. C. 151; 76 N. Y. 220 (*infra*, § 1257); Com. *v.* Cornish, 6 Binn. 249; Com. *v.* Cook, 1 Rob. (Va.) 729. See R. *v.* Muscot, 10 Mod. 192; R. *v.* Moreau, 11 Q. B. 1028; Steinman *v.* M'Williams, 6 Barr, 178.

II. FALSE AND CORRUPT.

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

"Falsely" is knowingly affirming without probable cause.

[1] Ibid.

[2] R. *v.* Edwards, 3 Russ. on Cr. 1; U. S. *v.* Neale, 14 Fed. Rep. 767; Com. *v.* Halstat, 2 Bost. Law. Rep. 177; State *v.* Gates, 17 N. H. 373.

[3] Per Lord Mansfield, in R. *v.* Pedley, 1 Leach, 327; R. *v.* Schlesinger, 10 Q. B. 670; State *v.* Knox, Phil. (N. C.) L. 312; though see 2 Russ. on Cr. 9th Am. ed. 527; 1 Sid. 419; U. S. *v.* Shellmire, 1 Bald. 370; U. S. *v.* Atkins, 1 Sprague, 558; 19 Law Rep. 95, explained by Lowell, J., in U. S. *v.* Moore, 2 Low. 232. *Infra*, § 1250. For other cases see *supra*, § 80.

In Lambert *v.* People, 76 N. Y. 220, 6 Abb. New Cas. 181, an affidavit, appended to a statement by a life insurance company, stated that deponents were the officers of the company, "and on the 31st of December last all the above described assets were the absolute property of the company, free and clear from any liens or claims, except as above stated; that the foregoing statement, with the schedules and explanations hereunto annexed and by them subscribed, are a full and correct exhibit of all liabilities, . . . on the said 31st day of December last, with the year ending on that day, according to the best of their knowledge, information, and belief respectively." It was held by a majority of the court, that all the statements contained in the affidavit were on information and belief, as well as those preceding the semicolon as those after it. Perjury, it was said, "can only be imputed upon full knowledge of the falsity, and cannot be predicated where wilfulness, corruption, and malice are not manifest. A possible conception, or a mistake in swearing to the construction of a written instrument, is not enough to warrant a conviction of perjury. R. *v.* Crespigny, 1 Esp. 280; U. S. *v.* Conner, 3 McLean, 573; U. S. *v.* Stanley, 6 Ibid. 409; 3 Whart. C. L. (7th ed.), §§ 2199, 2200; Steinman *v.* M'Williams, 6 Penn. St. 170, 178. There is no fair inference that the accused intended to swear unqualifiedly as to the portion preceding the semicolon, and otherwise as to the remainder." See abstract in 19 Alb. L. J. 200; and see *infra*, §§ 1247, 1283.

[4] 1 Hawk. c. 69, s. 6; 3 Inst. 166; Palmer, 294. *Infra*, § 1302. In an action on a contract before a justice of

instance, if a man swear that J. N. revoked his will in his presence, though he really had revoked it, it is perjury if it were unknown to the witness that he had done so.[1] And it is perjury for a person knowingly and corruptly to swear that he is ignorant of a particular fact of which he is cognizant,[2] or cognizant of a fact of which he is ignorant.[3]

Probable cause is to be estimated from defendant's standpoint.

§ 1247. It has just been seen that falsity consists in knowingly affirming a condition without probable cause.[4] But what is probable cause? Here we must again accept a position so often vindicated in these pages, that probable cause must be estimated, not from the jury's standpoint, nor from the judge's, but from the defendant's. On the one hand, the fact sworn to may have been true, but if the defendant swore to it wilfully and corruptly, not knowing it to be true, or not having probable cause, according to his own lights, for believing it to be true, he is guilty, as stated in the last section, of perjury. On the other hand, if he swore honestly to a fact or belief, with probable cause, according to his own lights, to the best of his belief, he is not guilty of perjury, though his oath was really untrue.[5]

Admissible to prove a mistake of fact induced by erroneous representations of others.

§ 1248. Hence it is admissible to prove reception of such information by the defendant as gave him probable ground for his oath. A witness stating evidence truly to the writer of an affidavit, and swearing to it when drawn up, is not guilty of perjury if the statements are written erroneously by the amanuensis.[6] Upon an indictment against the defendant for a misdemeanor in falsely swearing that he *bonâ fide* had such an estate in law or equity

the peace, the making of the contract was in issue. A witness testified that he went to a field with the parties to the contract, no other persons than the parties and himself being present, and that he heard the contract agreed to by the parties. In point of fact he did not go to the field, was not present when the contract was made, and had no knowledge of the making. The contract was made, nevertheless; but it was held that the prisoner, having wilfully sworn to a thing he did not know to be true, although it was true, was guilty of perjury. People *v.* McKinney, 3 Parker C. R. 510.

[1] Hetley, 97.

[2] Wilson *v.* Nations, 5 Yerg. 211. See U. S. *v.* Atkins, 1 Sprague, 558.

[3] State *v.* Gates, 17 N. H. 373; State *v.* Knox, Phillips, N. C. L. 312.

[4] See Com. *v.* Cook, 1 Rob. (Va.) 729; Jesse *v.* State, 20 Ga. 156.

[5] R. *v.* De Beauvoir, 7 C. & P. 17; R. *v.* Moreau, 11 Q. B. 1028; Com. *v.* Brady, 5 Gray, 78; Smith *v.* Myers, 41 Md. 425; Flemister *v.* State, 48 Ga. 170.

[6] Jesse *v.* State, 20 Ga. 156.

of the annual value of £300 above reprises, as qualified him to be a member of parliament for a borough, a surveyor stated that the fair annual value of the property was about £200 a year, but another witness stated that it was badly let, and that he believed it was worth more than £300 a year, and that he told the defendant so, and that he did not think that the defendant had any reason to believe that the qualification in point of value was not sufficient. It was held that the jury must be satisfied beyond all doubt that the property was not of the value of £300 a year, and that at the time the defendant made the statement he knew that it was not of that value.[1]

And so when advised by counsel.

§ 1249. An honest oath taken under advice of counsel, therefore, is not perjury.[2] Thus a bankrupt who submits the facts in regard to his property fairly to the advice of his counsel, and acting under the advice thus given withholds certain items from his schedule, is not guilty of perjury; the fraudulent intent being wanting.[3] Nor is it perjury when a party swears erroneously to a written statement which his counsel tells him is substantially correct.[4]

General evil intent may constitute corruption.

§ 1250. It has been already seen that where there is a general intent to do mischief, and a specific overt act follows in causal connection with such general intent, then the general intent applies to the specific act, so as to complete the offence.[5] Hence it is perjury if a witness, from general recklessness and a depraved determination to hurt, fall the consequences where they may, swears knowingly to a falsehood. Even a drunkard, swearing falsely, may be convicted of perjury, if his intent in rendering his testimony were evil, though his conception of what he was doing was not exact;[6] and in fact if we require proof of the exact perception of the falsification to convict of perjury, there would be few convictions of perjury, since there are few cases of perjury in which such an exact conception

[1] R. *v.* De Beauvoir, 7 C. & P. 17—Lord Denman, C. J.

[2] U. S. *v.* Stanley, 6 McLean, 409; State *v.* McKinney, 42 Iowa, 205. As to advice of counsel in other matters, see *supra*, § 85 *b*; Jesse *v.* State, 20 Ga. 169; Hood *v.* State, 44 Ala. 81.

[3] U. S. *v.* Conner, 3 McLean, 573. See U. S. *v.* Dickey, 1 Morris, 412.

[4] U. S. *v.* Stanley, *ut sup.*

[5] See *supra*, §§ 101 *et seq.*

[6] People *v.* Willey, 2 Park. C. R. 19. See, for other cases, *supra*, § 53.

could be proved. But if there be no evil intent, general or special, perjury fails. Thus it is not perjury to swear honestly to testimony which the witness believes to be true, though a little diligence would have enabled him to have discovered its falsity. Where, however, he dishonestly refuses to make inquiry, and purposely shuts himself in to impressions which he has good reason to believe further investigations would dispel, then it is perjury. The *corruptness*, when proved, completes the offence; the absence of corruptness negatives it.[1]

III. OATH.

§ 1251. While the oath must be solemnly administered, and by an officer duly authorized,[2] it is immaterial in what form it is given, if the party, at the time, professes such form to be binding on his conscience.[3] When a witness comes to be sworn, it is to be assumed that he has settled with himself in what way he will be sworn, and he should make it known to the court; and should he be sworn with uplifted hands, or by any other unusual mode, though not conscientiously opposed to swearing on the gospel, and depose falsely, he subjects himself to a prosecution for perjury.[4] "The fact that a person takes an oath in any particular form is a binding admission that he regards it as binding on his conscience."[5] And a mere formal variation from the form of a statutory oath does not affect its obligatory character.[6]

Form of oath is immaterial if legal.

[1] U. S. *v.* Shellmire, 1 Bald. 370; U. S. *v.* Atkins, 1 Sprague, 558; U. S. *v.* Moore, 2 Low. 232; Com. *v.* Brady, 5 Gray, 78; Cothran *v.* State, 39 Miss. 541.

[2] Van Dusen *v.* People, 78 Ill. 645; Biggerstaff *v.* Com., 11 Bush, 169. *Infra*, §§ 1263, 1315.

[3] *Infra*, §§ 1287, 1305. See Whart. Cr. Ev. §§ 353 *et seq.* By § 97 of New York Penal Code of 1882, it is made no defence that the oath was administered irregularly.

[4] Com. *v.* Knight, 12 Mass. 274; Campbell *v.* People, 8 Wend. 636; Thomas *v.* Com., 2 Rob. Va. 795; Com. *v.* Cook, 1 Rob. Va. 729; State *v.* Caffey, N. C. Term R. 272; S. C., 2 Murph. 320; State *v.* Witherow, 3 Ibid. 153; State *v.* Wisenhurst, 2 Hawks, 458. As to oath, see Whart. Cr. Ev. § 353. As to oaths administered by commissioners from other States, see Com. *v.* Smith, 11 Allen, 243. *Infra*, § 1287.

[5] Steph. Dig. C. L. art. 135, citing Ides *v.* Hoare, 2 B. & B. 232.

"Corporal oath" and "solemn oath" are equivalent, and either is sustained by proof of swearing with uplifted hands. Jackson *v.* State, 1 Carter (Ind.) 184. When a statute directs a form of swearing, it must be substantially followed. Maher *v.* State, 3 Minn. 444; State *v.* Davis, 69 N. C. 383; Ashburn *v.* State, 15 Ga. 246. But mere verbal deviations are immaterial. Com. *v.* Smith, 11 Allen, 243; State *v.* Gates, 17 N. H. 373; State *v.* Dayton, 3 Zab. 49; People *v.* Cook, 8 N. Y. 67. "Kissing the book" may be omitted. R. *v.* Haly, 1 Cr. & D. 199. And kissing the wrong book does not vitiate. R. *v.* Haly, *ut sup.* That mere technical variations do not affect the validity of the oath even when prescribed by statute, see State *v.* Dayton, *ut sup.*; Ashburn *v.* State, 15 Ga. 246; State *v.* Owen, 72 N. C. 605; Edwards *v.* State, 49 Ala. 334; Faith *v.* State, 32 Tex. 373.

A prosecution for perjury cannot be based on testimony received orally, but which by law ought to have been taken in writing and which could not be evidence. State *v.* Trask, 42 Vt. 152. See *infra*, § 1294, and State *v.* Helle, 2 Hill (S. C.), 290. *Infra*, § 1270.

To an affidavit it is not necessary that there should be a signature. Com. *v.* Carel, 105 Mass. 582; Turpin *v.* Road Co., 48 Ind. 46. *Infra*, § 1310.

[1] State *v.* Keene, 26 Me. 33.

[2] *Infra*, § 1271.

[3] See R. *v.* Phillips, 2 Strange, 921; Resp. *v.* Ross, 2 Yeates, 1; Whart. Cr. Pl. & Pr. § 302.

[4] *Infra*, §§ 1271, 1280, and cases there cited; Chamberlain *v.* People, 23 N. Y. 85; Montgomery *v.* State, 10 Ohio, 220.

[5] Ibid.; Resp. *v.* Newell, 3 Yeates, 407. See *infra*, § 1271; *supra*, §§ 185, 1252.

[6] Com. *v.* Knight, 12 Mass. 274.

[8] 3 Inst. 165; State *v.* Dayton, 3 Zab. 49; State *v.* Owen, 72 N. C. 605.

§ 1252. Where a party offers himself to prove his books, and wilfully testifies untruly as to matters material to the issue, it is perjury, although he was sworn generally, but without objection, to tell the whole truth, instead of being sworn to make true answers.[1] And a party is generally liable for perjury in his own case.[2]

No matter if oath was on *voir dire*.

IV. PARTY TO BE CHARGED.

§ 1253. The crime being distinct, several persons cannot be joined. One only can be made defendant. Even supposing two persons to swear jointly to the same false affidavit, it is impossible to suppose that they did so at the same moment of time, so as to make the offence exactly joint.[3]

Two defendants cannot be joined.

§ 1254. If an incompetent witness is permitted to testify, and testifies falsely, it is perjury.[4] This holds even where a party himself is a witness.[5]

Perjury though witness is incompetent.

§ 1255. Nor is it requisite that the defendant should have been served with a subpœna, or have been compelled to testify. The mere fact of his testifying is enough.[6]

And though he be a volunteer.

[1] State *v.* Keene, 26 Me. 33.

[2] *Infra*, § 1271.

[3] See R. *v.* Phillips, 2 Strange, 921; Resp. *v.* Ross, 2 Yeates, 1; Whart. Cr. Pl. & Pr. § 302.

[4] *Infra*, §§ 1271, 1280, and cases there cited; Chamberlain *v.* People, 23 N. Y. 85; Montgomery *v.* State, 10 Ohio, 220.

[5] Ibid.; Resp. *v.* Newell, 3 Yeates, 407. See *infra*, § 1271; *supra*, §§ 185, 1252.

[6] Com. *v.* Knight, 12 Mass. 274.

V. BEFORE A COMPETENT OFFICER.

§ 1256. Breach of vows, when attended by injury to others or to society, by the canon law is subjected to specific ecclesiastical penalties. "Quicunque sciens pejereraverit" (whether in a private vow or public testimony, supposing that God be appealed to as a sanction of the truth of vow or statement), "quadraginta dies in pane et aqua et septem sequentes annos pocniteat, et nunquam sit sine poenitentia, et nunquam in testimonium recipiatur: communionem tamen post haec percipiat." (C. 18. c. vi. qu. 1.) But the Roman common law, followed in this respect by the English, treats perjury as an offence only when it can be used to disturb in judicial processes the civil relations of men. So far as it is solely an offence against God, solely by God is it to be avenged. "Jurisjurandi contemta religio satis Deum habet ultorem." (L. 2. Cod. de reb. cred.) In the maintenance of this distinction the English common law has been resolute.

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

§ 1257. It is essential to constitute the offence that, if the oath be non-judicial, it be taken before the proper officer, or if it be judicial, before the court having jurisdiction of the proceedings.[1] If, in case of a non-judicial oath, it appear to have been taken before a person who had no

Officers of court administering the oath must be competent.

[1] *Infra*, § 1275; 2 Russ. on Cr. 6th Am. ed. 599; R. *v.* Senior, L. & C. 409; 9 Cox C. C. 469; R. *v.* Hughes, D. & B. 188; 7 Cox C. C. 286; R. *v.* Shaw, 10 Ibid. 66; R. *v.* Bacon, 11 Ibid. 540; R. *v.* Lewis, 12 Ibid. 163; R. *v.* Willis, Ibid. 164; U. S. *v.* Bailey, 9 Peters, 238; U. S. *v.* Barton, Gilpin, 439; State *v.* Furlong, 26 Me. 69; Com. *v.* Knight, 12 Mass. 274; Com. *v.* White, 8 Pick. 453; State *v.* Fassett, 16 Conn. 457; Arden *v.* State, 11 Ibid. 408; Jackson *v.* Humphrey, 1 Johns. 498; Conner *v.* Com., 2 Va. Cas. 30; Pankey *v.* People, 1 Scam. 80; Montgomery *v.* State, 10 Ohio, 220; Lamden *v.* State, 5 Humph. 83; Steinson *v.* State, 6 Yerger, 531; State *v.* Gallimon, 2 Ired. 374; State *v.* Alexander, 4 Hawks, 182; State *v.* Hayward, 1 N. & McC. 546; State *v.* McCroskey, 3 McCord, 308; State *v.* Wyatt, 2 Hayw. 56; State *v.* Crumb, 68 Mo. 206. For other cases, see *infra*, § 1290.

An indictment averring that "in the Whitechapel County Court of Middlesex, holden before J. M., judge of the court, an action, then pending in the court, came on to be tried; that the defendant was sworn as a witness before J. M., being judge of the said county court, and having sufficient and competent authority to administer the said oath; and then perjury was assigned: sufficiently shows on the face of the indictment that the court was properly constituted, and that the judge had jurisdiction over the cause in which

lawful authority to administer it,[1] or, in case of a judicial oath, before a court which had no jurisdiction of the cause,[2] the defendant must be acquitted.[3] The indictment, however, need not show the nature of the authority of the party administering the oath.[4]

Being sworn by a clerk in presence of the court, is being sworn by the court.[5]

The fact that the oath was administered must be proved beyond reasonable doubt.[5]

§ 1258. Where the court has jurisdiction of the subject matter of inquiry, it is not necessary that the proceedings should be strictly regular.[7] But if from want of some essential condition (*e. g.*, an issue) no jurisdiction attached, perjury cannot be maintained.[8]

Proceedings need not have been strictly regular.

the perjury was alleged to have been committed. Lavey *v.* R. (in error), 17 Q. B. 496; 2 Den. C. C. 504; 5 Cox C. C. 539. See, to same effect, R. *v.* Lawlor, 6 Ibid. 187.

[1] 3 Inst. 165, 166; R. *v.* Hanks, 3 C. & P. 419; Lambert *v.* People, 76 N. Y. 220; 6 Abb. New Cas. 181; Case *v.* People, N. Y. Ct. Ap. 1879; Morrell *v.* People, 32 Ill. 499; State *v.* Phippen, 62 Iowa, 54. *Infra*, § 1272.

[2] 3 Inst. 166; Yelv. 111; State *v.* Furlong, 26 Me. 69; State *v.* Alexander, 4 Hawks, 182. *Infra*, § 1272.

[3] See 1 Hawk. c. 69, ss. 3, 4; Bac. Abr. Perjury (A.); R. *v.* Crossley, 7 T. R. 315; R. *v.* Dunn, 1 D. & Ry. 10; R. *v.* Hanks, 3 C. & P. 419. *Infra*, § 1272.

[4] R. *v.* Callanan, 6 B. & C. 102; State *v.* Ludlow, 2 Southard, 772. *Infra*, §§ 1288, 1289.

[5] *Infra*, §§ 1287, 1315.

[6] In Case *v.* People, 6 Abb. (N. Y.) N. C. 151; 76 N. Y. 220, the defendant was charged with perjury, in swearing to an affidavit before a notary, and the notary could not remember that he administered the oath, but believed he did so from seeing his name on the jurat, and the prisoner swore he did not take the oath, but sent the paper signed by him by a messenger to the notary's office, and the prisoner was corroborated by others. It was ruled that there was not adequate proof that the oath was ever administered.

[7] State *v.* Lavalley, 9 Mo. 824. *Infra*, § 1273.

In R. *v.* Hughes, C. C. R., June, 1879, 40 L. T. (N. S.) 685; 14 Cox C. C. 284; 48 L. J. M. C. 151; the point in the text was examined under the following circumstances:—

A police officer, H., obtained an illegal warrant against S. for assaulting him and obstructing him in the discharge of his duty. H. arrested S. thereon, and took him before the magistrates in petty sessions, who convicted and sentenced S. to six months' imprisonment with hard labor. S. took no objection to the proceedings, and he called a witness to show he was not guilty.

An indictment was afterwards found

[8] R. *v.* Ewington, 2 Mood. C. C. 223; C. & M. 319; R. *v.* Pearce, 3 B. & S. 531; 9 Cox C. C. 258; State *v.* Shanks, 66 Mo. 560. *Infra*, § 1272.

Perjury may be before court-martial.

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

And in Connecticut before an ecclesiastical court.

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

§ 1261. Perjury may be assigned on a false oath taken before a grand jury.[4] In England doubts seem to have existed as to whether

against H. for perjury committed by him at the hearing of the case at petty sessions, and he was convicted by the jury, subject to the opinion of the court as to the jurisdiction of the justices in petty sessions, because there was no written information nor oath to support the warrant. It was held (Kelly, C. B., dissentiente), that the justices had jurisdiction to hear and determine the case against S., notwithstanding he was brought before them on an illegal warrant, and there was no written information. But to make false swearing before commissioners of bankrupt perjury, it is necessary that there should be a good petitioning creditor's debt to support the fiat. R. *v.* Ewington, 2 M. C. C. 223; Car. & M. 319.

In R. *v.* Carr, 10 Cox C. C. 564, it was held that it should be proved distinctly, on the trial of an indictment for perjury, what the charge was, on the hearing of which the false evidence was given.

[1] R. *v.* Heane, 4 B. & S. 947; 9 Cox C. C. 433; R. *v.* Tomlinson, L. R. 1 C. C. 49.

Wilful and corrupt false swearing, when before a local marine board duly and lawfully appointed and constituted, upon a matter material to an inquiry then being lawfully investigated by them, is perjury. R. *v.* Tomlinson, L. R. 1 C. C. 49; 12 Jur. (N. S.) 945.

[2] Chapman *v.* Gillet, 2 Conn. 40.

[3] *Infra*, § 1267.

[4] 1 Ch. C. L. 322; State *v.* Fassett, 16 Conn. 457; Com. *v.* Parker, 2 Cush. 212; Huidekoper *v.* Cotton, 3 Watts,

a grand juror was competent to swear a witness; but it is clear that the clerk of the assizes, or any third person, is admissible for that purpose.[1] In most States the practice is for the foreman of the grand jury, or one of the members, to administer the oath.[2]

Grand jury may administer oath.

§ 1262. The officer who administers the oath must have legal power to administer the oath in the particular process.[3] Thus a man cannot be indicted for perjury in swearing before a justice to his attendance in court as a witness, when the clerk only is authorized to administer such oath.[4]

But otherwise of unauthorized officer.

§ 1263. It is held to be sufficient *primâ facie*, that the person by whom the oath is administered was an acting magistrate, and the evidence of the officer himself may be received to prove this.[5] When such a case is presented by the prosecution,[6] it may be rebutted by proof on part

Officer acting as such *primâ facie* competent.

56; Thomas *v.* Com., 2 Rob. (Va.) 795; Com. *v.* Pickering, 8 Grat. 628; State *v.* Wakefield, 73 Mo. 549. See State *v.* Offutt, 4 Blackf. 355; People *v.* Young, 31 Cal. 563; St. Clair *v.* State, 11 Tex. Ap. 297; Whart. Cr. Pl. & Pr. §§ 378 *et seq.*

[1] R. *v.* Hughes, 1 C. & K. 519.

[2] See Whart. Cr. Pl. & Pr. § 358 *a*; People *v.* Young, 31 Cal. 563; State *v.* Green, 24 Ark. 591.

[3] R. *v.* Stone, Dears. 251; R. *v.* Hanks, 3 C. & P. 419; U. S. *v.* Curtis, 107 U. S. 671; State *v.* Clark, 2 Tyler, 277; State *v.* Jackson, 36 Ohio St. 281; Staight *v.* State, 39 Ibid. 497; Lamden *v.* State, 5 Humph. 83.

[4] State *v.* Wyatt, 2 Hayw. 56. But see *supra*, § 1257.

[5] R. *v.* Roberts, 38 L. T. (N. S.) 690; State *v.* Hascall, 6 N. H. 352. See *infra*, § 1315; Whart. Cr. Ev. §§ 164, 835.

In R. *v.* Roberts, 38 L. T. 690, an indictment for perjury alleged the offence to have been committed before J. U., then being and sitting as the duly qualified and appointed deputy judge of the county court of W. Proof was given that the perjury took place in the presence of J. U., at the county court, and a certified minute, under the seal of the court, of the proceedings, was put in evidence, entitled, "Minute of judgments, orders, and other proceedings, at a court holden at, etc., before J. U., deputy judge of the said court." It was ruled on a case reserved that there was sufficient proof of J. U. acting as deputy judge, and therefore *primâ facie* evidence of his appointment as such. Lord Coleridge, C. J., said:—

"I am of opinion that the conviction should be affirmed. One of the best recognized principles of law, *Omnia praesumuntur esse rite et solemniter acta donec probetur in contrarium*, is applicable to public officers acting in discharge of public duties. The mere acting in a public capacity is sufficient *primâ facie*

[6] People *v.* Phelps, 5 Wend. 10; State *v.* Clark, 2 Tyler, 277.

of the defendant that the officer was not competent to act.[1] Trials for perjury, in this respect, differ from that class of cases in which it is sufficient to prove that an officer whose action is assailed had a *de facto* right. No *de facto* title by the officer administering the oath will sustain an indictment for perjury.[2] But perjury may be assigned on an oath erroneously taken, while the proceedings in which it was taken remain unreversed.[3] And an oath administered

proof of the proper appointment; but it is only a *primâ facie* presumption, and it is capable of being rebutted, and in the case of Rex *v.* Verelst that presumption was rebutted in fact, and the person who there had acted as surrogate for twenty years was proved to have been improperly appointed. The case of Rex *v.* Verelst, 3 Camp. 433, is exceedingly like this; there the fact of Dr. Parson having acted as surrogate was held by Lord Ellenborough, C. J., to be sufficient *primâ facie* evidence that he was duly appointed, and had competent authority to administer an oath, and for that proposition Rex *v.* Verelst was referred to as good law by Lord Campbell, C. J., in Wolton *v.* Gavin, 16 Q. B. 48. But it was further shown in Rex *v.* Verelst that Dr. Parson had never been regularly appointed as surrogate, and Lord Ellenborough then held that the evidence that Dr. Parson was not duly appointed a surrogate could not be shut out, however long he might have acted in that capacity, and that the presumption arising from his acting only stood until the contrary was proved. That is an instructive case, as showing the true rule as to the *primâ facie* presumption in such cases. It is laid down in all the text-books as a recognized principle, that a person acting in the capacity of a public officer is *primâ facie* to be taken to be so, and that principle was adopted by Patteson, J., in Doe dem. Bowley *v.* Barnes, 8 Q. B. 1043. In that case there was a demise by the churchwardens and overseers of some parish property, and the fact that they acted as churchwardens and overseers at the time of the demise was held to be sufficient *primâ facie* proof for the purpose of an action of ejectment without proving their appointment." He then referred to the decision of Tindal, C. J., to the same effect, in R. *v.* Newton, Car. & Kir. 469, and to R. *v.* Jones, 2 Camp. 131; and added: "This objection, if it were good, would extend very widely, for, suppose perjury committed on the first time of acting in his office before a judge or a recorder or county court judge, or any person who fills a responsible public position, would it lie on the prosecution to show the appointment of such an officer in the strictest possible way? Mr. Jelf has not satisfied me that it would, and no member of the court has any doubt that there is no ground for such a contention." See *infra*, § 1315.

[1] Lambert *v.* People, 76 N. Y. 220. *Supra*, § 1246.

[2] R. *v.* Verelst, *ut sup.*; R. *v.* Roberts, *ut sup.*; R. *v.* Newton, 1 C. & K. 469; State *v.* Hascall, 6 N. H. 352; Staight *v.* State, 39 Ohio St. 497; Muir *v.* State, 8 Blackf. 154; Biggerstaff *v.* Com., 11 Bush, 169. *Infra*, § 1315. See People *v.* Phelps, 5 Wend. 10; State *v.* Clark, 2 Tyler, 277.

[3] Van Steenburgh *v.* Kortz, 10 Johns. 167. *Infra*, § 1273.

by an officer (though incompetent) in presence of the court, is regarded as administered by the court.[1]

Perjury not extra territorially punishable.

§ 1264. According to English and American law, one State has no jurisdiction of perjury committed in another State, against the authority of such other State;[2] nor does it make any difference that such perjury was committed in an affidavit taken before a judge of the prosecuting State at the time sojourning in the foreign State, such judge not being authorized so to act by the prosecuting State.[3] There are, however, exceptions to this rule:—

Perjury before consuls, etc., abroad, by statute, may be punished in the United States.[4]

Perjury before a commissioner to take testimony, though committed abroad, is punishable both in the State where the false oath is taken,[5] and in the State from which the commission issues.[6] But the authority of the commissioner is strictly limited by his commission; and if he transcend it, any oath administered by him is not the subject of prosecution in the State from which the commission issues.[7]

Fraudulent use of a false foreign affidavit, though the perjury itself is not cognizable, is indictable at common law.[8]

Whether a State court has jurisdiction of perjury in a federal procedure will be presently considered.[9]

State magistrate under act of Congress may administer oath.

§ 1265. It has been held that if a state magistrate administer an oath under an act of Congress expressly giving this power to magistrates of his class, it is to be regarded as a lawful oath by one having competent authority; as much so as if he had been especially appointed a commissioner under a law of Congress for that purpose.[10] The same

[1] Warwick *v.* State, 25 Ohio St. 21; Stephens *v.* State, 1 Swan, 157. See *infra*, § 1313, for other cases.

[2] Musgrave *v.* Medex, 19 Ves. 652; Phillippi *v.* Bowen, 2 Barr, 20; Whart. Conf. of Laws, § 853.

[3] Jackson *v.* Humphrey, 1 Johns. 498. See Wickoff *v.* Humphrey, Ibid.

[4] *Supra*, § 276; Whart. Conf. of Laws, § 873.

[5] Com *v.* Smith, 11 Allen, 243; see *supra*, §§ 279, 280, 284, 288 *et seq.*, and see article on extra-territorial crime in Crim. Law Mag. for March, 1885.

[6] *Supra*, §§ 276, 288; see Phillippi *v.* Bowen, 2 Barr, 20; Stewart *v.* State, 22 Ohio St. 477; Whart. Conf. of Laws, § 722. *Supra*, §§ 287, 288.

[7] Com. *v.* Quimby, 6 Bost. Law Rep. (N. S.) 210.

[8] O'Mealy *v.* Newell, 8 East, 364.

[9] *Infra*, § 1275.

[10] U. S. *v.* Bailey, 9 Peters, 238; U. S. *v.* Winchester, 2 McLean, 135.

view has been taken where the authority of the State officer to administer the oath is implied under the act of Congress.[1] But the right of Congress to impose duties of this class on State officials may be questioned.[2]

And so justice of the peace and arbitrators under rule of arbitration.

§ 1266. Perjury may be assigned on an oath administered by a justice of the peace, on the investigation of a matter submitted to arbitration by a rule of court, with the consent of parties.[3] The same rule applies to arbitrators.[4] But it may be otherwise if the arbitrators have no power to make a binding award.[5]

VI. IN PROCEEDING AUTHORIZED BY LAW.

False swearing must be in proceeding authorized by law.

§ 1267. To constitute the technical offence of perjury at common law, it must appear that the false swearing was in a judicial proceeding,[6] or, as we will see hereafter,[7] in proceedings which by statute have this predicate assigned to them. It must be remembered, however, that in some jurisdictions it is held that the making of a false affidavit in any proceeding authorized by statute is held to be a distinctive misdemeanor; though in an indictment for such an offence, the averments peculiar to perjury may be rejected as surplusage.[8]

If the defendant took a false oath when examined as a witness at a trial; or in an affidavit to or answer to a bill in equity;[9] or in depositions in a court of equity;[10] or before a commissioner to take depositions for a foreign court;[11] or on a motion for continuance;[12] or in proceedings before referees;[13] or in an affidavit in any pending

[1] U. S. *v.* Madison, 21 Fed. Rep. 628.

[2] *Supra*, §§ 264–6; *infra*, § 1275.

[3] State *v.* Stephenson, 4 McCord, 165. See Chapman *v.* Gillett, 2 Conn. 40.

[4] R. *v.* Ball, 6 Cox C. C. 360. See State *v.* McCroskey, 3 McCord, 308.

[5] *Infra*, § 1269.

[6] *Supra*, § 1244; State *v.* Chamberlin, 30 Vt. 559; State *v.* Simons, Ibid. 620.

[7] *Infra*, § 1270.

[8] R. *v.* Hodgkiss, L. R. 1 C. C. 212; Rump *v.* Com., 30 Penn. St. 475. *Supra*, § 1244. *Infra*, § 1270.

[9] 5 Mod. 348; 3 Inst. 66; R. *v.* White, M. & M. 271; Com. *v.* Warden, 11 Met. 406.

[10] 5 Mod. 348.

[11] *Supra*, § 1264.

[12] State *v.* Hobbs, 49 N. H. 229; State *v.* Johnson, 7 Blackf. 49; State *v.* Flagg, 27 Ind. 24; State *v.* Shupe, 16 Iowa, 36; Morrell *v.* People, 32 Ill. 499.

[13] State *v.* Keene, 26 Me. 33.

issue in court,[1] such as a motion for a new trial;[2] or upon a wager of law;[3] or upon a commission for the examination of witnesses;[4] or in justifying bail in any of the courts;[5] or before a federal commissioner;[6] or on a plea in abatement;[7] or in naturalization proceedings;[8] or upon an affidavit in *habeas corpus* proceedings;[9] or in a judicial proceeding in a court baron;[10] or before a grand jury;[11] or in mitigation of sentence;[12] or before a legally authorized ecclesiastical court;[13] it is perjury.[14]

Juror indictable for false swearing on *voir dire*.

§ 1268. An indictment lies against a juror which alleges that he falsely and corruptly swore upon his *voir dire*, that he had not formed or expressed an opinion on the merits of the case, when in fact he had.[15]

Voluntary false affidavits are not perjury.

§ 1269. But a mere voluntary oath cannot amount to perjury. Therefore, false swearing in a voluntary affidavit, made before a justice of the peace or notary, before whom no cause is pending, and under no statutory procedure, is not perjury.[16] Even when a reference before arbitrators

[1] 5 Mod. 348; 1 Show. 335, 397; 1 Ro. Rep. 79, per Coke, C. J.; Stewart *v.* State, 22 Ohio St. 477; State *v.* Keenan, 8 Rich. 456.

[2] State *v.* Chandler, 42 Vt. 446.

[3] Noy, 128.

[4] Cro. Car. 99. See 1 B. & P. 240.

[5] Com. *v.* Hughes, 5 Allen, 499; Com. *v.* Carel, 105 Mass. 582; Pollard *v.* People, 69 Ill. 148; State *v.* Lavalley, 9 Mo. 824. See Stratton *v.* People, 20 Hun, 288.

[6] U. S. *v.* Volz, 14 Blatch. 15.

[7] State *v.* Roberts, 1 Humph. 539.

[8] U. S. *v.* Jones, 14 Blatch. 90. In this case J. testified, as a witness, that he was well acquainted with the applicant. It appeared that he was a total stranger to the applicant, and volunteered as a witness. This was held perjury. See, also, State *v.* Whittemore, 50 N. H. 245; State *v.* Helle, 2 Hill, S. C. 290; and see *infra*, § 1275.

[9] White *v.* State, 1 Sm. & M. 149.

[10] 5 Mod. 348; 1 Ibid. 55, per Twisden, J.

[11] *Supra*, § 1261.

[12] State *v.* Keenan, 8 Rich. L. 456.

[13] 5 Mod. 348. *Supra*, § 1260.

[14] Archbold's C. P. 9th ed. 538; 1 Hawk. c. 69, s. 3.

[15] State *v.* Wall, 9 Yerger, 347; State *v.* Moffatt, 7 Humph. 250; State *v.* Howard, 63 Ind. 502. See Com. *v.* Stockley, 10 Leigh, 678.

[16] U. S. *v.* Nickerson, 1 Sprague, 232; Com. *v.* Knight, 12 Mass. 274; Jackson *v.* Humphrey, 1 Johns. 498; People *v.* Travis, 4 Parker C. R. 213; Shaffer *v.* Kentzer, 1 Binn. 542; Lamden *v.* State, 5 Humph. 83; State *v.* Wyatt, 2 Hayw. 56; Pegram *v.* Styrm, 1 Bailey, 595; State *v.* Stephenson, 4 McCord, 165; State *v.* Dayton, 3 Zab. 49. It is doubted if perjury can be assigned upon the oath made for the purpose of obtaining a marriage license; R. *v.* Alexander, 1 Leach, 74; but see 1 Vent. 370; and in R. *v.* Foster, R. & R. 459, a false oath taken before a surrogate, to procure a marriage license, was holden not sufficient to support a

is pending, it is not perjury to swear falsely before a justice to an affidavit to be used by them, if no suit or legal procedure could be based on their action.[1] And the same rule applies to all extra-judicial oaths, and to oaths not required by law.[2] Even false swearing to an affidavit attached to a bill in equity is held not to be perjury when the bill is one not required by law to be verified.[3]

But otherwise as to statutory affidavit.

§ 1270. As has been seen,[4] when a statute authorizes an affidavit to be made as a foundation for any legal claim or right, the false swearing to such an affidavit is, in England, an indictable misdemeanor at common law, while in most jurisdictions in this country such false oath is held to be perjury.[5] But in such case the affidavit must be within the purview of the statute.[6] If it be so, or if the affidavit be made in conformity with any enabling statutes, the offence is a misdemeanor, if the oath were taken before a party authorized to administer the same.[7]

prosecution for perjury. The contrary, however, was ruled in R. *v.* Chapman, 1 Den. C. C. 432; 2 C. & K. 846. In South Carolina, doubts have been expressed on a cognate point. Pegram *v.* Styrm, 1 Bailey, 595. In such a case it is usual to indict as for a mere misdemeanor at common law. Archbold C. P., 9th ed., 538; R. *v.* Hodgkiss, L. R. 1 C. C. 212. *Supra*, § 1267.

[1] Mahan *v.* Berry, 5 Mo. 21. See *supra*, § 1266.

[2] People *v.* Fox, 25 Mich. 492; People *v.* Gaige, 26 Ibid. 30. See Silver *v.* State, 17 Ohio, 365.

[3] Silver *v.* State, 17 Ohio, 365; People *v.* Gaige, 26 Mich. 30.

[4] *Supra*, § 1244.

[5] So as to affidavits before assessors of taxes. State *v.* Cannon, 79 Mo. 34.

[6] R. *v.* Barnes, 10 Cox C. C. 539; State *v.* Helle, 2 Hill (S. C.), 290. See U. S. *v.* Kendrick, 2 Mason, 69; U. S. *v.* Babcock, 4 McLean, 113; U. S. *v.* Sonachall, 4 Biss. 425; Warwick *v.* State, 25 Ohio St. 21; State *v.* Foulks, 57 Mo. 461.

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

[7] Ralph *v.* U. S., 11 Biss. 88; U. S. *v.* Curtis, 107 U. S. 671; St. Dig. C. L. art. 138, citing the following:—

"(1) A. takes a false oath before a surrogate in order to obtain a marriage license. A. commits a misdemeanor. Chapman's Case, 1 Den. C. C. 432. See R. *v.* Barnes, 10 Cox C. C. 539; Call *v.* State, 20 Ohio St. 330; Warwick *v.* State, 25 Ibid. 21.

"(2) A. takes a false oath before commissioners appointed by the king to inquire into cases in which a royal grant was required to confirm title to lands. A. commits a misdemeanor. Hobart, 62.

"(3) A. swears a false affidavit under the Bills of Sale Act (17 & 18 Vict. c. 36). A. commits a misdemeanor. R. *v.* Hodgkiss, L. R. 1 C. C. 212."

For false affidavits by solicitors, see R. *v.* Moojen, Lond. L. T. Dec. 6, 1879.

A party making a false affidavit before a justice of the peace of a State,

It is not necessary that a statutory affidavit should do more than substantially follow the statute.[1]

Perjury, under naturalization proceedings, is elsewhere considered.[2]

Party may be guilty of perjury in his own case.

§ 1271. The fact that the alleged perjury is committed by a party testifying in his own case is no defence. If the party offer himself as a witness, be sworn, and testify falsely, perjury may be assigned on the oath thus taken.[3] As has been seen, perjury may be committed in an answer to a bill in equity. But this is not the case when the affidavit is without either legal sanction or effect.[4]

No perjury in void suit.

§ 1272. A suit which is actually void and null from want of jurisdiction or other incurable defect is not one in which perjury can be committed.[5] Thus it is not perjury to swear falsely in a discontinued or abated suit.[6] But if the proceeding is merely voidable, even though there be such defects as require a reversal on error, false swearing in its conduct is perjury, if the false evidence could by any contingency be introduced as

in order to establish a claim against the United States, is indictable under the act of Congress passed March 1, 1823, to prevent false swearing touching public money, though such affidavit was not expressly authorized by act of Congress. U. S. *v.* Bailey, 9 Pet. 238.

As the averment of "perjury" in such an affidavit can be rejected as surplusage, and the defendant sentenced for the constituent misdemeanor (see R. *v.* Hodgkins, *supra*, § 1244), the difference, supposing the indictment to be for perjury, is immaterial. See Tuttle *v.* People, 36 N. Y. 431; *infra*, § 1287; sustaining in such case the allegation of perjury.

[1] *Supra*, § 1251. That it need not be signed, see *supra*, § 1252.

[2] *Supra*, 266; *infra*, § 1275.

[3] R. *v.* Mullany, 10 Cox C. C. 97; L. & C. 593; R. *v.* Tichborne, London, May, 1873; State *v.* Keene, 26 Me. 33; Van Steenburg *v.* Kortz, 10 Johns. 167; Montgomery *v.* State, 10 Ohio, 220; Resp. *v.* Newell, 3 Yeates, 417; State *v.* Molier, 1 Dev. 263; Haley *v.* McPherson, 3 Humph. 104. See, however, R. *v.* Clegg, 19 L. T. (N. S.) 47; State *v.* Hamilton, 7 Mo. 300. As to incompetent witness, see *supra*, § 1254; *infra*, 1280.

[4] Silver *v.* State, 17 Ohio, 365; People *v.* Gaige, 26 Mich. 30; *supra*, § 1270; *infra*, §§ 1276, 1304.

[5] R. *v.* Cohen, 1 Stark. 511; R. *v.* Ewington, C. & M. 319; 2 Mood. C. C. 223; R. *v.* Pearce, 3 B. & S. 531; 9 Cox C. C. 258; R. *v.* Scotton, 5 Q. B. 493. *Infra*, §§ 1294, 1295; *supra*, § 1256.

[6] R. *v.* Pearce, 3 B. & S. 531; 9 Cox C. C. 258; State *v.* Hall, 49 Me. 412. *Supra*, § 1258.

testimony.[1] *A fortiori* is this the case with all defects which could be amended by the trial court.[2] But perjury cannot be committed in a suit not pending: unless it be in depositions taken in preparations for such suit.[3]

Nor on oath as to future official conduct.

§ 1273. At common law perjury cannot be committed in an official oath, so far as such oath touches future conduct.[4]

Not necessary to show additional enabling proof.

§ 1274. Perjury may be assigned upon an oath or affidavit which is insufficient to effect the purpose for which it was taken without additional proof, and it is not necessary to show or aver that such additional proof was made.[5]

State court has ordinarily no jurisdiction of false swearing in federal court.

§ 1275. A State court, it has been ruled, cannot punish for perjury when made such under an act of Congress,[6] and such is the true view when the offence is exclusively against the United States. Yet it is on principle otherwise when the offence strikes at the integrity of the State.[7] Hence false swearing in a naturalization case is perjury at common law, and though it may also be an

[1] *Infra*, §§ 1294, 1295; R. *v.* White, M. & M. 271; King *v.* R., 3 Cox C. C. 561; 14 Q. B. 31; R. *v.* Millard, 6 Cox C. C. 150; R. *v.* Simmonds, 8 Ibid. 190; R. *v.* Hailey, R. & M. 94; R. *v.* Christian, C. & M. 388; R. *v.* Meek, 9 C. & P. 513; Pippet *v.* Hearn, 1 D. & R. 266; R. *v.* Fletcher, L. R. 1 C. C. 320; U. S. *v.* Reese, 4 Sawy. 629; State *v.* Keene, 26 Me. 33; Com. *v.* Tobin, 108 Mass. 426; State *v.* Pike, 15 N. H. 83; Van Steenburgh *v.* Kortz, 10 Johns. 167; State *v.* Hall, 7 Blackf. 25; State *v.* Lavalley, 9 Mo. 824.

[2] R. *v.* Christian, C. & M. 388; R. *v.* Fletcher, L. R. 133, 370; 12 Cox C. C. 77; State *v.* Keene, 26 Me. 33; Com. *v.* Smith, 11 Allen, 243; State *v.* Lavalley, 9 Mo. 835; see Van Steenburgh *v.* Kortz, 10 Johns. 167.

[3] See *supra*, § 1267; R. *v.* Cohen, *supra*; State *v.* Whittemore, 50 N. H. 245; People *v.* Chrystal, 8 Barb. 546.

[4] State *v.* Dayton, 3 Zab. 59; 1 Hawk P. C. 431.

[5] *Infra*, §§ 1277, 1282; 1 Hawk. P. C. 431.

[6] U. S. *v.* Cornell, 2 Mason, 60; Bridges, *ex parte*, 2 Wood, 428; S. C. under name of Brown *v.* U. S., 14 Am. L. Reg. N. S. 566; People *v.* Lynch, 16 Johns. 549; State *v.* Pike, 15 N. H. 83; Davison *v.* Champlin, 7 Conn. 244; Wetherbee *v.* Johnson, 14 Mass. 412; Jackson *v.* Rose, 2 Va. Cas. 34; State *v.* McBride, Rice, 400, questioning State *v.* Wells, 2 Hill, 687; State *v.* Adams, 4 Blackf. 146; People *v.* Kelly, 38 Cal. 145; State *v.* Kirkpatrick, 32 Ark. 117. See *contra*, U. S. *v.* Smith, 1 South, 33; Buckwalter *v.* U. S., 11 S. & R. 193. This question is discussed in detail in Whart. Com. Am. Law, § 524.

[7] U. S. *v.* Bailey, 9 Peters, 238.

offence against the federal government, the offender may be indicted and punished in a State court.[1] Whether a State court can act generally under an act of congress has been already discussed.[2] It is conceded that a State court has no jurisdiction of false swearing in a trial in a federal court.[3]

VII. IN A MATTER MATERIAL.

False swearing must have been in matter material.

§ 1276. The assignment of perjury on which a conviction is asked must be in a matter which was material to the issue,[4] tending to prove a fact bearing on such issue.[5] Thus, in a common case, if a witness be asked whether goods were paid for "*on a particular day*," and he answer in the affirmative; if the goods were really paid for, though not on that particular day, it will not be perjury,[6] unless the day be material. It has also been ruled that it was not perjury when a witness falsely swore that a thing which occurred on a particular Sunday did not occur on a Sunday between two dates which included the Sunday in question; the court holding that the attention of the witness should have been called to the

[1] State *v.* Whittemore, 50 N. H. 245; Rump *v.* Com., 30 Penn. St. 475. *Contra*, People *v.* Sweetman, 3 Parker C. R. 358. See *supra*, § 266, for discussion of this topic.

[2] See *supra*, § 266; U. S. *v.* Bailey, 9 Pet. 238; State *v.* Whittemore, 50 N. H. 245; Wood *v.* People, 59 N. Y. 117; Rump *v.* Com., 30 Penn. St. 475. Compare People *v.* Sweetman, 3 Parker, C. R. 358.

[3] See prior cases cited to this section; State *v.* Shelley, 11 Lea, 594.

[4] 2 Russ. on Crimes (6th Am. ed.), 600; R. *v.* Worley, 3 Cox C. C. 535; R. *v.* Owen, 6 Ibid. 105; R. *v.* Naylor, 11 Ibid. 13; R. *v.* Alsop, Ibid. 264; R. *v.* Tate, 12 Ibid. 7; U. S. *v.* Landberg, 21 Blatch. 169; State *v.* Trask, 42 Vt. 152; State *v.* Meader, 54 Vt. 126; Com. *v.* Knight, 12 Mass. 274; Com. *v.* Smith, 11 Allen, 243; Com. *v.* Grant, 116 Mass. 17; State *v.* Hobbs, 40 N. H. 229; Campbell *v.* People, 8 Wend. 636; Conner *v.* Com., 2 Va. Cas. 30; Crump *v.* Com., 75 Va. 922; Rhodes' Case, 78 Va. 692; State *v.* Aikens, 32 Iowa, 403; State *v.* Flagg, 25 Ind. 243; People *v.* Gaige, 26 Mich. 30; Beecher *v.* Anderson, 45 Ibid. 543; Pollard *v.* People, 69 Ill. 148; State *v.* Hattaway, 2 N. & M. 118; Hinch *v.* State, 2 Mo. 158; State *v.* Bailey, 34 Ibid. 350; Gibson *v.* State, 44 Ala. 17; Nelson *v.* State, 47 Miss. 621; Page *v.* State, 59 Ibid. 475; Martinez *v.* State, 7 Tex. Ap. 394. See Platt *v.* Braunsdorff, 40 Wis. 107. *Cf.* article by Prof. Chase, in 3 Crim. Law Mag. 459.

[5] U. S. *v.* Shinn, 8 Sawy. 403; Com. *v.* Grant, 116 Mass. 17.

[6] 2 Ro. Rep. 41, 46. See R. *v.* London, 12 Cox C. C. 50.

particular day.[1] On the same principle it has been held that if a person swear that J. S. beat another with his sword, and it turned out that he beat him with a stick, this is not perjury when the character of the weapon is not at issue.[2] And, generally, superfluous and irrelevant matter, stated in an affidavit for a writ of *habeas corpus*, although false, is not perjury.[3] But evidence mitigating or aggravating damages is in this sense always material.[4]

But circumstantiality of detail may be material.

§ 1277. Yet when such apparently superfluous matter goes to give circumstantiality to the narrative, and to form therefore, a link in the chain of proof, it becomes material as contributing largely to the witness's credibility.[5] Bald statements of results (*e. g.*, "He struck me," as in a case just mentioned) want one of the prime essentials of reliable testimony. For a witness knowingly to fabricate details, in order to strengthen his credibility, is as much perjury as is any other false swearing. Hence it has been rightly held that perjury may be committed in swearing falsely to a collateral matter with intent to prop the testimony on some other point.[6] Thus where three or

[1] R. *v.* Stolady, 1 F. & F. 508. As to what constitutes fixing the witness's attention on a point see R. *v.* London, 12 Cox C. C. 511.

[2] Hetley, 97. See 1 Hawk. c. 69, s. 8.

[3] White *v.* State, 1 Sm. & M. 149.

[4] State *v.* Norris, 9 N. H. 101; State *v.* Keenan, 8 Rich. (L.) 456.

[5] R. *v.* Overton, 2 Moody, 263, C. & M. 655; R. *v.* Berry, 8 Cox C. C. 121; R. *v.* Mullaney, L. & C. 593; Com. *v.* Grant, 116 Mass. 17; Wood *v.* People, 59 N. Y. 117; People *v.* Grimshaw, 40 Hun, 505; 20 W. Dig. 116; People *v.* Courtney, 94 Ibid. 490; Dilcher *v.* State, 39 Ohio St. 130.

[6] R. *v.* Tyson, L. R. 1 C. C. 107; 11 Cox C. C. 1; Com. *v.* Pollard, 12 Met. 225; People *v.* Wood, 59 N. Y. 117; State *v.* Dayton, 3 Zab. 49; State *v.* Brown, 79 N. C. 642; Floyd *v.* State, 30 Ala. 511; State *v.* Shupe, 16 Iowa, 36; Parrish *v.* State, 18 Fla. 902. On an assignment of perjury by a defendant in a bastardy case, that he had never kissed the prosecutrix, the question of materiality was held by Wightman, J., to be for the jury. R. *v.* Goddard, 2 F. & F. 361. See R. *v.* Schlesinger, 10 Q. B. 670; 2 Cox C. C. 200. *Infra*, § 1284. Upon the trial of C. for perjury in an affidavit, proof was given that the signature to the affidavit was in his handwriting; and there was no other proof that he was the person who made the affidavit. P. was then called, and swore that the affidavit was used before the taxing master, that C. was then present, and that it was publicly mentioned, so that everybody present must have heard it that the affidavit was C.'s. It was held, that the matters sworn were material upon the trial of C. R. *v.* Alsop, 11 Ibid. 264—C. C. R. See R. *v.* Tyson, L. R. 1 C. C. 107; R. *v.* Murray, 1 F. & F. 80.

"A party not only commits perjury by swearing falsely and corruptly as

more persons were alleged to be jointly concerned in an assault, and it was contended to be immaterial, if all participated in it, by which of them certain acts were done, the contrary was held, and it was ruled that evidence as to the acts of any one, if wilfully and falsely given, constituted perjury.[1] So the testimony of a person offering himself as bail, as to the value of his property, is material,[2] though not as to incidents of the property not affecting its value;[3] and so of the answer of a witness denying on cross-examination a discrediting fact;[4] and so of false testimony as to the credit of a material witness.[5] It is when the false swearing goes to a point the existence or non-existence of which cannot affect the question in dispute, that it does not tend to prevent the due administration of justice, and therefore is not perjury.[6] Yet a

to the fact which is immediately in issue, but also by so doing as to material circumstances which have a legitimate tendency to prove or disprove such fact. He cannot in the latter case, exonerate himself from the offence, because while the circumstances to which he thus swore did not exist, the fact sought to be established by them did exist." Devens, J., Com. *v.* Grant, 116 Mass. 17. See R. *v.* Overton, 2 Moody, 263, C. & M. 655.

Where in a county court, on an action for having sued for goods sold, P., the defendant, falsely swore on cross-examination that she had never been tried at the Old Bailey, and had never been in custody at the Thames Police Station; it was held on a trial for perjury that this evidence was material. R. *v.* Lavey, 3 C. & K. 26. *Supra*, § 1279.

[1] State *v.* Norris, 9 N. H. 96.

[2] Com. *v.* Butland, 119 Mass. 317.

[3] Pollard *v.* State, 69 Ill. 148. *Infra*, § 1323.

[4] R. *v.* Gibbons, 9 Cox, 50. *Infra*, § 1278.

[5] People *v.* Courtney, 94 N. Y. 490.

[6] R. *v.* Worley, 3 Cox C. C. 535; Studdard *v.* Linville, 3 Hawks, 474.

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

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

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

And so testimony as to credit of witness.

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

And so witness's answers on his own cross-examination.

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

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

rally denied being with child, it was so far a part of such general denial that, although it could not be altogether withdrawn from the jury, it was not a corroboration of D. R.'s testimony, on which alone they could convict her. Another assignment of perjury was, that on the same occasion P. had falsely sworn that her master, who was uncle of D. R., had promised her that he would raise her wages, and allow her to lie in at his house, if she would swear the child to a person other than his nephew, D. R. It was held that such statement was not material to the issue so as to constitute the crime of perjury. R. *v.* Owen, 6 Cox C. C. 105 (Marten, B.). As to materialty see, also, *supra*, § 1246.

[1] Wood *v.* People, 59 N. Y. 117.

[2] R. *v.* Naylor, 11 Cox C. C. 13; R. *v.* Courtney, 7 Ibid. 111; Com. *v.* Grant, 116 Mass. 17.

[3] See distinctions taken in Whart. Cr. Ev. §§ 23 *et seq.*

[4] 2 Salk. 514; R. *v.* Griepe, Ld. Ray. 256; 12 Mod. 139; Wood *v.* People, 50 N. Y. 117; State *v.* Street, 1 Murph. 156.

[5] R. *v.* Greep, 5 Mod. 348. *Semble*, 1 Sid. 106, 174.

[6] *Supra*, § 1277; R. *v.* Overton, Car. & M. 655; 2 Mood. C. C. 263; R. *v.* Lavey, 3 C. & K. 26; R. *v.* Gibbon, L. & C. 109; R. *v.* Tyson, L. R. 1 C. C. 107. This applies to his denial that he had previously said certain things. People *v.* Barry, 63 Cal. 62.

[7] State *v.* Maxwell, 28 La. An. 361; Mattingly *v.* State, 8 Tex. Ap. 345.

[8] R. *v.* Philpotts, 5 Cox C. C. 363; 3 C. & K. 135; 2 Den. C. C. 302; R. *v.* Gibbon, L. & C. 109; 9 Cox C. C. 105; Chamberlain *v.* People, 23 N. Y. 85. *Supra*, § 1254.

It having become material to prove whether J. had died before M., the

may be perjury in giving evidence which could have been excluded as secondary.[1] And a witness who was admitted to testify, though incompetent, may be indicted for perjury in his testimony.[2] Perjury, also, may be assigned on affidavits never actually put in evidence.[3] The rule as to statutory affidavits has been already considered.[4]

Inadmissibility no test of immateriality.

§ 1281. On the other hand, the fact that certain testimony was admitted in evidence is not by itself sufficient to warrant a jury, upon the trial of the indictment for perjury, to infer that such testimony was material to the issue.[5]

Admission not conclusive as to materiality.

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

Primâ facie materiality is sufficient.

defendant on the trial produced a document purporting to be a copy of J.'s will, and falsely swore that he had examined it with the original will in the registry; and also, that he had examined a memorandum at the foot of the copy of the will with the entry in a book called the Act Book in the same registry. The judge offered to admit the evidence, but it was withdrawn; it was, in point of law, inadmissible. It was held that the circumstances that the evidence was inadmissible, and was withdrawn, did not affect the question of perjury, as it could not purge the false swearing; and that, as it was not material whether probate of J.'s will was granted in the lifetime of M., if the evidence of the prisoner had been received it would have been material to the issue, and, consequently, that the false oath of the prisoner amounted to perjury. R. *v.* Phillpotts, 2 Den. C. C. 302; 3 C. & K. 135; T. & M. 607; 5 Cox C. C. 363.

In R. *v.* Gibbon, L. & C. 109; 9 Cox C. C. 105, P. was indicted for having falsely sworn that in September, 1860, he had carnal knowledge of A. A. had obtained an affiliation summons against H., and in her cross-examination denied having had connection with P. in September, 1860 (a time which could not have made him the father of the child). P. was called as a witness on behalf of H., and swore that he had connection with A. in the month named. It was determined that although his evidence was legally inadmissible, yet being admitted, it became material, and perjury might be assigned upon it.

[1] Howard *v.* Sexton, 4 N. Y. 157.

[2] Van Steenburgh *v.* Kortz, 10 Johns. 167; Montgomery *v.* State, 10 Ohio, 220. But see R. *v.* Clegg, 19 L. T. (N. S.) 47. *Supra*, §§ 1254, 1271. *Cf.* article in London Law Times, April 9, 1881; 3 Crim. Law Mag. 461–4.

[3] R. *v.* Christian, 1 C. & M. 388; State *v.* Whittemore, 50 N. H. 245; State *v.* Flagg, 29 Ind. 24.

[4] *Supra*, § 1267.

[5] R. *v.* Tate, 12 Cox C. C. 7; R. *v.* Southwood, 1 F. & F. 356; Com. *v.* Pollard, 12 Met. 225. See Com. *v.* Parker, 2 Cush. 212; Ross *v.* Rouse, 1 Wend. 475; Wood *v.* People, 59 N. Y. 117; 3 Crim. Law Mag. 475.

a promise which the statute of frauds requires to be in writing. Hence, in jurisdictions in which such promise is absolutely void, the denial of it is not perjury, for the denial touches a non-existent object;[1] and so when the alleged false oath is as to the addition to a writing of certain words which are utterly without legal effect, and when such denial is not made to prop up the defendant's testimony in things material;[2] and so when the false oath is made to a matter which is an absolute nullity.[3] But the false swearing to matter which, however valueless and ineffective ultimately, has yet some *primâ facie*, though illusory, weight, is perjury; for by this injury and annoyance to another may be at least transiently wrought.[4] A similar distinction in forgery has been noticed;[5] it not being indictable to forge an absolutely void instrument, though it is otherwise as to an instrument only voidable. In other words, a fabrication aimed into blank air, where there is no possibility of injury, is not indictable; but such fabrication is indictable when there is a possibility of injury, no matter how remote, contingent, or ephemeral.

Irrelevant opinions not subjects of perjury.

§ 1283. Hence, when opinions are irrelevant, they are not subjects of perjury,[6] as is the case with the opinion of a witness as to the law of the land.[7] But when relevant and material (as with the opinions of experts, and of jurists testifying to foreign laws), it is otherwise.[8] Eminently is this the case when such opinion is a summary of facts claimed to be known by defendant.[9] As has been seen, however, mere opinions honestly expressed, though on insufficient evidence, are not perjury.[10]

[1] R. *v.* Dunston, R. & M. (N. P.) 109—Abbott, C. J.; R. *v.* Benesech, Peake's Add. Cas. 93—Kenyon, C. J., cited *supra*, § 1277.

[2] People *v.* McDermott, 8 Cal. 288.

[3] R. *v.* Fairlie, 9 Cox C. C. 209; State *v.* Steel, 1 Yerg. 394.

[4] R. *v.* Yates, C. & M. 132; Com. *v.* Parker, 2 Cush. 212.

[5] *Supra*, § 696.

[6] R. *v.* Crespigny, 1 Esp. 280; R. *v.* Pepys, Peake (N. P.) 187. This applies to an opinion as to the meaning of a document, unless the object be to restore a document which is lost. Ibid. State *v.* Wolverton, 8 Blackf. 453.

[7] State *v.* Henderson, 90 Ind. 406.

[8] See Whart. on Crim. Ev. §§ 225, 455, 458, 460, as to when opinions become primary proof. R. *v.* Pedley, 1 Leach, 365; R. *v.* Schlesinger, 10 Q. B. 670; 2 Cox C. C. 200; Fergus *v.* Hoard, 15 Ill. 357; State *v.* Lea, 3 Ala. 602; R. *v.* Cowan, 24 Up. Can. (Q. B.) 606. See State *v.* Cruikshank, 6 Blackf. 62.

[9] Com. *v.* Thompson, 3 Dana, 301; State *v.* Cruikshank, 6 Blackf. 62; Hoch *v.* People, 3 Mich. 552; State *v.* Terry, 30 Mo. 368.

[10] *Supra*, § 1246.

Materiality is for court.

§ 1284. According to Lord Campbell, the materiality of the alleged false oath is for the jury.[1] But the weight of authority is that it would be error to leave the question to the jury without definite instructions from the court.[2] And the proper course is for the court, assuming all the evidence to be true, to determine whether the particular article of evidence is or is not material. Any dispute as to the truth of facts, however, must go to the jury.[3]

VIII. INDICTMENT.[4]

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

1. *Wilful and Corrupt.*

Indictment must charge wilfulness and corruption.

§ 1286. The indictment must aver that the defendant "wilfully and corruptly" swore falsely.[5] And an indictment which charges that the prisoner "feloniously, corruptly, knowingly, wilfully, and maliciously swore," omitting the word "falsely," but concluding "and so the defendant in manner and form aforesaid did commit wilful and corrupt perjury," is bad.[6] But in another case, an indictment which stated that the defendant "did voluntarily, and of his own free will and accord, propose to purge himself upon oath of the said contempt," negativing by express averments the truth of the oath, and concluding, that the defendant "did knowingly, falsely, wickedly, maliciously, and corruptly commit wilful and corrupt perjury," was held good.[7]

[1] R. *v.* Lavey, 3 C. & K. 26; R. *v.* Worley, 3 Cox C. C. 535. See R. *v.* Courtney, 7 Ibid. 111; R. *v.* Goddard, 2 F. & F. 361. *Supra*, § 1277.

[2] R. *v.* Mullany, L. & C. 593; 10 Cox C. C. 97; R. *v.* Southwood, 1 F. & F. 356; Com. *v.* Parker, 2 Cush. 212; Hutchins *v.* Blood, 25 Wend. 413; Steinman *v.* McWilliams, 6 Barr, 170; State *v.* Lewis, 10 Kans. 157.

[3] See Cothran *v.* State, 39 Miss. 541; State *v.* Lewis, 10 Kans. 157.

[4] For forms of indictment, see Whart. Prec. 577 *et seq.*

[5] *Supra*, §§ 1245 *et seq.* State *v.* Carland, 3 Dev. 114; Parrish *v.* State, 18 Fla. 902.

[6] R. *v.* Oxley, 3 C. & K. 317; State *v.* Davis, 84 N. C. 629. See Whart. Cr. Pl. & Pr. § 264.

[7] Resp. *v.* Newell, 3 Yeates, 407. In R. *v.* Cox, 1 Leach, 82, "wilfully" was held to be unnecessary when "falsely, maliciously, wickedly, and corruptly" were used. In Johnson *v.* People, 94 Ill. 505, it was held that "knowingly" could be dispensed with when "wilfully" and "corruptly" were used.

In State *v.* Bixler, 13 Md. Rec. 103 (1884), "corruptly" was dispensed with.

We may in general conclude that at common law the words "wilfully," "corruptly," and "falsely," are terms which cannot be omitted with safety.[1]

2. *Sworn before Competent Jurisdiction.*

§ 1287. "Duly sworn" is sufficient to describe the swearing; nor need the particular mode be set forth.[2] Hence it is sufficient to aver that the defendant "did then and there in due form of law, take his corporal oath," without stating whether he was sworn on the gospels, or with uplifted hand.[3] But "sworn" (or affirmed) must be distinctly alleged;[4] and where the procedure is special, prescribed by statute, the special oath so prescribed must be averred.[5]

Oath must be properly set forth.

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

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

That the words "committed perjury" are not essential when the constituents of the offence are given, see Massie v. State, 5 Tex. Ap. 81.

[1] R. v. Stevens, 5 B. & C. 246; R. v. Richards, 7 D. & R. 665; R. v. Harris, 1 Ibid. 578; 5 B. & A. 926; U. S. v. Babcock, 4 McLean, 113; Thomas v. Com., 2 Rob. (Va.) 795; Cothran v. State, 39 Miss. 541; State v. Carland, 3 Dev. 114; State v. Bobbitt, 70 N. C. 81; Juaraequi v. State, 28 Tex. 625; State v. Webb, 41 Ibid. 67; Allen v. State, 42 Ibid. 12. Under Iowa statute, see State v. Morse, 1 Greene, 503. "Knowingly" is said not to be necessary when "falsely, wilfully, and corruptly" are averred. State v. Sleeper, 37 Vt. 122. Under Texas statute, see Smith v. State, 1 Tex. Ap. 620.

[2] See *infra*, § 1305; R. v. McCarther, Peake, 211; Tuttle v. People, 36 N. Y. 431; Dodge v. State, 4 Zabr. 455; State v. Farrow, 10 Rich. 165. See Com. v. Warden, 11 Met. 406; People v. Warner, 5 Wend. 271.

[3] Resp. v. Newell, 3 Yeates, 407. See State v. Freeman, 15 Vt. 723; Jackson v. State, 15 Tex. Ap. 579.

[4] State v. Divoll, 44 N. H. 140; State v. Hamilton, 65 Mo. 567.

It has been ruled that in cases where, to give magistrates jurisdiction to hear a case punishable on summary conviction, it is essential that they should have an information on oath made before them, it is not sufficient in an indictment for perjury, alleged to have been committed on the hearing of such information, to allege that before M. G., Esq., and T. H. H., clerk, two of the justices, etc., the magistrates who heard the case, J. O. came and exhibited a certain information upon oath, because it does not sufficiently show that J. O. was sworn before M. G. and T. H. H. R. v. Goodfellow, Car. & M. 569.

[5] State v. Blackstone, 74 Ind. 592.

istering the oath must be given,[1] and a variance in this respect is fatal.[2]

It is, however, enough to allege swearing *before* a court;[3] and proof of swearing before an officer of court, in presence of the court, will sustain an allegation of swearing before or by the court.[4]

An indictment charged the defendant with having sworn to tell "the truth, the whole truth, and nothing but the truth." The evidence was that he was sworn to tell "the whole truth and nothing but the truth." It was held that the variance was immaterial.[5]

§ 1288. By stat. 23 Geo. II. c. 11, it is "sufficient to set forth . . . . by what court, or before whom the oath was taken, averring such court or person or persons to have competent authority to administer the same." By the English practice, under the statute, the *nature* of the authority need not be specified.[6] In the United States, there are jurisdictions in which the relaxation of the common law affected by the statute has not been accepted; and where it has been held necessary to set forth all the facts essential to constitute the authority to administer the oath.[7] But as a general rule, the principle of the statute has been accepted among us as virtually a part of the common law,[8] though it must appear from the indictment that the officer administering the oath was of a class authorized by law to act in such capacity.[9] Beyond this specification need not be pushed. Thus, it has been held, that where an oath before a foreman of a

Detailed authority of court need not be given.

[1] Kerr v. People 42 Ill. 307; State v. Street, 1 Murph. 156; State v. Hardwick, 2 Mo. 185.

[2] Hitesman v. State, 48 Ind. 473; State v. Harlis, 33 La. An. 1172; State v. Oppenheimer, 41 Tex. 82.

[3] Campbell v. People, 8 Wend. 636.

[4] *Supra*, § 1257; *infra*, § 1315.

[5] State v. Gates, 17 N. H. 373. See R. v. Southwood, 1 F. & F. 356.

[6] R. v. Calanan, 6 B. & C. 102; 9 D. & R. 97; R. v. Doty, 13 Up. Can. (Q. B.) 398; R. v. Mason, 29 Ibid. 431. See Burns v. People, 59 Barb. 531.

[7] State v. Gallimon, 2 Ired. 372; Lodge v. Com., 2 Grat. 579; McGregor v. State, 1 Carter (Ind.), 232. See State v. Hanson, 39 Me. 337; State v. Nickerson, 46 Iowa, 447.

[8] U. S. v. Deming, 4 McLean, 3; State v. Langley, 34 N. H. 529 (cited *infra*, § 1297); Com. v. Hatfield, 107 Mass. 227; Burns v. People, 59 Barb. 531; People v. Warner, 5 Wend. 271; State v. Ludlow, 2 South. 772; State v. Dayton, 3 Zabr. 49; State v. Wise, 3 Lea, 38; Kimmel v. People, 92 Ill. 457; State v. Schill, 27 Iowa, 263; Stofer v. State, 3 W. Va. 689; State v. Below, 79 Mo. 584; Stewart v. State, 6 Tex. Ap. 184; Bradberry v. State, 7 Ibid. 375. *Infra*, §§ 1294, 1325.

[9] State v. Crumb, 68 Mo. 206.

grand jury is averred, this is enough without stating the foreman's name in detail.[1] It must, however, be specifically averred that the person or court administering the oath had authority so to do.[2]

Otherwise with special statutory officer.

§ 1289. Under any circumstances, however, where the oath was taken before a subordinate statutory officer, specially empowered to administer an oath, it is necessary that the facts setting forth his authority should be averred. Thus, it is not enough to aver that the perjury was committed before "a commissioner of the United States duly appointed." The mode and authority of the appointment, and the official title of the officer, must be set out.[3]

Jurisdiction must be averred.

§ 1290. The jurisdiction of the court over the subject matter must be distinctly averred.[4] The title of the court must be correctly given;[5] and if a quorum is essential to jurisdiction, it is proper to aver that a due quorum of the judges was present.[6] But if jurisdiction be averred, the subordinate prerequisites of regularity may be inferred from the other allegations, when not explicitly stated.[7] Thus, in perjury committed by a

[1] St. Clair *v.* State, 11 Tex. Ap. 297.

[2] State *v.* Owen, 72 Mo. 440, and prior cases cited in this section.

[3] U. S. *v.* Wilcox, 4 Blatch. C. C. 391. See Flint *v.* People, 35 Mich. 491.

[4] State *v.* Hanson, 39 Me. 337; State *v.* Thurstin, 35 Ibid. 205; State *v.* Plammer, 50 Ibid. 217; Steinson *v.* State, 6 Yerg. 531; State *v.* Witherow, 3 Murph. 153; R. *v.* Doty, 13 Up. Can. (Q. B.) 398.

[5] State *v.* Street, 1 Murph. 156; State *v.* Knight, 84 N. C. 789. *Infra*, § 1314.

[6] State *v.* Freeman, 15 Vt. 723.

[7] R. *v.* Virrier, 4 P. & D. 161; 12 Ad. & El. 317; Walker *v.* R., 8 El. & Bl. 439; Com. *v.* Hatfield, 107 Mass. 227. *Supra*, § 1257.

It has been held that jurisdiction is sufficiently averred in an indictment which charges that a petition for protection from process was, under 5 & 6 Vict. c. 116, 7 & 8 Vict. c. 96, and 10 & 11 Vict. c. 102 (Insolvent Debtors' Acts), filed and presented at the county court of S., at W., by the defendant; that he afterwards obtained an order of protection; but afterwards, while the proceedings were pending in the county court, to wit, at the time of the filing the petition and schedule, he came before K., a commissioner to administer oaths in chancery, duly appointed and empowered to act in the matter of the insolvent, and take the defendant's oath then and there at the county court, and within the jurisdiction aforesaid, for the purpose of making an affidavit, and verifying his petition on oath, and was duly sworn before K., and swore and took his oath that the affidavit then made was true, K. having competent power and authority to administer the oath. The indictment went on to aver that certain matter was material in the matter of of the insolvency, and that the affidavit

petitioner in bankruptcy, it is unnecessary to set forth the petition; such reference to it as will show its character and object is sufficient.[1] In States where the statute of George II. is not in force, and where there is no similar relaxing statute, there is, as has been seen, authority to the effect that the whole record should be set forth. But such cumbrous and entrapping particularity will scarcely at present be anywhere exacted.

Time and place must be correctly averred.

§ 1291. If the facts be stated, as to time or place, with uncertainty or repugnancy, the indictment will be bad.[2] And a variance as to *time* of oath, when the latter is proved by record, is fatal.[3] But where the indictment charged the defendant with having committed perjury, by swearing at a court in July that he had witnessed a transaction in October of the same year, it was held not to be such a repugnancy as to afford cause for arresting judgment.[4]

3. *In a Judicial Proceeding.*

Judicial proceeding must be averred.

§ 1292. An indictment for perjury, either at common law or under 23 George II. c.11, which does not show on its face that the oath was in a judicial proceeding, is bad.[5]

Thus, an omission to charge in the bill of indictment that the matter of traverse tried between the State of Tennessee and D.,

was false in respect thereof. The defendant was convicted, and judgment sustained. Walker *v.* R. (in error), 8 El. & Bl. 439; 27 L. J. M. C. 43. See *supra*, §§ 1287 *et seq.*

[1] U. S. *v.* Deming, 4 McLean, 3. *Supra*, § 1289; *infra*, § 1299.

[2] State *v.* Hardwick, 2 Mo. 185.

[3] Whart. Cr. Ev. § 103 *a*. *Infra*, § 1314; U. S. *v.* McNeal, 1 Gallis. 387; U. U. *v.* Bowman, 2 Wash. C. C. 328; Com. *v.* Monahan, 9 Gray, 119; Rhodes' Case, 78 Va. 692.

[4] State *v.* McKennon, Harp. 302.

[5] R. *v.* Overton, 4 Q. B. 83; 3 G. & D. 133; State *v.* Lamont, 2 Wis. 437; Morrell *v.* People, 32 Ill. 499. See for adequate form Com. *v.* Carel, 105 Mass. 582.

An indictment was held defective which merely stated that the defendant, intending to subject W. M. to the penalties for felony, went before two magistrates, and "did depose and swear," etc., setting out a deposition, which stated that W. B. had put his hand into the defendant's pocket and taken out a £5 note, and assigning perjury upon it. The defects stated were that the indictment did not show that any charge of felony had been previously made, or that the defendant then made any charge of felony, or that any judicial proceeding was pending before the magistrate. R. *v.* Pearson, 8 C. & P. 119. *Supra*, § 1277.

touching which the defendant gave his evidence, was by indictment or presentment, is fatal.[1]

Must appear that proceedings were regular.

§ 1293. It has been shown that it is necessary that the proceedings should have been regular.[2] Thus, where it becomes necessary, in charging the commission of the offence, to allege that a certain term of county court was duly holden, it is not at common law sufficient to allege that it was holden by and before the chief judge of such court, without mention of any assistant judges.[3] And it must appear that the party administering the oath had authority.[4]

But irregularities which are curable are not fatal.

§ 1294. Curable irregularities, however, are not fatal.[5] Thus it is no defence to perjury on an affidavit that the affidavit was not filed.[6] Nor, under most recent statutes of jeofails, is a variance in details of record fatal.[7]

Otherwise as to essential conditions.

§ 1295. It is otherwise as to essential prerequisites. Thus judgment was arrested in a case where perjury was charged to have been committed in what was in effect an affidavit on an interpleader rule; and the indictment set out the circumstances of a previous trial, the verdict, the judgment, the writ of *fieri facias*, the levy, the notice by the prisoner to the sheriff not to sell, and the prisoner's affidavit that the goods were his property, but omitted to state that any rule was ob-

[1] Steinson *v.* State, 6 Yerg. 531.

[2] *Supra*, §§ 1267, 1273, 1287.

It was averred in the indictment that after K. was duly summoned to appear before certain justices, being and acting as two justices of the peace in and for a county, to answer before such justices a certain information and complaint against him, of having opened his house (a beer-house) on a Sunday, for the sale of beer, after three and before five in the afternoon; K. duly appeared before the justices at the petty sessions of a petty sessional division in the county, and that at the hearing, the defendant, being called as a witness for K., falsely swore that he had not been in the house of K. at all that day; that he had never seen a certain policeman, and had not been in B. that day, or for a fortnight before. It was ruled that it was sufficiently alleged in the indictment that the offence was one over which the justices had jurisdiction, and that it was committed in a place where they had jurisdiction. R. *v.* Shaw, L. & C. 579; 10 Cox C. C. 66.

[3] State *v.* Freeman, 15 Vt. 723.

[4] *Supra*, § 1251; see Eighmy *v.* People, 79 N. Y. 546.

[5] See *supra*, § 1273. State *v.* Shanks, 66 Mo. 560.

[6] R. *v.* Crossley, 7 T. R. 315. *Supra*, § 1288. See R. *v.* Hailey, 1 C. & P. 258; R. & M. 94; State *v.* Langley, 34 N. H. 529. See State *v.* Sleeper, 37 Vt. 122. *Supra*, § 1289.

[7] Com. *v.* Soper, 133 Mass. 393.

tained according to the provisions of the interpleader act.[1] And an indictment for perjury in false swearing to a bill of equity which does not show that the bill is one which is required to be verified by oath, is insufficient.[2]

By present practice only essential averments of record need be introduced.

§ 1296. But so radically have the statutes of jeofails, and those for relaxing the old common law strictness in this respect, affected this portion of criminal pleading, that there is probably no State in which it would now be held necessary to set out the whole record of the suit in which the perjury is alleged to have been committed. It is generally enough to state correctly the facts showing that the court had jurisdiction, that the oath was duly administered, and that the proceedings were regular.[3]

[1] R. *v.* Bishop, C. & M. 302.

[2] People *v.* Gaige, 26 Mich. 30. See Silver *v.* State, 17 Ohio, 365.

[3] Several cases to this point have been grouped in other sections of the present chapter. In addition to these the following may be examined:—

An indictment for perjury, alleged to have been committed on a writ of trial, stated the trial to have taken place before the high sheriff. It was proved that when the defendant gave evidence on the writ of trial, neither the high sheriff nor the under sheriff was present, but that the writ of trial was executed before M. S., the sheriff's assessor, who was proved to have been in the constant practice of acting as the sheriff's assessor and deputy; but the writ of trial was directed to the sheriff, and it was stated in the postea that the trial took place before him; it was held by the judges that the allegation in the indictment was supported, and that it sufficiently appeared that M. S. had authority to execute the writ of trial. R. *v.* Dunn, 1 C. & K. 730.

Where the indictment charged perjury in a matter of traverse between the State of Tennessee and D., for an "assault and battery," it was held that this was not a sufficient charge of the jurisdiction of the court before which the case was tried. Steinson *v.* State, 6 Yerger, 531.

In perjury in taking a false oath before a regimental court of inquiry, it has been ruled in Virginia, where the statute of George II. is not in force, that the indictment ought to set forth of what number of officers the court of inquiry consisted of, and what was their respective rank, so as to enable the court to discern whether the said court of inquiry was constituted according to law. Com. *v.* Conner, 2 Va. Cas. 30.

It is not necessary in averring the authority of an officer to administer an oath, in an indictment for perjury, to aver that he then and there had authority, if time and place had been added to the act of taking the oath before him. State *v.* Dayton, 3 Zab. 49; cited *supra*, §§ 1251, 1269, 1277, 1288.

It is sufficient, so far as concerns the mode of taking the oath, where the indictment charges that the oath was taken before the judge, and the evidence was thereupon given to the jurors. State *v.* Witherow, 3 Murph. 153.

The style of the court may be suffi-

4. *How, and to what Extent, the alleged False Matter is to be set out.*

§ 1297. The same rigor has not been required in this country in the setting forth of the alleged false oath of the defendant, as under the statute of Elizabeth was considered essential in England.[1] Thus, it is said that at common law, it is only necessary to set forth the substance of the oath, and, when that is done, an exact recital is not necessary;[2] hence, when the article "an" was substituted for the article "the," the variance was held immaterial.[3] In a case decided in 1876, in Massachusetts, an indictment charging that the defendant swore

Verbal exactness in sworn matter not necessary.

ciently described by words which cannot apply to any other court. U. S. *v.* Deming, 4 McLean, 3; State *v.* Gallimon, 2 Iredell, 374.

As to particularity required in old practice, see State *v.* Gallimon, 2 Ired. 374; State *v.* Keene, 26 Me. 33; People *v.* Grimshaw, 40 Hun, 505.

It has been held in Iowa not necessary, in an indictment for swearing falsely before the grand jury, to aver that the person whose case was under investigation, and as to whom the defendant swore, was or was not guilty, nor to state the facts as to such offence. State *v.* Schill, 27 Iowa, 263. See *infra*, § 1325.

In an indictment for perjury committed by the defendant upon an examination under oath as to his sufficiency as a surety for another in a bond executed under the 4th subdivision of the 10th section of the New York "act to abolish imprisonment for debt," etc., after a conviction of the debtor and an order for his commitment under that act, it is not necessary, under the special terms of that act, to set forth facts sufficient to show that the officer who entertained the proceedings had jurisdiction to administer the oath. People *v.* Tredway, 3 Barb. 470, decided on the strength of People *v.* Phelps, 5 Wend. 10, and People *v.* Warner, 3 Ibid. 271; which decisions, however, were disapproved. See *supra*, § 1289.

[1] See Whart. Cr. Pl. & Pr. §§ 203-4; Whart. Crim. Ev. § 120 *a*; Whart. Prec. 577, *et seq.*; State *v.* Keene, 26 Me. 33. *Infra*, § 1313.

[2] R. *v.* Webster, Bell C. C. 154; 8 Cox C. C. 187. In this case the indictment alleged that a cause was pending in a county court, and that at the hearing it became a material question whether the plaintiff in the cause had, in the presence of the prisoner, signed at the foot of a bill of account, purporting to be a bill of account between a firm called B. & Co. and W., a receipt for payment of the amount of the bill; and that the prisoner falsely swore that the plaintiff did, on a certain day, in the presence of the prisoner, sign the receipt (meaning a receipt at the foot of the first mentioned bill of account) for the payment of the amount of the bill. The plaintiff in the county court had on other occasions signed similar receipts in the presence of the prisoner. It was ruled that the bill of account was stated and set forth in the indictment with sufficient certainty.

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

that he had personal property in G., in the county of E., and Commonwealth of Massachusetts, was held to be sustained by proof that he swore to a written statement that he had personal property at G., in the county of E., there being proof that the statement was meant for G. in the Commonwealth of Massachusetts.[1] But a substantial variance is fatal.[2]

§ 1298. At common law, where the tenor of an affidavit is undertaken to be recited, and the recital is variant in a word or letter, thereby introducing a different word, it is fatal.[3] But where a statement of the substance and effect of an affidavit is sufficient, as is now generally the case in English and American practice, and only substance and effect are pretended to be given, evidence of the substance and effect is sufficient.[4] And where the charge is swearing to an affidavit "to the substance and effect following;" a variance, which consisted in using the word "suit" instead of "case," is immaterial.[5]

"Substance" and "effect" enough.

§ 1299. It is not necessary to set out the whole of what the defendant has sworn: only those parts alleged to be false need be stated,[6] and such parts may be lumped in one count.[7] The questions which elicited the alleged false answers are also unnecessary.[8] But alleged false statements that are averred consecutively must be proved to have been made consecutively,[9] and the substance must be given.[10]

Only alleged falsities need be pleaded.

[1] Com. *v.* Butland, 119 Mass. 317. As to variance under Massachusetts statute, see Com. *v.* Terry, 114 Mass. 263.

[2] *Infra*, § 1313: Whart. Cr. Ev. § 120 *a*.

[3] Whart. Cr. Pl. & Pr. §§ 167 *et seq.*; R. *v.* Leefe, 2 Camp. 134. See State *v.* Umdenstock, 43 Tex. 554.

[4] Ibid.; State *v.* Groves, Busbee, 402; Taylor *v.* State, 48 Ala. 157.

[5] State *v.* Caffey, N. C. Term R. 272; S. C., 2 Murph. 320; Whart. Cr. Pl. & Pr. § 173.

[6] Campbell *v.* People, 8 Wend. 636; Ingram *v.* Watkins, 1 Dev. & Bat. 442; State *v.* Neal, 42 Mo. 119; State *v.* Wakefield, 9 Mo. Ap. 326; S. C., 73 Mo. 549. *Infra*, §§ 1305, 1325.

[7] Ibid. *Infra*, §§ 1301, 1322, 1325.

[8] State *v.* Bishop, 1 Chip. (Vt.) 120; Com. *v.* Knight, 12 Mass. 274.

[9] R. *v.* Leefe, 2 Camp. 134.

[10] Ibid.; Com. *v.* Lodge, 2 Grat. 579; U. S. *v* Morgan, Morris (Iowa), 341.

In an indictment for perjury, under the bankrupt law, for not giving a full and true account of the property of the petitioners, the items on the schedule need not be stated in the indictment. The allegation that the property was omitted, with intent to defraud A. and the other creditors, is sufficient. U. S. *v.* Chapman, 3 McLean, 390. See *supra*, § 1290.

5. *How the False Matter is to be negatived.*

Negation of false matter must be express.

§ 1300. The general averment that the defendant swore falsely, etc., upon the whole matter, will not be sufficient; the indictment must proceed by particular averments (or, as they are technically termed, by assignments of perjury) to negative that which is false, and it is necessary that the indictment should thus expressly contradict the matter falsely sworn to by the defendant.[1] But while it may be necessary to set forth the whole matter to which the defendant swore, in order to make the rest intelligible, it does not follow that the whole context should be negatived. Even the use of the word "falsely" does not import that the whole is false; and it is only necessary to negative such parts as the prosecutor can falsify, admitting the truth of the rest.[2]

Several assignments may be incorporated in one count.

§ 1301. All the several particulars, in which the prisoner swore falsely, may be embraced in one count,[3] and proof of the falsity of any one will sustain the count.[4]

"Belief" must be specifically negatived.

§ 1302. In negativing the defendant's oath, where he has sworn only to his belief, it will be proper to aver either that the defendant did not believe what he swore, or that "*he well knew*" the contrary.[5] Thus, when an affidavit merely states the belief of the affiant that a larceny has been committed, the assignment of the perjury must negative the words of the affidavit, and it is not sufficient to allege generally that the persons charged did not commit the larceny.[6]

[1] *Infra*, § 1323; R. *v.* Whitehouse, 3 Cox C. C. 86; State *v.* Mumford, 1 Dev. 519; Dilcher *v.* State, 39 Ohio St. 130. Though see State *v.* Lindenburg, 13 Tex. 27. That a contradictory averment may be a sufficient negative, see Com. *v.* Sargent, 129 Mass. 115.

[2] See Whart. Prec. 577 *et seq.* As to practice under Texas statute, see Brown *v.* State, 9 Tex. Ap. 171; Langford *v.* State, Ibid. 283.

[3] R. *v.* Callanan, 6 B. & C. 102; 9 D. & R. 97; State *v.* Bishop, 1 Chip. 120; Com. *v.* Johns. 6 Gray, 274. *Infra*, § 1325; *supra*, § 1299.

[4] R. *v.* Hill, R. & R. 190; R. *v.* Callanan, 6 B. & C. 102; 9 D. & R. 97; State *v.* Hascall, 6 N. H. 352; Com. *v.* Johns, 6 Gray, 274; Dodge *v.* State, 4 Zabr. (N. J.) 455; De Bernie *v.* State, 19 Ala. 23; State *v.* Raymond, 20 Iowa, 582. *Infra*, § 1316; Whart. Cr. Ev. § 131.

[5] Lambert *v.* People, 76 N. Y. 220.

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

Ambiguities may be cleared by innuendoes.

§ 1303. The assignment of perjury may, in some instances, be more full than the statement of the defendant which it is intended to contradict. When there is any doubt as to the words of the oath which can be made more clear and precise by a reference to some other matter, it may and must be supplied by an innuendo; the use of which is, by reference to preceding matter, to explain and fix the meaning more precisely;[1] but it is not allowed to add to, extend, or change the sense.[2] But in a case where an objection was made to an indictment that it added, by way of innuendo, to the defendant's oath, "his house, situate in the Haymarket, in St. Martin-in-the-Fields;" without stating by an averment, recital, or introductory matter, that he had a house in the Haymarket; or, even admitting him to have such a house, that his oath was of and concerning the said house, so situated; the objection was overruled, on the ground that the innuendo was only a more particular description of the same house which had been previously mentioned.[3]

[1] R. *v.* Taylor, 1 Camp. 404; R. *v.* Yates, 12 Cox C. C. 233. In R. *v.* Verrier (or Virrier), 4 P. & D. 161; 12 A. & E. 317, a motion to arrest judgment was made on an indictment which alleged that a petition was presented to the House of Commons against the return of B., on the ground of bribery; that, shortly before his election, to wit, on the 6th July, B. and C. went to the house of the defendant to solicit his vote; that, at the time of the petition, it was a material question whether at the time when B. and C. went to the defendant's house, a certain act of bribery took place; that the defendant was a witness sworn to speak the truth of and concerning the premises, and he deposed touching the election and the matter of the petition, that, shortly before B.'s election, B. and C. came on a canvassing visit to the defendant's house, and that the act of bribery then took place (innuendo), thereby meaning that at the time when B. and C. went to the defendant's house as aforesaid, the act of bribery was committed. It was held by the court: first, that the allegation that the defendant deposed "touching the election," etc., sufficiently pointed to the matter whereupon the defendant was sworn as a witness; secondly, that the innuendo did not introduce new matter, as from the introductory averment it appeared there was a canvassing visit on the 6th July, and the deposition of the defendant was shown to refer to that particular time and no other.

[2] R. *v.* Griepe, 1 Ld. Raym. 256. See *supra*, §§ 1214, 1220.

[3] R. *v.* Aylett, 1 T. R. 63.

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

In a case of perjury committed in an affidavit, it was held that a word which had been omitted by accident in the original document was improperly

When innuendoes are necessary to make out the sense, their omission is fatal.[1]

6. *Materiality.*

Materiality must appear on record.

§ 1304. It must be either averred on the face of the indictment, with proper inducement, that the matter alleged to be false was material;[2] or such materiality must appear on record;[3] and the latter is sufficient even where the averment of materiality is defective.[4] When the first alternative, that of the allegation of materiality, is taken, it is sufficient in all cases in which the alleged false oath appears to be relevant to the issue, to charge generally that the false oath was material on the trial of the issue in which it was taken.[1] And this is the case though the record does not itself show that the false oath, if relevant, was material.[2] But the averment of materiality does not avail when the record shows immateriality.[3] When, however, the record does not positively show immateriality, an express averment that a question is material lets in evidence to prove it to be so.[4]

stated in the indictment as though it had been in the original document, and that such word ought to have been inserted and explained by an innuendo. R. *v.* Taylor, 1 Camp. 404. If an innuendo is introduced contrary to the rules which have been mentioned, and any use is made of it in the indictment, it cannot be rejected as surplusage, and will be bad after verdict. R. *v.* Griepe, 1 Ld. Raym. 256.

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

[1] R. *v.* Yates, 12 Cox C. C. 233. *Supra*, § 1296.

[2] R. *v.* Nicholl, 1 B. & Ad. 21; R. *v.* Stolady, 1 F. & F. 518; R. *v.* Cutts, 4 Cox C. C. 435; R. *v.* Bartholomew, 1 C. & K. 366; R. *v.* Tate, 12 Cox C. C. 7; State *v.* Chandler, 42 Vt. 446; Com. *v.* Byron, 14 Gray, 31; Wood *v.* People, 59 N. Y. 117; State *v.* Beard, 1 Dutch. 384; State *v.* Thrift, 30 Ind. 211; Morrell *v.* People, 32 Ill. 499; People *v.* Collier, 1 Mich. 137; People *v.* Gaige, 26 Ibid. 30; Pickering's Case, 8 Grat. 629; State *v.* Kennerly, 10 Rich. 152; Hembree *v.* State, 52 Ga. 242; Dilcher *v.* State, 39 Ohio St. 130; State *v.* Holden, 48 Mo. 93; State *v.* Shanks, 66 Ibid. 560; State *v.* Wakefield, 2 Mo. Ap. 326; S. C., 73 Mo. 549; Donahoe *v.* State, 14 Tex. Ap. 638.

[3] 2 Stark. N. P. C. 423, n.; R. *v.* Dunn, 1 D. & R. 10; R. *v.* Thornhill, 8 C. & P. 575; R. *v.* Goodfellow, C. & M. 569; R. *v.* Harvey, 8 Cox C. C. 99; State *v.* Chamberlain, 30 Vt. 559; Com. *v.* Knight, 12 Mass. 274; Campbell *v.* People, 8 Wend. 636; Wood *v.* People, 59 N. Y. 117; State *v.* Dayton, 3 Zabr. 49; Stofer *v.* State, 3 W. Va. 692; Weathers *v.* State, 2 Blackf. 278; State *v.* Hall, 7 Ibid. 25; State *v.* Dodd, 3 Murph. 226; Hinch *v.* State, 2 Mo. 158; Hendricks *v.* State, 26 Ind. 493; Galloway *v.* State, 29 Ind. 442; People *v.* Brilliant, 58 Cal. 214. See State *v.* McCormick, 52 Ind. 169.

[4] Ibid.; U. S. *v.* McHenry, 6 Blatch. 503. See Kimmel *v.* People, 92 Ill. 457; People *v.* Kelly, 59 Cal. 372.

[1] R. *v.* Dowlin, 5 T. R. 311; R. *v.* Gardiner, 8 C. & P. 737; 2 Mood. C. C. 95; State *v.* Mumford, 1 Dev. 519; State *v.* Maxwell, 28 La. An. 361; R. *v.* Scott, 13 Cox C. C. 594.

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

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

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

[2] State *v.* Sleeper, 37 Vt. 122; People *v.* Burroughs, 1 Parker C. R. 211.

[3] People *v.* Gaige, 26 Mich. 30.

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

[4] R. *v.* Bennett, 2 Den. C. C. 241; 5 Cox C. C. 207; 3 C. & K. 124; R. *v.* Schlesinger, 10 Q. B. 670; 2 Cox C. C. 200.

An indictment sufficiently charges materiality, by averring that upon a

But it is not enough when the alleged false matter appears on the record to be immaterial, to say that "it became and was material to ascertain the truth of the matter hereinafter alleged to be sworn to."[1]

certain trial it became and was a material question whether certain chattels sold by the defendant to another person were so sold "in part payment for" a certain debt, or "in part payment for" a certain other debt; and that the defendant falsely swore that they were so sold in part payment of the debt first named; without adding anything about the other debt. Com. *v.* Johns, 6 Gray, 274.

An indictment against a person summoned as a juror, for having falsely sworn to his having formed or expressed an opinion as to the guilt or innocence of a person on trial, must state that it became material to ascertain whether the juror had formed and expressed an opinion of the guilt or innocence of such person, and that an issue as to the qualifications of the jurors generally, or of the juror in particular, had been made by the parties, and submitted to the court. State *v.* Moffatt, 7 Humph. 250.

It appeared in the indictment that the defence set up to a criminal complaint amounted to an alibi; and that the testimony of a particular witness who was examined thereon, and whose evidence was alleged to be false, tended to establish this defence; and it was averred that each part of the testimony became and was material to the defence; it was held, that the materiality of the alleged false testimony was sufficiently stated. Com. *v.* Flinn, 3 Cush. 525.

An indictment against P. for perjury was in four counts, each of which stated, that for P. on his retainer V. had done business as attorney; that V. delivered his bill, and after the expiration of one month from such delivery took out a summons before a judge, under 6 & 7 Vict. c. 73, to show cause why the bill should not be referred for taxation; that it then and there became and was material in showing cause to ascertain whether P. did retain V.; and that he, before showing cause, made an affidavit, denying that he had retained V., and assigned perjury on such affidavit. Each of the counts concluded, "and so the jurors aforesaid did say, that the defendant did commit perjury." The record stated the writ of venire to try whether the defendant "be guilty of the perjury and misdemeanor aforesaid," and the verdict, that "he is guilty of the perjury and misdemeanor aforesaid," and a general judgment thereon. It was ruled, that the fact of the retainer by the defendant was a material ingredient in the inquiry, and was sufficiently averred; and that the averment at the conclusion of each count was immaterial, and might be struck out as surplusage. Ryalls *v.* R. (in error), 11 Q. B. 781; 18 L. J. M. C. 69; 3 Cox C. C. 254—Exch. Cham. affirming the judgment of the Q. B.; S. C., 12 Jur. 458; 17 L. J. M. C. 93.

An assignment was that the defendant, upon his oath, did swear "that he then thought that the words written in red ink were not his writing, and that he had not in the presence of W. D. written the words so written in red ink, whereas, in truth and in fact, the words so written in red ink were the defendant's writing, and whereas also, in truth and in fact, he then and there, when he so deposed as aforesaid, thought that the words so written in red ink as aforesaid were his writing." It was ruled, that perjury might be assigned upon the deposition of the defendant. And it was ruled, further,

IX. EVIDENCE.

§ 1305. The fact that the defendant was duly sworn must be substantively proved,[2] independently of the *jurat*,[3] unless, as will be hereafter seen, the jurat is admissible as independent *primâ facie* proof.[4] An indictment alleging that the respondent was sworn, and took her *corporal oath* to speak the truth, the whole truth, etc., is sustained by evidence of the oath taken in the usual form.[5] But if it be stated that the defendant was sworn on the gospels, and it be proved that he was sworn in a different manner, according to the custom of his country, the variance will at common law be fatal.[6] It must, also, appear that the oath was actually taken; proof of mere passive acquiescence, without any expression of assent, will not constitute an oath.[7]

Oath must be correctly averred and proved.

If it be not alleged that the witness was sworn in any other manner, proof that he was sworn generally, and was examined, will support the allegation.[8]

§ 1306. Here must be kept in mind the distinction between evidence when *preceded* by the oath, and evidence when *followed* by the oath. According to the Roman common law, the oath must close the testimony. The witness swears that all the foregoing testimony is true. According to the practice of the English common law, the wit-

Whole of testimony may be taken into consideration.

that the materiality of the allegation that the defendant wrote the words in the presence of W. D. being averred, the court would not inquire into it. R. *v.* Schlesinger, 10 Q. B. 670; 2 Cox C. C. 200.

[1] R. *v.* Goodfellow, C. & M. 569.

[2] As to what oath binds, see *supra*, § 1251. As to averment of oath, see *supra*, § 1289. And see U. S. *v.* Baer, 18 Blatch. C. C. 493; Hitesman *v.* State, 48 Ind. 473.

[3] Case *v.* People, 76 N. Y. 242.

[4] *Infra*, § 1312.

[5] State *v.* Norris, 9 N. H. 96; Resp. *v.* Newell, 3 Yeates, 407. See *supra*, § 1287. That an oath taken with uplifted hand may be averred to be a "corporal" or "solemn" oath, see Jackson *v.* State, 1 Ind. 184.

[6] R. *v.* M'Carther, Peake (N. P.), 155; State *v.* Porter, 2 Hill (S. C.), 611.

[7] O'Reilly *v.* People, 86 N. Y. 154; 10 Abb. (N. Y.) New Ca. 53.

[8] R. *v.* Rowley, R. & M. (N. P.) 299. See U. S. *v.* Baer, 18 Blatch. C. C. 493 (11 Rep. 182), where the officer's testimony as to his general usage was held sufficient. As to presumption of regularity, see Whart. Crim. Ev. §§ 829 *et seq.*; State *v.* Mace, 86 N. C. 668; Van Dusen *v.* People, 78 Ill. 645.

ness is sworn beforehand to the testimony he subsequently gives. Where the former practice exists, the witness is allowed to review the whole of his testimony before the jurat; and as he has thus an opportunity to revise each point that he accepts and swears to, there is less objection to prosecuting him for perjury in particular statements. Yet even here the perjury, viewing the question philosophically, is to be gauged by the whole of the testimony thus given.[1] Under the English common law practice, this precaution is peculiarly important. A witness examined *vivâ voce* may inadvertently, or through confusion, say many things to which he would not deliberately swear, had he an opportunity of final revision, and which, in subsequent portions of his testimony, he may qualify or recall. Hence, on the trial, he should have the privilege of proving the whole of his testimony, so as to show, if possible, that the alleged falsehood was in other portions of his examination recalled or toned down.[2] But it is not necessary for the prosecution to put in the whole of the defendant's evidence.[3]

Substance of assignment must be proved.

§ 1307. It is necessary, at all events, for the prosecution to prove in substance the whole of what was set out in a particular assignment, as having been sworn by the defendant referable to such assignment; proving a part only is not sufficient.[4]

One witness enough to prove testimony.

§ 1308. The evidence of a single witness is sufficient to prove that the defendant swore to the facts charged in the indictment.[5]

Answers in chancery

§ 1309. Where perjury is assigned upon an answer to a bill in equity, it is sufficient, after producing the bill or a copy of it,[6] to produce the answer, and prove either

[1] Die Vollendung tritt ein, sobald die ganze Eidesformel von dem Schwörenden gesprochen ist. Berner, Lehrbuch, p. 560.

[2] See *supra*, §§ 1244, 1245; *infra*, § 1325.

[3] Dodge *v.* State, 4 Zabr. 455.

It is sufficient to prove all the evidence given by the defendant, referable to the fact on which perjury is assigned. R. *v.* Rowley, R. & M. 299.

[4] R. *v.* Jones, Peake (N. P.), 37. See *infra*, § 1322; State *v.* Ah Sam, 7 Oreg. 477.

[5] Com. *v.* Pollard, 12 Met. 225; State *v.* Hayward, 1 N. & McC. 546; State *v.* Wood, 17 Iowa, 18. As to admissibility of judge's notes, see R. *v.* Child, 5 Cox C. C. 197; R. *v.* Morgan, 6 Ibid. 107. See, as to subornation of perjury, Com. *v.* Douglass, 5 Met. 241.

[6] See R. *v.* Laycock, 4 C. & P. 326.

and depositions to be proved by jurat.

that the defendant was sworn to it, or that the signature to it is in the defendant's handwriting, and that the name subscribed to the jurat is the name and handwriting of a master or other person having authority for that purpose.[1] The same practice applies to depositions in equity, and other similar cases, at least so as to throw upon the defendant the onus of proving that he was personated.[2]

Written evidence may be proved by parol.

§ 1310. It makes no difference, at common law, if either before or after the oath was administered, the statements of the witness made when examined *vivâ voce* before the jury, were reduced to writing and signed by the witness. In either case parol testimony of the evidence is admissible.[3]

So of lost instrument.

§ 1311. Secondary evidence is admissible of a lost written instrument on which perjury is assigned.[4]

Jurat of officer ad-

§ 1312. In cases where the alleged false oath was taken before a magistrate or officer of court, then, after proof of the identity of the defendant with the person swearing to it,[5]

[1] R. *v.* Morris, 2 Burr. 1189; R. *v.* Benson, 2 Camp. 508.

[2] Ibid.

On an indictment setting forth, with proper innuendoes, a copy of a deposition before a magistrate, written in the English language, and signed by the defendant, he may be convicted on proof of a verbal deposition in the Welsh language, of which the written deposition, signed by him, is the substance. R. *v.* Thomas, 2 C. & K. 806.

[3] Com. *v.* Carel, 105 Mass. 582; Com. *v.* Hatfield, 107 Mass. 227.

[4] R. *v.* Milnes, 2 F. & F. 10.

[5] This is essential. R. *v.* Barnes, 10 Cox C. C. 539.

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

ministering oath may be proof of oath.

the certificate of such magistrate or officer, on proof of the handwriting of his signature, is competent and sufficient *primâ facie* evidence of the administration of the oath at the alleged time and place to the defendant.[1]

Substantial variance as to evidence is fatal.

§ 1313. The proof of the testimony alleged to have been given must substantially support the narration of it in the indictment;[2] and any substantial variance in this respect will be fatal.[3] Thus where the indictment charged that the defendant swore "that one G. did not interrupt a constable in driving certain cattle to G.'s house," and the evidence was, that the defendant swore "that G. did assist in driving the cattle from the officer," it was held that the evidence did not support the charge.[4] But substantial conformity is enough.[5]

Records must be literally given.

§ 1314. Any variance, as has been already said, in the setting forth of a record is at common law fatal,[6] though under recent statutes mere formal variances are cured by verdict, or may be amended on trial.[7]

The day on which the offence occurred, being matter

[1] R. *v.* Spencer, 1 C. & P. 260; R. & M. 97; Com. *v.* Warden, 11 Met. 406. As already seen (*supra*, § 1309), in an answer in chancery, the practice is to prove the fact of swearing, the handwriting of defendant, and the jurat of the officer administering the oath. R. *v.* Morris, 1 Leach, 60; R. *v.* Benson, 2 Camp. 508; R. *v.* Morris, 2 Burr. 1189.

[2] Whart. Cr. Ev. § 116; R. *v.* Leefe, 2 Camp. 134; Roberts *v.* People, 99 Ill. 275.

[3] *Supra*, § 1297; Whart. Crim. Ev. § 120 *a*. See R. *v.* Taylor, 1 Camp. 404; and see 2 Ibid. 509; 1 Stark. N. P. C. 518; 1 T. R. 327, 340, n.; 14 East, 218, n.; R. *v.* Stoveld, 6 C. & P. 489; R. *v.* Cooke, 7 Ibid. 559; Roberts *v.* People, 99 Ill. 275; Watson *v.* State, 5 Tex. Ap. 11; State *v.* Ah Sam, 7 Or. 477.

[4] State *v.* Bradley, 1 Hayw. 403, and 1 Hayw. 463.

An allegation that A. and four others committed an assault on B. is not proved by the production of a record which sets forth a bill of indictment charging A. and five others with an assault on B. State *v.* Harvell, 4 Jones, N. C. 55.

[5] See *supra*, § 1297; and see Harris *v.* People, 64 N. Y. 148; Taylor *v.* State, 48 Ala. 157.

[6] See Whart. Cr. Ev. § 115; R. *v.* Christian, C. & M. 388; R. *v.* Browne, 3 C. & P. 572; M. & M. 315; R. *v.* Dunn, 2 Mood. C. C. 297; 1 C. & K. 730; R. *v.* Stoveld, 6 C. & P. 489; State *v.* Tappan, 1 Foster (N. H.), 56; State *v.* Ammons, 3 Murph. 123; Jacobs *v.* State, 61 Ala. 448. Thus, an allegation of perjury committed upon a trial for the larceny of property of W. G. M. G., or his son M., is not sustained by a record of an indictment for the larceny of property of W. G. M. G.'s son M. Brown *v.* State, 47 Ala. 47.

[7] State *v.* Bailey, 11 Foster (N. H.), 521.

of record, must at common law be correctly laid; and if there be a variance from the record on this point, the indictment is bad.[1]

A failure to prove any substantial averment (*e. g.*, that a summons issued in the original case) is fatal.[2]

Not necessary to prove appointment of officer.

§ 1315. It is not necessary for the prosecution to prove the appointment of the officer who administered the oath, if a *primâ facie* case of authority is made out;[3] and (if the court will not judicially notice it) that the person lawfully exercising the duties of that office had authority to administer an oath in such a case.[4] And the officer himself may be called to prove that he was acting as such.[5] But if the defence prove that the officer (or the court he represents) had no authority to administer the oath, the prosecution falls.[6]

Swearing before a clerk in open court is equivalent to swearing before the court.[7]

Proving one assignment is sufficient.

§ 1316. Some one or more of the assignments of perjury must be sustained by proper evidence, and the assignments proved must have been material to the matter before the court at the time the oath was taken.[8] It is not necessary, therefore, as will be seen, to support all the assignments in any given count. The proper course of pleading is to negative specially each part of the defendant's testimony which is alleged to be false; and if any material assignment be adequately proved, it is enough to support the indictment,[9] if falsity be satis-

[1] U. S. *v.* Bowman, 2 Wash. C. C. 326; U. S. *v.* M'Neal, 1 Gallis. 387; *contra*, People *v.* Hoag, 2 Parker C. R. 36. See Whart. Cr. Pl. & Pr. § 135; Whart. Cr. Ev. § 103. *Supra*, § 1290.

[2] R. *v.* Whybrow, 8 Cox C. C. 438; R. *v.* Newall, 6 Ibid. 21; R. *v.* Hurrell, 3 F. & F. 271. See R. *v.* Dunn, 2 Mood. C. C. 297; 1 C. & K. 730; R. *v.* Smith, L. R. 1 C. C. 110. *Infra*, § 1326; *supra*, § 1263.

[3] R. *v.* Newton, 1 C. & K. 469; R. *v.* Verelst, 3 Camp. 432; R. *v.* Howard, 1 M. & R. 187; Keator *v.* People, 32 Mich. 484; Whart. Cr. Ev. §§ 164, 835. *Supra*, § 1263.

[4] *Supra*, § 1264; Whart. Cr. Ev. §§ 164, 835; R. *v.* Roberts, 14 Cox C. C. 101; State *v.* Hascall, 6 N. H. 352; State *v.* Gregory, 2 Murph. 69.

[5] Ibid.

[6] *Supra*, § 1263.

[7] Warwick *v.* State, 25 Ohio St. 21; Server *v.* State, 2 Blackf. 35. *Supra*, § 1287.

[8] Dodge *v.* State, 4 Zabr. 455. *Supra*, § 1301; *infra*, § 1322.

[9] Lord Raymond, 886; 2 Camp. 138–9; Cro. C. C. 7th ed. 622; R. *v.* Hemp, 5 C. & P. 468; State *v.* Bishop, 1 Chip. (Vt.) 120; State *v.* Hascall, 6 N. H. 358; State *v.* Blaisdell, 59 Ibid.

factorily shown.[1] So on an indictment for obtaining goods on false pretences, it is sufficient to prove on trial any one of the several assignments of fraud which a given count may contain.[2] But the attention of the jury must be called to each specific assignment as an independent issue.[3]

Defendant's oath to the contrary not sufficient proof of falsity.

§ 1317. When the defendant has made two distinct statements under oath, one directly the reverse of the other, it is not enough to produce the one in evidence to prove the other to be false.[4] Hence where on trial upon an indictment for perjury in swearing falsely to a deposition, the facts stated in the deposition were averred to be true, but after making the deposition, the deponent had testified on the stand that they were not true; it was held, that the prisoner in his defence was not estopped by his *vivâ voce* testimony from showing the verity of the facts stated in the deposition.[5] And the prosecution must specify in the indictment which of the two conflicting statements is alleged to be false.[6]

Facts admissible to infer corrupt motive.

§ 1318. Evidence is admissible to show that the motives which actuated the defendant were fraudulent or corrupt;[7] as, for instance, that his object was to coerce the settlement of a civil claim.[8] For the same purpose it is admissible to prove other cognate perjuries.[9]

One witness not enough to prove falsity.

§ 1319. The rule that the testimony of a single witness is not sufficient to negative the alleged false oath is not merely technical, but is founded on substantial justice. There must be either two witnesses to prove such falsity, or one witness with material and independently established cor-

329; Com. *v.* Johns, 6 Gray, 274; Com. *v.* McLaughlin, 122 Mass. 449; Dodge *v.* State, 4 Zabr. 455. See Harris *v.* People, 64 N. Y. 148; Page *v.* State, 59 Miss. 475. *Supra*, § 1301. Whart. Cr. Ev. § 131.

[1] *Infra*, § 1322.

[2] *Supra*, § 1218.

[3] Wood *v.* People, 59 N. Y. 117.

[4] R. *v.* Wheatland, 8 C. & P. 238; R. *v.* Hughes, 1 C. & K. 519; U. S. *v.* Mayer, Deady, 127; Dodge *v.* State, 4 Zabr. 455; Schwartz *v.* Com., 27 Grat. 1025; Cothran *v.* State, 39 Miss. 541. Whart. Cr. Ev. § 387. But see People *v.* Burden, 9 Barb. 467.

[5] State *v.* J. B., 1 Tyler, 269.

[6] Rhodes' Case, 78 Va. 692.

[7] See Eighmy *v.* People, 79 N. Y. 546.

[8] *Supra*, § 1245; R. *v.* Munton, 3 C. & P. 498; State *v.* Hascall, 6 N. H. 352.

[9] State *v.* Raymond, 20 Iowa, 582. Whart. Cr. Ev. § 53.

roborative facts.[1] Evidence confirmatory of that one witness, in some slight particular only, is not sufficient to warrant a conviction.[2] And where perjury was assigned upon a statement made by the prisoner on oath, on a trial at *nisi prius*, that in June, 1851, he owed no more than one quarter's rent to his landlord, and the prosecutor swore that the prisoner owed five quarters' rent at that time, and to corroborate this a witness was called who proved that in August, 1850, the prisoner admitted to him that he owed his landlord three or four quarters' rent, it was held that this was not a sufficient corroboration.[3] But one witness may be adequately sustained by the defendant's own letters and declarations,[4] by his own

[1] R. *v.* Gardner, 8 C. & P. 737; R. *v.* Boulter, 2 Den. C. C. 396; 5 Cox C. C. 543; R. *v.* Roberts, 3 C. & K. 607; R. *v.* Braithwaite, 8 Cox C. C. 254; R. *v.* Hook, Ibid. 5; U. S. *v.* Wood, 14 Pet. 430; People *v.* Stone, 39 Hun, 41; Williams *v.* Com., 91 Penn. St. 493; Crusen *v.* State, 10 Ohio St. 258; State *v.* Raymond, 20 Iowa, 582; State *v.* Heed, 57 Mo. 252; People *v.* Davis, 61 Cal. 536.

[2] R. *v.* Yates, 1 C. & M. 132; 3 Russ. on Cr. 4th Eng. ed. 277 *et seq.*; Champney's Case, 2 Lewin C. C. 258; R. *v.* Boulter, 2 Den. C. C. 396; 5 Cox C. C. 543; State *v.* Buie, 43 Tex. 532.

[3] R. *v.* Boulter, 9 Eng. L. & Eq. 537; 5 Cox C. C. 543; 3 C. & K. 236; 2 Den. C. C. 396. See, also, R. *v.* Parker, C. & M. 639. See Whart. Cr. Ev. § 387.

[4] R. *v.* Boulter, *ut supra*; R. *v.* Shaw, L. & C. 579; R. *v.* Mayhew, 6 C. & P. 315; R. *v.* Hook, D. & B. 606; 8 Cox C. C. 5. See R. *v.* Champney, 2 Lew. 258; R. *v.* Towey, 8 Cox C. C. 328; U. S. *v.* Wood, 14 Peters, 430; Dodge *v.* State, 4 Zabr. 455; State *v.* Moliere, 1 Dev. 263.

P., a policeman, having laid an information against a publican for keeping open his house after lawful hours, swore, on the hearing, that he knew nothing of the matter except what he had been told, and that "he did not see any person leave the defendant's house after eleven" on the night in question. P. was indicted for perjury, and the perjury was assigned on this last allegation, and the evidence to prove its falsehood was that P., when laying the information, said that "he had seen four men leave the house after eleven," and that he could swear to one as W. On two other occasions P. made a similar statement to two other witnesses, and W. and others did, in fact, leave the house after eleven o'clock on the night in question; that on the hearing P. acknowledged that he had offered to smash the case for 30*s.*; that he had talked, in the presence of another witness, of making the publican give him money to settle it; and he had, in fact, offered to the publican to settle it for £1, and had said that he had received 10*s.* to smash the case, and was to have 10*s.* more. It was ruled that the evidence was sufficient to prove the perjury assigned, and that the conviction was right. R. *v.* Hook, Dears. & B. C. C. 606; 8 Cox C. C. 5.

R. *v.* Webster, 1 F. & F. 315, goes to the great length of holding that a witness was sufficiently corroborated by memoranda made by himself at the time of the contested transaction. This, however, conflicts with R. *v.* Boulter,

admissions as a witness on the stand,[1] as well as by independent admissible corroborative material facts.[2]

§ 1320. The *credibility* of the witnesses is for the jury. They are not to be excluded because *participes criminis*.[3]

Credibility of witnesses for jury.

When falsity is proved, the burden is on the defendant to show that it arose from surprise, inadvertence, or mistake, and not from a corrupt motive.[4]

§ 1321. The cases in which a second living witness in issues of this class may be dispensed with, are thus summed up by the Supreme Court of the United States: where a person is charged with a perjury by false swearing to a fact directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent; where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath, the oath being proved to have been taken corruptly; where the party has been charged with taking an oath contrary to what he must necessarily have known to have been the truth, and the false swearing can be proved by his own letters relating to the fact sworn to, or by other written testimony existing and being found in the possession of the defendant, and which has been treated by him as containing the evidence of the fact recited in it.[5]

Witness may be dispensed with when there is adequate documentary falsification.

ut sup., and with the following comment by Mr. Greaves, in the 4th ed. of Russell on Crimes: "If this case is correctly reported, it deserves reconsideration. The memorandum was not itself admissible, and could only be used to refresh the memory of the witness; so that the whole statement rested on his single oath; and even if the memorandum had been admissible, it would only have been the written statement of the witness, and not on oath; and the time when it was made and the veracity of its statements must have rested on his single oath." See to same effect, criticism in London Law Times, March 22, 1884, p. 375–6. See same paper, Jan. 15, 1881, p. 184.

[1] State *v.* Miller, 24 W. Va. 802.

[2] R. *v.* Lee, 2 Russ. on Cr. 545; R. *v.* Gardner, 2 Mood. C. C. 95; R. *v.* Mayhew, 6 C. & P. 315; R. *v.* Verrier, 12 Ad. & El. 317; R. *v.* Hare, 13 Cox C. C. 174; R. *v.* Roberts, 2 C. & K. 607; R. *v.* Braithwaite, 8 Cox C. C. 254; 1 F. & F. 639; R. *v.* Boulter, 9 Eng. L. & Eq. 537; 2 Den. C. C. 396; 5 Cox C. C. 543; Com. *v.* Parker, 2 Cush. 212; Com. *v.* Pollard, 12 Met. 225; Hendricks *v.* State, 26 Ind. 493; State *v.* Raymond, 20 Iowa, 582; Crusen *v.* State, 10 Ohio St. 258; State *v.* Hayward, 1 N. & Mc. 546. See fully Whart. Cr. Ev. § 387.

[3] Whart. Cr. Ev. § 439. See *infra*, § 1330.

[4] State *v.* Chamberlain, 30 Vt. 559.

[5] U. S. *v.* Wood, 14 Peters, 430.

§ 1322. Where an indictment contains several assignments of perjury, it is not sufficient to disprove all of them by a separate witness to each; since, in order to convict on any one assignment, there must be either two witnesses, or one witness and corroborative evidence, negativing the truth of the matter contained in such assignment.[1] It is not necessary, however, that *every* fact which goes to make up any particular assignment of perjury should be so disproved.[2] There can be no statement, however false, that does not contain some element of truth.

Some one assignment should be adequately falsified.

§ 1323. Nor is it requisite that the false testimony set forth in the indictment should be in every point and shade squarely negatived and falsified by the prosecution, for if so, no conviction of perjury could be had, it being difficult to conceive, in matters of moral proof, of any two propositions as exactly and absolutely opposite. It is sufficient if the *effect* of the defendant's testimony is shown to have been false. Thus, a false statement, on an affidavit justifying bail, to the effect that the witness owned certain parcels of land, is perjury, if he did not own some of the parcels, though the value of others of the parcels, which he did own, was sufficient to cover the amount of the bail for which he offered himself.[3]

Necessary only that testimony should be substantially negatived.

As has been already seen, there may be a negation of a false statement of opinion, of a false statement of an inference, and of a false statement of unreal incidents to a real fact.[4]

But one material and salient point, at least, assigned as perjury, must be proved to have been false.[5]

[1] 3 Russ. on Cr. 4th Am. ed. 79 *et seq.*; 3 Greenl. on Ev. § 198; R. *v.* Roberts, 2 C. & K. 607; Whart. Cr. Ev. § 387.

[2] R. *v.* Parker, C. & M. 639; R. *v.* Verrier, 12 Ad. & El. 317; R. *v.* Yates, C. & M. 132; R. *v.* Mudie, 1 M. & R. 128; Williams *v.* Com., 91 Penn. St. 493. *Supra*, §§ 1299, 1316.

[3] Com. *v.* Hatfield, 107 Mass. 227; Brown *v.* State, 57 Miss. 424. See *supra*, §§ 1277, 1300.

[4] *Supra*, §§ 1246 *et seq.*; R. *v.* Hook, *supra*, § 1319.

[5] R. *v.* Tucker, 2 C. & P. 500.

P. having sworn that he did not enter into a verbal agreement with B. and C. for them to become joint dealers and copartners in the trade or business of druggists, was indicted for perjury, and it appeared that, in fact, B. was a druggist, keeping a shop with which P. had nothing to do; but that P. and C. being sworn brokers, could not trade, and therefore made speculations in drugs in B.'s name with his consent, he agreeing to divide profits and losses with P. and C. It was held that this did not support the indictment, as this was not the sort of partnership denied by P. upon oath. R. *v.* Tucker, 2 C. & P. 500.

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

Perjury not to be prosecuted during pendency of civil suit in which alleged false oath was taken.

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

Entire facts connected with false evidence admissible.

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

[1] Burns *v.* People, 59 Barb. 531.

[2] See 3 Russ. on Cr. 4th Eng. ed. 678 *et seq.* See as to concurrence of civil and criminal process, *supra*, § 31 *b*.

[3] Com. *v.* Dickinson, 5 Penn. L. J. 164.

[4] R. *v.* Simmons, 8 C. & P. 50; R. *v.* Ashburn, Ibid. See Peddell *v.* Rutter, Ibid. 337. And as to continuance see more fully Whart. Cr. Pl. & Pr. §§ 584 *et seq.*

[5] R. *v.* Harrison, 9 Cox C. C. 503. *Supra*, § 1306.

[6] Osburn *v.* State, 7 Ham. (Part. 1st) 212.

At common law entire record should be proved.

§ 1326. In a trial at *nisi prius*, on an indictment for perjury, the *postea* must be produced by the plaintiff.[1] At common law, generally the entire record should be put in evidence.[2] But where the proceedings were in any way collateral, and there is parol proof of regularity, it is not necessary that all the original papers should be produced or exemplified.[3] Nor need there be proof of final judgment when the *postea* is produced.[4]

Character of defendant for truth admissible.

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

X. ATTEMPTS TO COMMIT PERJURY.

Attempt at perjury indictable.

§ 1328. An attempt to commit perjury is indictable[6] on the same reasoning as are attempts to commit other offences. And when the complete offence of perjury is not proved (as where the false oath is taken before an incompetent officer, the defendant believing him to be competent), the defendant may be indicted for the attempt.[7] Attempts to suborn witnesses, and to suppress testimony, will be independently considered.[8]

XI. SUBORNATION OF PERJURY.[9]

To subornation corrupt motive is essential.

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

[1] Resp. *v.* Goss, 2 Yeates, 479.

[2] Porter *v.* Cooper, 6 C. & P. 354.

[3] R. *v.* Turner, 2 C. & K. 732; R. *v.* Smith, L. R. 1 C. C. 110; 11 Cox C. C. 10.

[4] Bull, N. P. 243.

[5] R. *v.* Hemp. 5 C. & P. 468. See Whart. Cr. Ev. § 60.

[6] St. Dig. C. L. art. 138; R. *v.* Taylor, Holt, 534. See R. *v.* Stone, Dears. 251; Chapman's Case, 1 Den. C. C. 432; Hodgkins *v.* R., L. R. 1 C. C. R. 212. *Supra*, §§ 179 *et seq.*, 185.

[7] R. *v.* Stone, Dears. 251; 22 Eng. L. & Eq. 593.

[8] *Infra*, § 1332.

[9] For forms of indictment, see Whart. Prec., 597, *et seq.*

[10] 1 Hawk. c. 69, s. 10; 3 Russ. on Cr. (9th Am. ed.) 50 *et seq.*; R. *v.* Reilley, 2 Leach, 509; U. S. *v.* Staats, 8 How. 41; Com. *v.* Douglass, 5 Met. 241. See Com. *v.* Smith, 11 Allen, 243; Dawkins *v.* Gill, 10 Ala. 206; Patterson *v.* Donner, 28 Cal. 369.

jury must have been actually committed,[1] and this must appear in the indictment.[2] The suborner must be aware of the intended corruptness on part of the person suborned. Thus though a party, who is charged with subornation of perjury, knew that the testimony of a witness whom he called would be false, yet if he did not know that the witness would wilfully testify to a fact, knowing it to be false, he cannot be convicted of the crime charged.[3]

§ 1330. In subornation of perjury, the same rules as to materiality of testimony prevail as in perjury.[4] Hence, in trials of this class, a perjured witness, who claims to have been suborned, is not sufficient, without corroboration, to procure the conviction of the alleged suborner.[5]

Testimony must be material.

§ 1331. The *scienter* must be averred; and it must be also averred that the false oath was procured to be used as testimony in a court having jurisdiction,[6] the defendant knowing that the witness knew he was to swear falsely.[7] When the scienter is otherwise given, the word "knowingly" is not necessary in an indictment which avers that the defendant "unlawfully, wilfully, wickedly, feloniously, and corruptly did persuade, procure, and suborn" the witness to "commit said perjury in manner and form aforesaid."[8]

Indictment must aver *scienter*.

XII. ATTEMPTS TO SUBORN: DISSUADING WITNESS FROM APPEARING.

§ 1332. Although, in order to constitute the technical offence of subornation, the person cited must actually take the false oath, yet it is plain that attempts, though unsuccessful, to induce a witness to give particular testimony, irrespective of the truth,[9] even though such witness had not been served with a subpœna, are indictable.[10] But the attempt must be in connection with litigation, actual or prospective.[11]

Attempts at subornation are indictable.

[1] Com. v. Maybush, 29 Grat. 857. Under New York statutes, see Stratton v. People, 81 N. Y. 629.

[2] U. S. v. Evans, 19 Fed. Rep. 912; 2 West Coast Rep. 611.

[3] Com. v. Douglass, 5 Met. 241; Stewart v. State, 22 Oh. St. 477.

[4] Com. v. Smith, 11 Allen, 243.

[5] People v. Evans, 40 N. Y. 1. So in Ohio by Act of May, 1869.

[6] U. S. v. Wilcox, 4 Blatch. C. C. 391, 393; Whart. Cr. Pl. & Pr. § 164.

[7] U. S. v. Dennee, 3 Woods C. C. 39.

[8] Stewart v. State, 22 Ohio St. 477.

[9] 3 Russ. on Cr. 9th Am. ed. 60 *et seq*; R. v. Darby, 7 Mod. 100; Overton, *ex parte*, 2 Rose, 257; Jackson v. State, 43 Tex. 421. See State v. Hughes, Ibid. 518. *Supra*, § 179.

[10] R. v. Phillips, Cas. temp. Hard. 241; State v. Keyes, 8 Vt. 57. See *supra*, § 179; and see Whart. Cr. Pl. & Pr. § 954.

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

[11] State v. Josquin, 69 Me. 218.

§ 1333. To attempt to prevent, either by persuasion or intimidation, a witness from attending a trial is not merely a contempt of court,[1] but may be punishable by indictment, irrespective, it is said, of materiality,[2] or of the prior summoning of the witness by subpœna.[3]

And so of dissuading witness from attending.

In an indictment against S. for endeavoring to prevent a witness bound over to testify before a grand jury from appearing and testifying, the indictment in the original case, in which the witness was recognized to appear, need not be recited, nor does the guilt or innocence of the respondent depend upon the sufficiency of that indictment, or of the guilt or innocence of the defendant in the first case.[4]

XIV. FABRICATION OF EVIDENCE.

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

[1] See Whart. Cr. Pl. & Pr. § 965.

[2] R. v. Darby, 7 Mod. 100; R. v. Loughran, 1 Cr. & D. C. C. 76; R. v. Chandler, 2 Ld. Ray. 1398; S. C., under name of R. v. Chandler, 1 Mod. 336; State v. Ames, 64 Me. 386; State v. Carpenter, 20 Vt. 9; Com. v. Reynolds, 14 Gray, 87; State v. Early, 3 Harring. (Del.) 562; Com. v. Feeley, 2 Va. Ca. 1; Martin v. State, 28 Ala. 71; and see 2 Russ. on Cr. (6th Am. ed.) 595; State v. Keyes, 8 Vt. 57. In Pennsylvania the offence is statutory. Com. v. Phillips, 3 Pittsb. 426.

[3] State v. Ames, 64 Me. 386; State v. Keyes, 8 Vt. 57; Com. v. Feeley, 2 Va. Ca. 1; Martin v. State, 28 Ala. 71. As taking a stricter view of pleading, see Brown v. State, 13 Tex. Ap. 358.

By § 80 of the New York Penal Code of 1882, the witness receiving the bribe is made indictable for felony.

[4] State v. Carpenter, 20 Vt. 9. See Martin v. State 28 Ala. 71.

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

[1] *Supra*, § 681.

CHAPTER XXI.

CONSPIRACY.

I. GENERAL CONSIDERATIONS.

§ 1337. A conspiracy is a confederation to effect an unlawful object by lawful means or by unlawful means a lawful object;[1] and is a misdemeanor at common law.

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

It is on all sides conceded that combinations of two or more persons may become indictable when directed to the accomplishment either of an illegal object, or of an indifferent object by illegal means.[2] The conflict begins when we reach those combinations which are assumed to be indictable, not as aimed at an indictable offence, but

[1] See *infra*, § 1359; *supra*, § 1118; and see Com. *v.* Bliss, 12 Phila. 580.

[2] Sir J. F. Stephen's definition (Dig. C. L. art. 36) is given *infra*, § 1347.

The late Chief Justice Cockburn proposed the following to the commissioners of the Criminal Code:—

"Conspiracy may be divided into three classes. First, where the end to be accomplished would be a crime in each of the conspiring parties, a class which offers no difficulty. Secondly, where the purpose of the conspiracy is lawful, but the means to be resorted to are criminal, as when the conspiracy is to support a cause believed to be just by perjured evidence. Here the proximate or immediate intention of the parties being to commit a crime, the conspiracy is to do something criminal; and here again the case is consequently free from difficulty. The third and last case is where with a malicious design to do an injury the purpose is to effect a wrong, though not such a wrong as, when perpetrated by a single individual, would amount to an offence under a criminal law. Thus an attempt to destroy a man's credit, and effect his ruin by spreading reports of his insolvency, would be a wrongful act, which would entitle the party whose credit was thus attacked to bring an action for a civil wrong, but it would not be an indictable offence. . . . . The law has wisely and justly established that a combination of persons to commit a wrongful act with a view to injure another shall be an offence, though the act, if done by one, would amount to no more than a civil wrong."

By sec. 284 of the English Draft Code of 1879, declared by the reporters to be a compilation in this respect of the common law, "every one shall be guilty of an indictable offence, and shall be liable, upon conviction thereof, to five years' penal servitude, who conspires with any other person, by deceit or falsehood or other fraudulent means, to defraud the public, or to affect the public market price of stocks, funds, shares, or merchandise, or anything else publicly sold, or who conspires by deceit and falsehood or other means to defraud any person, ascertained or unascertained, whether such deceit or falsehood or other fraudulent means would or would not amount to a false pretence, as hereinafter defined."

By sec. 420 it is made indictable to conspire "to commit any indictable offence not punishable with penal servitude or to do anything in any part of the world, which, if done in England or Ireland, would be an indict-

from the idea that the policy of the law forbids the reaching of the attempted object by a confederacy.[1] We propose, therefore, instead of further defining the offence, *first*, to scrutinize the cases which have been considered as belonging to it; and *secondly*, to notice such general points of pleading and evidence as relate to them all jointly. Before proceeding, however, to this analysis, certain general qualifications are to be noticed.

Offence to be limited to such cases.

§ 1338. We may now regard it as settled that it is an indictable offence for two persons to conspire to defraud a third by false statements for which one calls on the other in any way to vouch, this concert, as well as the falsehood, being concealed from the party defrauded; nor is it any defence in such cases that there is no statute under which, if the conspiracy charge were thrown out, the defendants could be convicted. Cheating by reciprocal preconcerted false personations of this class may justly be regarded as a cheat at common law; and the rulings making it indictable are sustainable on principle.[2] But to extend indictable conspiracies so as to include cases where acts not in themselves indictable are attempted by concert involving neither false statement nor concerted force, should be resolutely opposed. A distressing uncertainty will oppress the law if the mere fact of concert in doing an indifferent act be held to make such act criminal. We all know what offences are indictable, and if we do not, the knowledge is readily obtained. Such offences, when not defined by statute, are limited by definitions which long processes of judicial interpretation have hardened into shapes which are distinct, solid, notorious, and permanent. It is otherwise, however, when we come to speak of acts which, though not penal when they are committed by persons acting singly, are supposed to become so when brought about by concert which involves neither fraud nor force. These there has never been any judicial attempt to define, or legislative attempt to codify.[3] No man can know in advance whether any enterprise in which he may engage may not in this way become subject to prosecution. It is essential to the constitu-

able offence not punishable with penal servitude."

That overts acts are not necessary, see *infra*, §§ 1382, 1400.

[1] See R. *v.* Parnell, 14 Cox C. C. 508.

[2] *Supra*, § 1124; *infra*, § 1359. Compare §§ 14 *et seq.*

[3] See *supra*, § 15.

tion of an indictable offence, as is elsewhere shown,[1] that it should be prohibited either by statute or by common law; but conspiracies to commit by non-indictable means non-indictable offences, if we resolve them into their elements, are neither prohibited by common law nor by statute. By force of their definition, their object is not *per se* prohibited; and the other ingredient in their constitution, that of an association of individuals to effect a common end, is essential to all action in which two persons engage. When we remember, also, that, as we have seen, it is necessary to a righteous administration of public justice that punishment should be attached only to acts which are made penal by rules which are pre-announced and constant,[2] the objection just stated acquires additional weight. An act of business enterprise in purchasing goods in a cheap market for the purpose of selling them in a dear market, which in one phase of judicial sentiment would be regarded as a meritorious impetus to commercial activity, would be in another phase of judicial sentiment, as it once has been, treated as an indictable offence.[3] Legislative and judicial compromises, which one court may view as essential to the working of the political machine, another court may hold to be indictable as a corrupt conspiracy.[4] Nor can we continue to accept the reasons by which this indefinite extension of conspiracy has been justified. It used to be said that the *combination* of a plurality of persons to do an act invests it with a criminality which it does not otherwise possess. Undoubtedly this is so with riot, which depends on tumult, which again depends on plurality of agents; but riot is positively defined by the law, and all who engage in a riot have means to know what it is, and that it is punishable. But can this be predicated of combinations which the law does not in advance pronounce to be unlawful? One of two alternatives we must here accept. Either we must, with the old English judges, look upon all voluntary combinations as suspicious, and objects of judicial suppression, or we must declare that only such combinations are penally cognizable as are made so either by statute or by a settled judicial construction of the common law. We must, in other words, either on the one hand say, that voluntary combination has in it an element of evil which infects with indictability acts not in themselves indictable, or we must hold that voluntary combination is indictable or

[1] *Supra*, § 14.

[2] See *supra*, §§ 1 *et seq.*

[3] See *infra*, § 1366.

[4] *Infra*, § 1375.

not, just as the conduct it involves is indictable or not. Now, whatever may have been the view in old times, when the maxim was that voluntary combinations should do nothing that government could do, the first of these hypotheses must be rejected in an age in which the maxim is that government, so far as concerns affairs of trade, should do nothing that voluntary combinations can do as well, and in which great social and commercial enterprises can no longer be undertaken by individuals, but must be undertaken by combinations. So cogent have these and other reasons appeared to the jurists of countries whose notions of the freedom of the individual we are apt to regard as less comprehensive than our own, that conspiracy (Komplott), as a distinct offence, has been stricken from the revised codes of Prussia, Oldenburg, Würtemburg, Bavaria, Austria, and North Germany.[1] Nor can it be justly said that by this change of the law the courts lose the power to punish offences in their inception. Such was no doubt the case before the law of attempts assumed its present comprehensiveness. Since, however, whatever crime is punishable in consummation is now punishable in attempt,[2] the argument drawn from necessity fails.[3] The conclusion is that on reason the offence of conspiracy at common law is limited to, (1) confederacies to effect illegal objects as ends or means; (2) confederacies to pervert public justice, or injuriously affect the body politic; and (3) confederacies which, from the mode of their operations, exhibit the features of false devices and tokens, or of aggregation of violence likely to overbear individual resistance and to produce public terror. And this is virtually saying that in the first case the confederacy is unlawful, because it is a cheat at common law; in the second case, because it is an attempt to obstruct government; in the third case, because it is an attempt at riot.[4]

[1] Berner, a very high authority (Strafrecht, etc., 1871, § 113), says: "The common (German) law doctrine developed the idea of conspiracy to a perilous practical extent; and it has consequently been omitted in our later codes. As illustrating the mischief which this idea has wrought see the cases in Temme, Archiv. i. pp. 260–6; ii. 72, 100, 126."

[2] See *supra*, §§ 173 *et seq.*

[3] See U. S. *v.* Goldberg, 7 Biss. 175; U. S. *v.* Nunnemacher, Ibid. 111; U. S. *v.* Mitchell, 1 Hughes, 439; Mussel *v.* Slough, 5 Fed. Rep. 680; 6 Sawy. 612; McHenry *v.* Sneer, 56 Iowa, 649; and see *infra*, § 1400. That when an offence is consummated, the indictment should be for the consummated offence, see *infra*, § 1346.

[4] As to a confederacy being a false token, see *infra*, § 1359. As to exhibition of violence by two or more persons being indictable when it would not be indictable if exhibited by one person, the case is analogous to that of riot in which an exhibition of violence which would not be indictable in one person is indictable when three persons are concerned in it.

In Pennsylvania the common law offence is not superseded by § 1289 of the criminal code.

§ 1339. When to the idea of an offence plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. As crimes to which concert is necessary (*i. e.*, which cannot take place without concert), we may mention duelling, bigamy, incest, and adultery; to the last of which the limitation here expressed has been specifically applied by authoritative American courts.[1] We have here the well-known distinction between *concursus necessarius* and *concursus facultativus*: in the latter of which the accession of a second agent to the offence is an element added to its conception; in the former of which the participation of two agents is essential to its conception; and from this it follows that conspiracy, the gist of which is combination, *added* to crime, does not lie for *concursus necessarius*. In other words, when the law says, "a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name," it is not lawful for the prosecution to call it by some other name; and when the law says, such an offence—*e. g.*, adultery—shall have a certain punishment," it is not lawful for the prosecution to evade this limitation by indicting the offence as conspiracy. Of course when the offence is not consummated, and the conspiracy is one which by evil means a combination of persons is employed to effectuate this combination is of itself indictable. And hence, persons combining to induce others to commit bigamy, adultery, incest, or duelling, do not fall within this exception, and may be indicted for conspiracy.

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

§ 1340. Mere thoughts are not indictable, nor is the expression of thought, unless as a scandal or a political wrong. Such expressions, if not indicable when uttered by an individual, do not become indictable when uttered by a crowd.[2] Nor are preparations for crime indictable, un-

Conspiracy must be directed to something which, if not inter-

[1] Shannon *v.* Com., 14 Penn. St. 226; Miles *v.* State, 58 Ala. 390.

[2] See Alderman *v.* People, 4 Mich. 414. A conspiracy cannot exist without the consent of two or more persons,

rupted by extraneous interference, will result in an unlawful act.

less under special statute, or unless such preparations are made in complicity with those by whom the crime is executed.[1] We must here again appeal to the distinction already fully set forth between a *condition* and a juridical *cause*.[2] The selling of a gun, for instance, is a *condition* of the gun's being used in a homicide; but it is not a juridical *cause*, unless the seller disposes of it for the purpose of killing a third person, and thus becomes accessary before the fact in such killing. The turning of a drunken man into the street is a *condition* of his being subsequently struck by lightning when lying in the public road; but it is not the juridical *cause* of such death, because the stroke of lightning was an extraordinary natural occurrence, not in any way a likely consquence of turning the man out of doors. If, on the other hand, the drunken man was in a helpless state, and if the cold outside were such that he would freeze to death when exposed to it, then turning him out of doors was the juridical cause of his death, since the death resulted from this act, and not from either collateral human intervention, or an extraordinary natural occurrence. This check, which applies equally and invariably to all criminal prosecutions, is peculiarly important in conspiracy. The dangers arising from a vague extension of conspiracy have been already noticed; and it will be seen that the offence has been sometimes made to embrace cases which a wise and humane jurisprudence would withdraw from criminal cognizance. These dangers would be greatly multiplied if we should hold that conspiracy includes a combination to produce such conditions of crime as are distinct from juridical causes. If the law be thus stretched, indictments for conspiracy could be maintained against all who furnish firearms or other lethal weapons; against all who mould type which could be used for incendiary publications; against all who contribute the material, however indifferent, which is subsequently employed for purposes of

and their agreement is an act in advancement of the intention which each of them has conceived in his mind. Mulcahy *v.* R. (in error), L. R. 3 H. L. 306; S. C., 1 Ir. R. C. L. (Q. B.) 13. Mere sympathy is no conspiracy. *Infra*, § 1400.

[1] See *supra*, §§ 173 *et seq.*; U. S. *v.* Nunnemacher, 7 Biss. 111; U. S. *v.* Goldberg, Ibid. 175. In a North Carolina case it was proved that the defendant gave B. certain powders which would enable him to debauch certain girls. It was held that this, though followed by attempts by B. on the girls in question, would not sustain an indictment for a conspiracy to ravish. State *v.* Trice, 88 N. C. 629.

[2] *Supra*, §§ 152 *et seq.*

guilt. Undoubtedly there are dicta by English judges which go to sustain this position;[1] though these dicta are usually qualified by the statement that the manufacturer or producer is not to be held guilty unless he anticipated the guilty use to which the instrument is to be put. But what thoughtful man who manufactures or sells any dangerous weapon or compound, does not anticipate that there may arise contingencies in which it may be put to an unlawful use? And what safety or uniformity can there be in the administration of penal justice, if it depend upon the surmises a jury may make as to a defendant's capacity of anticipation? The only safe course is to make the test objective, even, and palpable, and to apply universally the limit here presented, holding that conspiracy does not lie unless the defendants can be proved to have done something which, if not interrupted by extraordinary natural occurrences, or by collateral human intervention, would have resulted in an unlawful act. But if so, the conspiracy is indictable, though the overt act was not consummated.[2]

§ 1340 *a*. Waiving the question discussed in the chapter on attempts, whether an indictment lies for a conspiracy to do an act of which the parties are all legally incapable, we may hold that it is in any view sufficient to sustain a conspiracy to commit an offence, that any party concerned was legally capable of committing the offence, though another party may not have been so capable.[3]

Not necessary that all the parties should be capable of committing the offence.

§ 1341. Conspiracy, when its object is to effect an indictable offence, is subject, in the main, to the limitations heretofore expressed with regard to attempts. Hence we may hold that it is no defence that the means adopted, if apparently adapted to the end, were not really so; that there need not have been physical ability in the conspirators to effect their pur-

Conspiracy analogous to attempt.

[1] See O'Connell *v.* R., 11 C. & F. 155. A striking illustration may be found in an English case, where it was held that an indictment for conspiracy to violate the provisions of a statute will lie, after the repeal of such statute, for an offence committed before the repeal. R. *v.* Thompson, 16 Q. B. 832; Dears. C. C. 3. The offence could not have been prosecuted after the statue was repealed; why the conspiracy, unless seditious? *Supra*, § 31.

[2] *Infra*, §§ 1382–1400. As to the controversy between "objective" and "subjective" tests, see *supra*, § 182.

[3] East P. C. 96; R. *v.* Potts, R. & R. 352; U. S. *v.* Bayer, 4 Dillon, 407; 13 Bk. Reg. 403; State *v.* Sprague, 4 R. I. 257; Boggus *v.* State, 34 Ga. 275. *Infra*, § 1388; *supra*, § 211 *b*.

pose; and that it is a defence that the conspiracy was abandoned voluntarily and freely before put in process of execution.[1] There remains, however, the difference that while attempts are only indictable when the consummated offence is indictable, conspiracies may be, as we have seen, indictable when the means are indictable.

Evil intent necessary.

§ 1341 *a*. We must also hold, to advance a step further, that there cannot be a negligent conspiracy. Joint evil intent is necessary to constitute the offence.[2] "The confederation must be corrupt. This is implied in the meaning of the term conspiracy."[3] And mere passive cognizance of a conspiracy is not sufficient to make a co-conspirator.[4] There must be active coöperation, and when this exists the period when each party enters into the combination is unessential.[5]

II. CONSPIRACIES TO COMMIT AN INDICTABLE OFFENCE.

Conspiracy to commit felony is indictable at common law as a misdemeanor.

§ 1342. Conspiracies to commit felonies are unquestionably indictable at common law,[6] and, like other conspiracies, are misdemeanors.[7] Two questions of interest, however, have arisen concerning them: first, whether it is necessary for the indictment to set forth the *means* by which the conspiracy was to have been executed; and secondly, whether, if the act be consummated, the conspiracy merges.

Indictment need not detail means.

§ 1343. As to the first question, it is not disputed that if the indictment set forth the object of the conspiracy in the language used to charge the commission of the offence itself, no exception as to form can be taken. But this is often impracticable, and if it were not, it would be absurd to charge A. and B. with conspiring "with one knife, of the value of one shilling, which he the said A. in his right hand was then and there to have and hold, him the said C. feloniously, etc., to strike," or with conspiring to rob the prosecutor of half a dozen distinct arti-

[1] *Supra*, §§ 173 *et seq.*

[2] R. *v.* Kenrick, 5 Q. B. 49; Heyman *v.* R., L. R. 8 Q. B. D. 102; 12 Cox C. C. 384; People *v.* Powell, 63 N. Y. 88.

[3] Andrews, J., 63 N. Y. 92. *Supra*, § 129.

[4] *Supra*, §§ 211 *a*, 227; *infra*, § 1402, and cases there cited; R. *v.* Barry, 4 F. & F. 389; Evans *v.* People, 90 Ill. 384.

[5] Ibid. *Supra*, §§ 225 *a*, 233; *infra*, § 1399.

[6] For a defective indictment of this class, see Com. *v.* Barnes, 132 Mass. 242.

[7] See cases cited to § 1344; State *v.* Jackson, 82 N. C. 565.

cles which he happened to have in his pocket, but with the existence and character of which it would be irrational to suppose the defendants to have been beforehand acquainted. It is enough, therefore, for the pleader to set out the offence aimed at by such apt words as will describe it as a conclusion of law.[1] Thus, it is sufficient to say that the defendants conspired "feloniously, wilfully, and of their malice aforethought, to kill and murder," etc., without describing the weapons intended to be used;[2] or that they conspired "certain goods and chattels of great value, etc., then belonging to and on the person of the said A. B., feloniously to steal," without going on to mention what those goods and chattels were.[3] This liberality is extended to every case where parties combine to commit an offence which is indictable whether committed by one or by a confederacy.[4] It is advised, however, that wherever the means by which a conspiracy was to have been executed are not sufficiently known to enable them to be specified, the reason why they are not set forth should be averred.[5] And the substantive felony intended must be described accurately; it being insufficient to charge a conspiracy to rob without averring "by violence" or "by putting in fear,"[6] or a conspiracy to commit burglary without giving the distinctive features of burglary, including the word burglariously, and the intent to steal.[7]

Gradual abandonment of doctrine of merger.

§ 1344. The technical rule of the old common law pleaders, that a misdemeanor always sinks in the felony when the two meet, has in some instances been recognized in this country,[8] though without good reason. In England, as has been already noticed, the inconvenience of the prin-

[1] See State *v.* Bartlett, 30 Me. 132; State *v.* Ripley, 31 Me. 386; Hazen *v.* Com., 23 Penn. St. 355; State *v.* Noyes, 25 Vt. 415.

[2] State *v.* Dent, 3 Gill & J. 8.

[3] Com. *v.* Rogers, 5 S. & R. 463. See R. *v.* Higgins, 2 East, 5.

[4] Archb. C. P. 5th Am. ed. 262, 458, 485, 487; People *v.* Bush, 4 Hill (N. Y.), 133; State *v.* Savage, 48 Iowa, 562. *Supra*, §§ 156, 644; *infra*, § 1404.

[5] For parallel cases, see Whart. Cr. Pl. & Pr. § 156. And for Ohio statutes, see Code of that State.

[6] Landringham *v.* State, 49 Ind. 186, which also holds that a statute making it unnecessary to aver the offence is unconstitutional.

[7] Smith *v.* State, 93 Ind. 67; Crim. L. Mag. 564; see State *v.* M'Kinstrey, 50 Ind. 465.

[8] Whart. Cr. Pl. & Pr. § 464. *Supra*, § 641 *a*. See State *v.* Mayberry, 48 Me. 218; State *v.* Noyes, 25 Vt. 415; Com. *v.* Kingsbury, 5 Mass. 106; People *v.* Mather, 4 Wend. 229; Elkin *v.* People, 28 N. Y. 177; Johnson *v.* State, 5 Dutch. 453; Com. *v.* Parr, 5 W. & S.

ciple, as well as its absurdity, has attracted grave judicial scrutiny, and eminent judges have declared they felt no disposition to extend a rule by which a man, when indicted for a misdemeanor, may be acquitted because it is doubtful whether the offence is not a felony, and who, when indicted for the felony, may be acquitted because it is doubtful whether the offence is not a mismedeanor. This has led, if not to a repudiation of the doctrine, at least to its restriction within narrow limits. Thus, it has been said that even when the felony is executed there may be cases where the conspiracy may still be pursued as an independent offence. Thus, when in 1848 the defendants, who were the workmen of L., a dyer, were charged with conspiring to use his vats and dye in preparing for market goods not belonging to him, and without his assent, it appeared on the trial that L. permitted the defendants to use his dye, etc., for their own use, and for such materials as he intrusted them with, but that they made a profit by using them for other materials without his knowledge. After conviction and removal to the Queen's Bench, a motion in arrest of judgment was urged on the ground that as larceny in abstracting the prosecutor's material was proved, the conspiracy merged. But the Court of Queen's Bench were unanimous in entering judgment on the verdict. "A misdemeanor which is part of a felony," declared Lord Denman, C. J., in summing up the cases, "may be prosecuted as a misdemeanor though the felony has been completed; and the attempt, upon the argument, to make a distinction between misdemeanors by statutes and those by common law was not successful, as the incidents to a misdemeanor are not affected by the origin in law from whence it is derived. It was further urged by the defendants that unless the defence was sustained they might be twice punished for the same offence; but this is not so, the two offences being different in the eye of the law. If, however, a prosecution for felony should occur after a conviction for conspiracy, it would be the duty of the court to apportion the sentence for the felony with reference to such former conviction."[1] On the same reasoning it was decided by the fifteen judges that a conviction for the misdemeanor of carnally

345; Com. *v.* Delany, 1 Grant (Penn.), 224; Com. *v.* McGowan, 2 Parsons, 341; People *v.* Richards, 1 Mich. 216; Com. *v.* Blackburn, 1 Duv. 4; Whart. Cr. Pl. & Pr. § 463.

[1] R. *v.* Button, 11 Q. B. 929; 3 Cox C. C. 229.

knowing a girl under twelve years old would stand, notwithstanding the felony of rape was proved on trial.[1] So far as the authority of the English courts go, therefore, the doctrine of merger, if not now abandoned, is confined to that small class of cases where the misdemeanor is the first step in the commission of the felony.[2] And in several of our courts a disposition has been exhibited to reject the doctrine in all cases,[3] and this is reasonable in cases where the conspiracy which the prosecution elects to pursue is a mere ingredient in the felony whose *differentia* the prosecution elects to reject.[4]

In New Jersey, a charge of conspiring to procure an indictment by perjury does not charge a felony which merges the conspiracy.[5]

§ 1345. The observations made on the last head, as to the setting out the means of the conspiracy, apply with equal force to this. The comparative simplicity of such an indictment has made it a favorite practice in this country, in preparing a prosecution for misdemeanor, the description of which is attended with any difficulties, to insert a count for a conspiracy. When the evidence for the prosecution is finished, the court will compel it, in a proper case, to state on what class of counts it relies; and when this discretion is judiciously exercised, it is hard to see how the defendant can be embarrassed in the management of his defence. Where he is shown to have acted conjointly with others, he cannot justly complain if he be charged with having conspired with them in producing the particular results; even though the names of his co-conspirators are not known to the grand jury, and the indictment so states.[6] The advantage of joining counts for conspiracy with counts for constituent misdemeanor is strongly illustrated by a leading case in Pennsylvania.[7] The defendants were charged in one set of counts with the sale of a lottery ticket, and in another with a conspiracy to sell

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

[1] R. *v.* Neale, 1 Den. C. C. 36. See *infra*, §§ 1746, 1764.

See R. *v.* Martin, 41 L. T. (N. S.) 531, where it was held that there could be no conviction of felony on an indictment for misdemeanor. Law Times, Dec. 13, 1879.

[2] This was the case in R. *v.* Evans, 5 C. & P. 553; R. *v.* Anderson, 2 M. & Rob. 469. See Hewitt, *ex parte*, 3 Am. L. Rev. 382.

[3] Whart. Cr. Pl. & Pr. § 464; and see Laura *v.* State, 26 Miss. 174; People *v.* Arnold, 46 Mich. 268.

[4] *Supra*, § 576.

[5] Johnson *v.* State, 2 Dutch. (N. J.) 313.

[6] See *infra*, § 1393.

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

it; the law being that, in an indictment for this offence, the ticket should be particularly set out, and as the ticket is perhaps purposely of a very complex character, it is convenient for the pleader to back up a count for the individual offence with the count for a conspiracy "to sell and expose to sale, and cause to be sold and exposed to sale" (reciting the words of the statute), "a lottery ticket, and tickets in a lottery not authorized by the laws of this commonwealth." This was the language of a count which was sustained by the Supreme Court after a new trial, in consequence of a variance in the count purporting to set forth the ticket, and an arrest of judgment for want of particularity in the counts charging the sale of the ticket without an attempt to set it out. After showing that such a generality of statement as appeared in the latter counts could not be tolerated, Duncan, J., proceeded: "But the same reason does not apply to the first count, for the conspiracy itself is the crime. It is different from an indictment for stealing, or action for trespass, where the offence consists of an act done, which it is clearly in the power of the prosecutor to lay with certainty. The conspiracy here was, to sell prohibited lottery tickets, any that he could sell; not of any particular prohibited lottery, but of all. The conspiracy was the *gravamen*, the *gist* of the offence."[1] The same liberality in the construction of counts for conspiracies to effect objects *per se* illegal having prevailed in England,[2] the practice of joining conspiracy counts with counts for the constituent misdemeanor is there sanctioned.[3]

Conspiracy does not merge in misdemeanor.

§ 1346. The same difficulty as to merger, however, which is applied to felonies, has been started as to misdemeanors, with equal reason but with less success. A conspiracy, it has been said in an early case[4] in Massachusetts, to commit either a misdemeanor or felony, merges in the overt act when such overt act appears to have been consummated. The case before the court was one of a conspiracy to commit a felony; and to extend the doctrine to cases of misdemeanors is in conflict with the English text-books, where such a doctrine is never broached, as well as with the books of precedents, where forms con-

[1] See Hazen *v.* Com., 23 Penn. St. 355; Wilson *v.* Com., 96 Ibid. 56. *Infra*, § 1382.

[2] 1 Russ. on Cr. 691.

[3] 1 Chit. C. L. 255.

[4] Com. *v.* Kingsbury, 5 Mass. 106. See *infra*, § 1344.

stantly occur of conspiracies to commit misdemeanors to which the overt act is attached. In Massachusetts, in fact, the application of the doctrine of merger to cases of misdemeanors has been intercepted by Rev. Stat. c. 137, § 11.[1] In New York, Maine, Vermont, Michigan, and Pennsylvania,[2] the idea that there can be a merger of one misdemeanor in another has been summarily repudiated; and there are few courts of criminal jurisdiction where counts for conspiracy to commit misdemeanors (*e. g.*, obtaining goods by false pretences or the sale of lottery tickets) are not constantly supported by evidence of the commission of the constituent offence. "It is supposed," said Marcy, J.,[3] "that a conspiracy to commit a crime is merged in the crime where the conspiracy is executed. This may be so where the crime is of a higher grade than the conspiracy, and the object of the conspiracy is fully accomplished; but a conspiracy is only a misdemeanor, and where its object is only to commit a misdemeanor, it cannot be merged. Wherever crimes are of an equal grade there can be no technical merger." But while this is in most jurisdictions the case, the better course, when the offence is consummated, is to indict, not for the conspiracy but for the overt act.[4]

Conspiracy to cheat is indictable at common law.

§ 1347. Undoubtedly where obtaining goods by false pretences, and secreting goods with fraudulent intent, are statutory misdemeanors, conspiracies to effect them are indictable, both as to real[5] and personal estate; and the unbroken and unquestioned practice of the courts has been to con-

[1] Com. *v.* Drum, 19 Pick. 479; Com. *v.* Goodhue, 2 Met. 193; Com. *v.* Walker, 108 Mass. 309; Com. *v.* Bakeman, 105 Ibid. 53; Com. *v.* Dean, 109 Ibid. 349.

[2] People *v.* Mather, 4 Wend. 265, Marcy, J.; State *v.* Murray, 15 Me. 100; State *v.* Mayberry, 48 Ibid. 218; State *v.* Noyes, 25 Vt. 415; People *v.* Richards, 1 Mich. 216; Com. *v.* Hartman, 5 Barr, 60; Com. *v.* McGowan, 2 Parsons, 341.

[3] 4 Wend. 265.

[4] In R. *v.* Boulton, 12 Cox C. C. 93, Cockburn, C. J., said:—

"I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it, for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which, if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others, and deprive defendants of the advantage of calling their co-defendants as witnesses."

[5] People *v.* Richards, 1 Mich. 216.

vict under indictments for conspiracies pointed at either of these statutory offences.[1] Where, therefore, the practitioner has a case in which he is able, from the maturity of the offence, to specify in the indictment what pretences the defendants conspired to use, and what goods they conspired to obtain, he may be sure that he may bring himself within the strictest rules of criminal pleading, and that the offence as thus stated will be adjudged indictable at common law. But in conspiracy this is not often practicable. Two important questions,

[1] See Whart. Prec. 611; R. *v.* Parker, 3 Q. B. 292; R. *v.* Whitehouse, 6 Cox C. C. 38; Heymann *v.* R., L. R. 8 Q. B. 102; 12 Cox C. C. 383; R. *v.* Bunn, Ibid. 316; Com. *v.* Walker, 108 Mass. 309; Cook *v.* Brown, 125 Ibid. 503; Clary *v.* Com., 4 Barr, 210; Huntzinger *v.* Com., 97 Penn. St. 336; Com. *v.* Bracken, 8 Weekly Notes, 280; State *v.* Norton, 3 Zab. 33. In Com. *v.* Walker, *ut supra*, decided, in 1871, the indictment was for a conspiracy to obtain goods by pretending falsely that the defendant intended to take the goods to his shop to sell in the ordinary course of trade. Compare, also, criticisms on R. *v.* Bunn, in Fortnightly Review for July 1, 1873, p. 40.

Sir J. F. Stephen (Dig. C. L. art. 336), gives the following:—

"Every one commits the misdemeanor of conspiracy who agrees with any other person or persons to do any act with intent to defraud the public, or any particular person, or class of persons, or to extort from any person any money or goods. Such a conspiracy may be criminal, although the act agreed upon is not in itself a crime.

"An offender convicted of this offence may be sentenced to hard labor.

"*Illustrations.*—The following are instances of conspiracies with intent to defraud:—

"A conspiracy to defraud the public by a mock auction. R. *v.* Lewis, 11 Cox C. C. 404.

"A conspiracy to raise the price of the funds by false rumors. R. *v.* De Berenger, 3 M. & S. 67.

"A conspiracy to defraud the public by issuing bills in the name of a fictitious bank. R. *v.* Haven, 2 East P. C. 858.

"A conspiracy to induce a person to buy horses by falsely alleging that they were the property of a private person, and not of a horse dealer. R. *v.* Kenrick, 5 Q. B. 49.

"A conspiracy to induce a man to take a lower price than that for which he had sold a horse, by representing that it had been discovered to be unsound, and resold for less than had been given for it. Carlisle's Case, Dears. 337.

"A conspiracy to defraud generally, by getting a settling day for shares of a new company. R. *v.* Aspinall, L. R. 1 Q. B. D. 730."

A conspiracy to defraud a partner by false accounts, has been held indictable, although the cheat without the conspiracy would not have been indictable at common law. R. *v.* Warburton, L. R. 1 C. C. 274; S. P., State *v.* Cole, 10 Vroom, 324.

A conspiracy by one confederate to get possession of goods to be attached by another confederate on a sham claim, has also been held indictable. R. *v.* King, Dav. & M. 741; 7 Q. B. 782, cited *infra*, § 1348.

therefore, here arise. The first is, whether a conspiracy "to cheat" is itself indictable. That such an indictment is too general there can be little doubt. If, however, the indictment, following the definition with which this chapter opens, should aver a conspiracy to cheat by "deceit and falsehood," or by "fraudulent means," specifying these, or excusing their non-specification, then other conditions are to be considered. It must be remembered that a confederacy to cheat by force of combination, even in a way which is not indictable when designed and effected by an individual singly, adds to the cheating a quality (that of reciprocity of support among the conspirators) which may make it indictable at common law, just in the way that using false weights or tokens makes a cheat indictable at common law, when, without such false weights or tokens, it would not be so indictable.[1] The playing of several persons into each other's hands may be, if not a false token, in some measure a false pretence. On this ground may be justified the definition already given in the text,[2] as well as that of the eminent jurists who framed the English Draft Code of 1879.[3] And accepting this definition, an indictment averring, as far as it is in the pleader's power, such a conspiracy, is good.[4]

Conspiracies to cheat the government of the United States are hereafter considered.[5]

§ 1348. So far as concerns indictments to cheat by "false pretences," it has been much discussed whether the pretences should be specially averred. That such cannot always be done, is conceded.[6] It is easy to conceive of a case in which, while the pretences were not so far executed as to enable the pleader to specify them in complete detail, they were matured sufficiently to show that the statutory misdemeanor was in process of commission.[7] Under such circumstances it has frequently been held enough for the pleader to aver generally a conspiracy to cheat by "divers false pretences." The utmost that could be exacted in such a case would be, that the pleader

Enough if indictment charge "divers false pretences."

[1] Wright's Conspiracy, 11.

[2] *Supra*, § 1337.

[3] Ibid.

[4] See *infra*, §§ 1349, 1359.

[5] *Infra*, § 1356 *a*.

[6] See U. S. *v.* Crafton, 4 Dill. 145; Com. *v.* Rhoads, 15 Penn. St. 272; Com. *v.* Goldsmith, 12 Phila. 632. Compare People *v.* Brady, 56 N. Y. 183; State *v.* Rickey, 4 Halst. 293.

[7] See *supra*, §§ 1337 *et seq.*

should give the non-disclosure of the means as his reason for not setting them out. In England such is certainly the law; and a careful scrutiny of the cases collated below[1] enables us to say that

[1] The leading case is R. *v.* Gill, 2 B. & A. 204; Whart. Prec. 611, etc., in which an indictment was sustained which merely charged the defendants with conspiring, "by divers false pretences and subtle means and devices, to obtain and to acquire to themselves, of and from P. D. and G. D., divers large sums of money, of the respective moneys of the said P. D. and G. D., and to cheat and defraud them respectively thereof."

Notwithstanding, however, the statement of Lord Mansfield, that for an undigested conspiracy no form more stringent than this could be exacted, the courts were for some time in the habit of complaining of the precedent as too lax. R. *v.* Parker, 3 Q. B. 555. In 1834, a case was reported in which it appeared that R. *v.* Gill was seriously questioned by the King's Bench. R. *v.* Biers, 1 Ad. & El. 327.

In R. *v.* Peck, 9 A. & E. 686; 1 P. & D. 508 (1839), an indictment was held defective which charged the defendants with conspiring to defraud divers of her Majesty's subjects who should bargain with the defendants for the sale of goods, of great quantities of such goods, without making payment, remuneration, or satisfaction for the same, with intent to obtain profit and emolument to the defendants (not stating with particularity what the defendants conspired to do). It was said, however, to be no objection that the count does not name the parties who were to have been defrauded. And it was further ruled that a count charging that the defendants, being indebted to divers persons, conspired to defraud them of the payment of such debts, and in pursuance of such conspiracy executed a false and fraudulent deed of bargain and sale and assignment of certain goods from two of themselves to a third, with intent thereby to obtain emoluments to themselves, is bad, for omitting to show in what respect the deed was false and fraudulent. (But in R. *v.* Heymann, L. R. 8 Q. B. 102; 12 Cox C. C. 383 (1873), R. *v.* Peck, was declared by Mellor, J., to be "virtually overruled.")

In none of these cases, however, was the object of the conspiracy an offence *per se* indictable, and though on each of them the court animadverted with great pungency upon a laxity of pleading which gave the defendant no notice of what he was tried for, yet there was an express recognition of the distinction between a conspiracy to commit an indictable offence, where the means need not be set out, and a conspiracy to commit an act unindictable, where the means must appear.

In 1844, the question was canvassed on an indictment which charged that the defendants conspired to cheat and defraud certain liege subjects of the queen, being tradesmen, of quantities of their goods; that, in pursuance of the conspiracy, the defendant, B., fraudulently ordered and obtained upon credit from W. W. and C. W., upholsterers, divers goods of W. W. and C. W. (the count stated a like obtaining on credit from other tradesmen named, and from others whose names were unknown); and that, in further pursuance of their conspiracy, and in order that the goods might be taken in execution and sold, as after mentioned, the defendants ordered the same to be delivered by W. W. and C. W. at the house of B., and they were

it is there settled to be sufficient to charge the defendants with a conspiracy to defraud the prosecutor of his moneys, "by divers false

so delivered and never paid for; and in further pursuance, etc., and in order, etc., B. allowed them to continue in his house till they were taken in execution as after mentioned. That the defendants, in further pursuance, etc., did falsely and fraudulently pretend that certain debts were due from B. to K. and P., two others of the defendants, and K. and P. did, to obtain payment of such fictitious debts, by collusion with B., commence actions against B.; that K. and P. collusively signed judgment against B. in the actions, and issued execution thereon, by virtue of which the goods, before the expiration of the times of credit, were taken in execution, and sold to satisfy the fictitious debts: and so the jurors found "the defendants, in manner and means aforesaid, did cheat and defraud W. W. and C. W. of the goods." The indictment was sustained in the Queen's Bench. R. *v.* King, 7 Q. B. 782; D. & M. 741, citing R. *v.* Spragg, 2 Burr. 993; R. *v.* De Berenger, 3 M. & S. 67. Error being brought upon the judgment, it was ruled in the Exchequer Chamber that the indictment was defective, not in the offence charged, but in the parties to be defrauded, it being held that the words alleging conspiracy showed a design to injure, not tradesmen indefinitely, but individuals, and therefore either the persons should have been named, or an excuse stated for not naming them, and that the allegation of conspiracy was not aided by the overt acts; and that the overt acts themselves did not, either in connection with the allegation of conspiracy or independently, amount to indictable misdemeanors. King *v.* R. (in error), 7 Q. B. 782, 795 (1844). See *infra*, §§ 1383–5–6.

Where the third count of an indictment to obtain money under false pretences charged the offence in general terms as a conspiracy to cheat the prosecutor by false pretences, without setting out the false pretences, the evidence was, that the prosecutor was told by the defendant that certain horses had been the property of a lady deceased, and were then the property of her sister, and never had been the property of a horse dealer, etc. All these statements were false, the defendants knowing that nothing but a belief of their truth would have induced the prosecutor to make the purchase. The conspiracy was proved. It was held that this count was sufficient, and that it charged an indictable offence. R. *v.* Kenrick, 5 Q. B. 49 (1843).

Nor is this the only case in which the Court of King's Bench has reaffirmed R. *v.* Gill. In R. *v.* Gompertz, 9 Q. B. 824 (1846), the last of eight counts charged the defendants with conspiring "by divers false pretences and indirect means to cheat and defraud the said S. P. R. of his moneys, to the great damage, fraud, and deceit of the said S. P. R., to the evil example," etc. There was a verdict for the crown on each of the counts, before Lord Denman, C. J., at the Middlesex sittings, and on December 17, 1846, a motion for a new trial was argued before the court in banc. "First, we think," said Lord Denman, in giving the opinion of the court, "that there is no ground for arresting the judgment in this case; one count is good, on the authority of R. *v.* Gill, never overruled, but founded on excellent reason, and always recognized, though not without regret, because that form

pretences and indirect means." The only positive qualifications that have been grafted on the principle are, *first*, that it must appear

of indictment may give too little information to the accused. A fair observation was made upon the manner in which that precedent was treated in R. *v.* Biers, 1 Ad. & El. 327; but even from the expressions there used, and much more from what has been said in later cases, it appears plainly that the court has never doubted the correctness of the decision in R. *v.* Gill."

In 1848, an indictment was sustained in the Exchequer Chamber, which averred merely that the defendants "unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud the prosecutor of his goods and chattels, to the great damage," etc. Sydserff *v.* R., 11 Q. B. 245. "R. *v.* Biers," 1 Ad. & El. 327, said Wilde, C. J., "was relied on in support of the objection, and as overruling Rex *v.* Gill, from which we think the present case is not distinguishable. But, upon referring to the judgment in Rex *v.* Biers, there appears strong reason to doubt whether it did not go wholly on the one objection to the special counts. Neither Rex *v.* Gill, nor any other authority at all bearing on the point, was referred to in the judgment; and it appears distinctly from the recent case of Regina *v.* Gompertz that Rex *v.* Biers has never been considered by the Court of Queen's Bench as overruling Rex *v.* Gill. We are of opinion that this count is good." This case goes to an unsafe extreme; but so far as it reaffirms R. *v.* Gill, it has been approved by succeeding cases. R. *v.* Whitehouse, 6 Cox C. C. 38; R. *v.* Carlisle, Ibid. 366; 25 Eng. L. & Eq. 577. In R. *v.* Yates, 6 Cox C. C. 441, a count charged the defendants with a conspiracy, by false pretences and subtle means and devices, to extort from T. E. one sovereign, his moneys, and to cheat and defraud him thereof. The evidence failed to prove that the defendants employed any false pretence in the attempt to obtain the money. It was held that so much of the count might be rejected as surplusage, and the defendants convicted of the conspiracy to extort and defraud.

In Latham *v.* R. (in error), 9 Cox C. C. 516; 5 B. & S. 635, the defendants were tried at a quarter sessions upon an indictment, one of the counts of which charged a conspiracy, "by divers false pretences against the statute in that case made and provided, the said R. B. of his moneys to defraud, against the form of the statute." It was held that the count sufficiently charged a conspiracy to obtain money by false pretences.

It may now be viewed as finally settled that an indictment charging that the defendants unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together by false pretences, specified as far as possible, to cheat and defraud the prosecutor of his goods and chattels, is good. Sydserff *v.* R. (in error) 11 Q. B. 245; 12 Jur. 418—Ex. Ch.; R. *v.* Heymann, L. R. 8 Q. B. 102; 12 Cox C. C. 383. See, also, *infra*, § 1382. As suggesting due limits to R. *v.* Gill, see White *v.* R., 13 Cox C. C. 318 (Irish Q. B.).

It has been held that a party may be convicted of a conspiracy to cheat and defraud, by means of a false and fraudulent representation as to the solvency or the trade of another, although the representation was oral, and one for which, *per se*, he would not be civilly liable under 9 Geo. IV. c. 16, s. 14; and that in such case the question will be not merely whether the representation was false and fraud-

from the indictment that the property sought to be obtained was not the property of the defendant;[1] and, *secondly*, that if the indictment be general, the court will order the prosecutor to furnish particulars of the charges to be relied on, though it will not compel him to state the details of the acts to be proved, nor time and place, with minute exactness.[2] The weight of authority in the United States is that at common law these conclusions may be sustained;[3] and that an indictment averring that the defendants did designedly

ulent, but whether it was made in collusion with the co-defendant, for the purpose of cheating the prosecutor. R. *v.* Timothy, 1 F. & F. 39.

[1] R. *v.* Parker, 11 L. J. (N. S.) 234; 3 Q. B. 292; 2 G. & D. 709.

[2] R. *v.* Hamilton, 7 C. & P. 448; R. *v.* Kenrick, 5 Q. B. 49; Whart. Prec. 351. As to bill of particulars, see *infra*, § 1386; Whart. Cr. Pl. & Pr. §§ 157, 702.

[3] State *v.* Bartlett, 30 Me. 132; Com. *v.* Ward, 1 Mass. 473; Com. *v.* Tibbets, 2 Ibid. 536; Com. *v.* Warren, 6 Ibid. 72; Com. *v.* M'Kisson, 8 S. & R. 420; State *v.* Buchanan, 5 Har. & J. 317; State *v.* Miller, 79 Ind. 198; People *v.* Richards, 1 Mich. 216, and cases hereafter cited. See Com. *v.* Fuller, 132 Mass. 563.

It may, however, be open to question whether the rule just expressed has not been shaken in Massachusetts and Pennsylvania.[1] In Pennsylvania, down to 1847, the rule was never disputed, and a series of convictions were sustained on its authority. In 1847, however, the Supreme Court examined in error the record of a case in which the defendants were convicted of conspiring to violate that section of the Act of 1842, abolishing imprisonment for debt, which makes it a misdemeanor for a debtor to secrete his property with intent to defraud his creditors. How far the indictment shrank below the statutory standard is examined in the text, the inquiry now being whether there was anything in the reasoning of the court which would divert the application of the express point ruled in England from our own practice. After noticing the inadequacy of this indictment to sustain a conviction for the statutory offence, independent of the conspiracy, Gibson, C. J., said: "Now, though it may not be necessary in an indictment for conspiracy so minutely to describe the unlawful act, where it has a specific name which indicates its criminality, yet where the conspiracy has been to do an act prohibited by statute, the object which makes it unlawful can be described only by its particular features, and without being so, it cannot be shown that the confederates had an unlawful purpose. It may be said that the form of a criminal purpose, meditated but not put in act, can seldom be described; but it can be as readily laid as proved."[2] It is true, that in a preceding passage, exception was taken to the omission in the indictment of a description of the place where the secreted goods were kept, and the person who had them in custody, and the time and place of the transaction, and it was argued that as a conspiracy to secrete goods abroad, having for its object no infraction of

[1] See Com. *v.* Eastman, 1 Cush. 190; Com. *v.* Hartmann, 5 Barr, 60.

[2] Com. *v.* Hartmann, 5 Barr, 60.

and fraudulently conspire to cheat by false pretences, setting out such pretences when practicable, and when not practicable duly

the laws of Pennsylvania, would not be criminal *in* Pennsylvania, such an hypothesis should be distinctly excluded by the record. But it will be no difficult matter to frame a count for a conspiracy in such a way as to meet these difficulties, without essentially varying from the rules previously announced. By charging that the defendants conspired by "divers false pretences and indirect means, then and there to cheat and defraud the said A. B. of his goods," etc., describing the pretences as exactly as possible, an indictable offence will be made out.[1] This view is sustained by an elaborate opinion of Judge Hare in Com. *v.* Barger,

[1] In Com. *v.* Eberle, F E. with fifty others, members of a German Lutheran congregation in Philadelphia, were charged, in the first count, with conspiring "to prevent, by force and arms, the use of the English language in the worship of Almighty God, among the said congregation, and for that purpose did then and there wickedly and unlawfully and oppressively confederate and agree among themselves, and did then and there determine and firmly bind themselves before God, and solemnly to each other, to defend, with their bodies and lives, the German divine worship, and to oppose by every means, lawful or unlawful, the introduction of any other language into the church;" and that in pursuance of the conspiracy, etc., the defendants did afterwards, at an election, etc., create a great riot and tumult, etc., and did commit divers assaults. The second count charged simply the conspiracy, without any overt acts. Com. *v.* Eberle, 3 Serg. & R. 9. See Pamphlet Trial, 218 At the trial, before Yeates, J, exceptions were taken to the indictment, and its insufficiency was urged with great learning by the eminent counsel engaged. It was said that, casting out the overt acts, which were always considered mere aggravation, that there was nothing in the charging portion of the indictment to show that an offence was really committed. The object in the alleged conspiracy was clearly lawful; it was necessary, therefore, in order to make out the offence, that the record should show unlawful means were to have been employed. Judge Yeates, however, held both counts good (Pamphlet Trial, 208); and though a motion for a new trial was argued with great energy before the court in banc (Com. *v.* Eberle, 3 Serg. & Raw. 9), it does not appear from the report that the objections to the indictment were pressed. The judgment of the court below was sustained.

In an indictment shortly afterwards, the defendants were charged with conspiring to deceive and defraud divers citizens of the commonwealth of great sums of money, by means of false pretences, and false, illegal, and unauthorized paper writing in the form and similitude of bank notes, which were of no value, and purported to have been promissory notes for the payment of divers sums of money on demand, by a company which was in fact fictitious. The indictment was sustained, though at the time there was no statute in Pennsylvania making it indictable to obtain property on false pretences. Still, however, the passing of a batch of fictitious notes has been held a cheat at common law, and on this ground the case may be reconciled with the current of authority. Collins *v.* Com., 3 S. & R. 220.

In a case some years later, the second count, on which alone the prosecution laid stress, averred that the defendants "conspired to cheat and defraud J. S. of the aforesaid heifer." "There may be confederacies," said Gibson, J., in giving the opinion of the court, "which are lawful; and you must therefore set forth some object of the confederates which it would be unlawful for them to attain either singly, or which, if lawful singly, it would be dangerous to the public to be attained by the combination of individual means. For it is the object that imparts to the confederacy its character of guilt or innocence; and of the nature of such object, and the bearing which the various kinds of it may have on the question in different cases, it is at present necessary to say no more than that where it is the doing of an act which would be indictable, it would undoubtedly render the confederacy criminal. But in stating the object, it is unnecessary to state the means by which it is to be accomplished, or the acts that were to be done in pursuance of the original design; they may, in fact, not have been agreed on. You need not set forth more of the object than is necessary to show it, from its general nature, to be unlawful; for that is all that is necessary to determine the character of what is, in truth, essentially and exclusively the crime—

excusing their non-specification, is good wherever obtaining goods by false pretences is by statute indictable.

Leg. Int. July 2, 1880; Whart. Prec. (4th ed.) 607, note; 14 Phila. 368.

In Massachusetts, it is held that in an indictment for a conspiracy to do an act which is a well-known and recognized offence at common law, the object of the conspiracy may be described in the general terms by which it is familiarly known; if the alleged purpose be the doing of an act which is not unlawful in itself, but which is to be effected by the use of unlawful means, those means must be particularly set forth; if it be the doing of an act which is not an offence at common law, but only by statute, the purpose of the conspiracy must be set forth in such a manner as to show that it is within the terms of the statute. The words "cheat and defraud," it is held, do not necessarily import any offence, either by statute or at common law; and, therefore, an indictment for a conspiracy, in which the object is alleged to be to "cheat and defraud," must set forth in detail such other allegations as will show the object to be an offence, either by statute or at common law.[1] And such is also the rule in Maine,[2] in New Hampshire,[3] in New York, at common law,[4] and in Michigan.[5] The same conclusion is reached in Iowa,[6] in Indiana,[7] Vermont,[8] and in North Carolina.[9] Nor can the soundness of the view be disputed. "A conspiracy to cheat" may or may not be indictable, since cheat is a term capable of many significations, and there are some forms of cheating which the law does not subject to indictment. Hence the indictment, when it charges a conspiracy to cheat, must show that the cheating was of a kind cognizable by criminal law.[10] Thus in Pennsylvania in 1859, where the point decided was that a conviction for a conspiracy to cheat and defraud creditors did not disqualify the defendant as a witness, Judge Woodward, in giving the opinion of the court quoted approvingly the language of Gibson, C. J., in Hartmann's case, that "a conspiracy is even less than an attempt," and that an attempt to commit an offence should

the confederating together; and this is proved by the precedents produced on the part of the commonwealth." The count was held sufficient to support the indictment. Com. *v.* M'Kisson, 8 S. & R. 420.

To the same effect is Mifflin *v.* Com., 5 W. & S. 461. For the indictment in this case, see Wharton's Prec. 379. So, even after Com. *v.* Hartmann, on an indictment for a conspiracy to cheat by offering to sell forged foreign bank notes, of a denomination the circulation of which was forbidden by law, which averred that the defendants, in pursuance of their conspiracy, did "offer to sell, pass, utter, and publish to," etc., it was held, that the means whereby the conspiracy was to be effected were sufficiently stated. Twitchell *v.* Com., 9 Barr, 211.

[1] Com. *v.* Eastman, 1 Cush. 190. See Com. *v.* Shedd, 7 Ibid. 514; Com. *v.* Prius, 9 Gray, 127. See Com. *v.* Fuller, 132 Mass. 563.

[2] State *v.* Mayberry, 48 Me. 218. See State *v.* Roberts, 34 Ibid. 320.

[3] State *v.* Parker, 43 N. H. 83.

[4] Lambert *v.* People, 9 Cow. 578. See this case discussed *infra*, §§ 1350, 1351; and aff. People *v.* Brady, 56 N. Y. 183.

[5] Alderman *v.* People, 4 Mich. 414; People *v.* Arnold, 46 Ibid. 268. See People *v.* Richards, 1 Ibid. 216. "By divers false pretences and subtle means and devices" is a sufficient specification to sustain an indictment. People *v.* Clark, 10 Ibid. 310. But there must be an allegation that the object of the conspiracy was to defraud persons to be specified as far as practicable. People *v.* Arnold, 46 Ibid. 268.

[6] State *v.* Jones, 13 Iowa, 269.

[7] Miller *v.* State, 79 Ind. 198.

[8] State *v.* Keach, 40 Vt. 113. Nor is this cured in Vermont by the words "by divers false pretences and subtle devices." Ibid.

[9] State *v.* Younger, 1 Dev. 357.

[10] Rhoads *v.* Com., 15 Penn. St. 272; Clary *v.* Com., 4 Barr, 210; Twitchell *v.* Com., 9 Ibid. 211; Com. *v.* McGowan, 2 Parsons, 341; Hazen *v.* Com., 23 Penn. St. 355.

§ 1349. Where the means are developed, and show a fraudulent scheme in operation, the offence is clearly indictable.[1] Thus it has been held that an indictment lies for a conspiracy to make a party drunk, and to cheat him while at cards ;[2] a conspiracy to obtain money from another by false pretences, though the money is obtained mediately by a contract ;[3] a conspiracy to impose pretended wine upon a man as and for true and good Portugal wine, in exchange for goods ;[4] a conspiracy to defraud a bank by false pretences and other illegal means of large sums of money ;[5] a conspiracy to defraud the government of taxes ;[6] a conspiracy by a female servant and a man whom

On the merits a conspiracy to defraud is punishable.

never be punished more severely than the perpetration of it. This was said *arguendo*, and it was admitted that a conspiracy to cheat by false pretences was indictable in Pennsylvania.[1] It was subsequently expressly held by the same court, that a conspiracy to cheat by false tokens cannot be more severely punished than the offence itself, that is, by imprisonment not exceeding one year.[2] "In an indictment for a conspiracy to do an act prohibited by the *common law*," said Lewis, C. J., in 1854, "where the act has a specific name which indicates its criminality, it is not necessary to describe it minutely. But it has been thought that where the object of the conspiracy is merely forbidden by the statutes, it can be described only by its particular features.[3] But even in offences of this character, it has never been held necessary to set forth the unlawful object with the precision required in an indictment for perpetrating it."[4] And wherever a statute exists making cheating by false pretences indictable, an indictment charging a conspiracy to cheat by "divers false pretences" must, if further non-specification be excused, be good.[5] As long as the law makes an unexecuted conspiracy indictable, we must permit the offence to be set forth merely as an unexecuted conspiracy, without the specification of detail which the very idea of incompleteness excludes. Any indefiniteness in pleading in this respect will be cured, as stated above, by requiring the prosecution to file a bill of particulars.[6]

[1] See *infra*, § 1370; Com. *v.* Fuller, 132 Mass. 563.

[2] State *v.* Younger, 1 Dev. 357.

[3] R. *v.* Kenrick, 5 Q. B. 49; D. & M. 208. *Infra*, § 1370.

[4] R. *v.* Mackarty, 2 L. Raym. 1179. See State *v.* Rowley, 12 Conn. 101.

[5] State *v.* Buchanan, 5 Har. & J. 317.

[6] U. S. *v.* Boyden, 1 Low. 266; U. S. *v.* Smith, 2 Bond, 323; U. S. *v.* Dustin, Ibid. 332. *Infra*, § 1373.

[1] Bickel *v.* Fasig, 33 Penn. St. 465.

[2] Williams *v.* Com., 34 Penn St. 178.

[3] Com. *v.* Hartman, 5 Barr, 60; Lewis U. S. Crim. Law, 223.

[4] Hazen *v.* Com., 23 Penn. St. 362. *Infra*, §§ 1381, 1404.

[5] See State *v.* Rowley, 12 Conn. 101; People *v.* Clark, 10 Mich. 310; State *v.* Cawood, 2 Stewart, 360; State *v.* Younger, 1 Dev. 357; State *v.* Buchanan, 5 Har. & J. 317; Bloomer *v.* State, 48 Md. 321; State *v.* Dewitt, 2 Hill (S. C.), 282; Isaacs *v.* State, 48 Miss. 234; as well as the Pennsylvania and English cases heretofore cited.

[6] *Infra*, § 1385; Whart. Cr. Pl. & Pr. §§ 157, 702.

she got to personate her master and marry her, in this way to defraud her master's relations of a part of his property after his death ;[1] a conspiracy to marry under a feigned name so as to raise a specious title to the estate of the person whose name is assumed ;[2] a conspiracy to defraud a settler on public lands of the United States of his rights ;[3] a conspiracy (by false pretences) to injure a man in his trade or profession ;[4] a conspiracy to charge a man as the reputed father of a bastard ;[5] conspiracy to cheat by offering to sell forged foreign bank notes of a denomination of which the circulation is prohibited in the prosecuting State ;[6] a conspiracy to manufacture spurious indigo, with intent to sell it at auction as good, to defraud the purchaser whoever he may be ;[7] a conspiracy to defraud the public generally, though no specific persons were made its object ;[8] a conspiracy to induce by means of false statements the prosecutor to make an absurd bet ;[9] a conspiracy between N. and the book-keeper of a bank, that N. was to draw cheques on the bank, and the book-keeper was to arrange the entries in the bank, so as to make it appear that N. was a creditor of the bank to the amount of the cheques ;[10] a conspiracy to file a fraudulent bond ;[11] a conspiracy to extort a deed by means of a peace warrant ;[12] a conspiracy to make a series of pretended purchases of stock in order to induce brokers to advance large sums on such purchases, and thus defraud them ;[13] a conspiracy to induce a party to forego a

[1] R. *v.* Taylor, 1 Leach, 49.

[2] R. *v.* Robinson, 1 Leach, 44; 2 East P. C. 1010.

[3] U. S. *v.* Waddell, 16 Fed. Rep. 221. *Infra*, § 1356 *a*.

[4] R. *v.* Eccles, 1 Leach, 274. Eccles's case, so far as it goes to show that a mere conspiracy to impoverish another is indictable, may be regarded as overruled by R. *v.* Rowlands, 2 Den. C. C. 364; 5 Cox C. C. 460, 468; 17 Q. B. 671.

In R. *v.* Warburton, *infra*, Cockburn, C. J., argued that a conspiracy would be indictable even if no action or indictment would lie for such acts. But this is *obiter*, since the proposition on which the decision rests is that it is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. The case, therefore, was that of a conspiracy to commit an indictable offence.

[5] 1 Hawk. c. 72, s. 2.

[6] Twitchell *v.* Com., 9 Barr, 211. See Clary *v.* Com., 4 Ibid. 210; State *v.* Vanhart, 2 Harr. (N. J.) 327.

[7] Com. *v.* Judd, 2 Mass. 329.

[8] R. *v.* De Berenger, 3 M. & S. 67; R. *v.* Roberts, 1 Camp. 399; Gardner *v.* Preston, 2 Day, 205.

[9] R. *v.* Hudson, 3 Cox C. C. 305.

[10] Com. *v.* Fœring, 4 Clark (Phila.), 29; Brightly R. 315.

[11] Com. *v.* Gallagher, 4 Penn. L. J. 58. *Infra*, § 1357.

[12] State *v.* Shooter, 8 Rich. 72.

[13] Com. *v.* Supt. Phila. County Prison, 6 Phila. 169 (Ludlow, J., 1866).

just claim by false representations as to its value ;[1] a conspiracy to obtain possession of goods, under the pretence of paying cash for them on delivery, the buyer knowing that he had no funds to pay with, in fraud of the seller ;[2] a conspiracy to induce persons to take shares in a new company, to which was to be transferred the business of an old company known to the conspirators to be hopelessly insolvent and worthless, with a view of defrauding and cheating the persons so taking and paying for their shares of the price which they would have to pay ;[3] and a conspiracy to sell fraudulent railroad tickets.[4]

[1] R. *v.* Carlisle, 25 Eng. L. & Eq. 577; Dears. 337; 6 Cox C. C. 366.

In this case the indictment alleged that S. sold B. a mare for £39; that while the price was unpaid, B. & C. conspired by false and fraudulent representations made to S. that the mare was unsound, and that B. had sold her for £27, to induce S. to accept £27, instead of the agreed price of £39, and thereby to defraud S. of £12. It was held that the indictment was good, and that, being supported by proof of the facts alleged, it warranted a conviction.

[2] Com. *v.* Eastman, 1 Cush. 190.

[3] R. *v.* Gurney, 11 Cox C. C. 414.

[4] Bloomer *v.* State, 48 Md. 521.

Three persons being in a public house with the prosecutor, one of them, in concert with the other two, placed a pencil case on the table and left the room. While he was absent, one of the two remaining took the pen out of the case, and put a pin in its place, and the two induced the prosecutor to bet with the other, when he returned into the room, that there was no pen in the case, and the prosecutor staked 50*s*. On the pencil case being turned up, another pen fell into the prosecutor's hand, and the three took the money. It was held, that the evidence supported a conviction upon a count charging the three with conspiring by false pretences and fraudulent devices to cheat the prosecutor of his money, although it appeared that he had the intention of cheating one of the three if he could. R. *v.* Hudson, Bell C. C. 263; 8 Cox C. C. 305.

As will be seen more fully (*infra*, § 1359), conspiring to cheat a partner by false entries at the time of the settlement of an account, though in a way which if executed by a single individual would not be indictable, is indictable as a conspiracy. R. *v.* Warburton, L. R. 1 C. C. 274 (1872).

Where the defendants started out on a fox chase and then turned their attention to chasing cattle, some of which were killed, it was held that this was indictable as a conspiracy, and that it was not necessary to prove any original malicious plan toward the party injured. Lowery *v.* State, 30 Tex. 402.

Mr. Wright (Conspiracy, 35) questions whether an indictment for conspiracy could be maintained in cases where the "proposed deceit is such that it could not have any effect in deceiving the persons intended to be defrauded." He proceeds to illustrate this by cases where conspiracies are made to effect impossible ends, *e. g.*, to steal non-existent goods. In other words, he confounds unsuitability of means with non-accessibility of objects. This limitation we have already fully discussed, giving the proper distinctions. *Supra*, §§ 174 *et seq.* To apply the rules there stated to conspiracies, we may say that a conspiracy to effect a criminal object is indictable, though the means employed are only apparently suitable, and that when a conspiracy to effect such an object is put in the process of execution, it is no defence that the thing which it was intended to attack was (unknown to the conspirators) removed from the range of their operations.

§ 1350. But an indictment will not lie for a conspiracy to kill game, or to commit any other mere civil trespass ;[1] nor for a conspiracy to sell a man an unsound horse, there being no fraudulent devices ;[2] nor for a conspiracy to deprive a man of an office under an illegal trading company, there being no overt act ;[3] nor for a conspiracy to procure an over insurance, there being no fraudulent representations alleged.[4] Nor will an indictment be sustained against H., C., and D., township councillors, etc., and T., treasurer, for conspiring unlawfully and fraudulently to obtain and get into their hands £300 of the moneys of said council, then being in the hands of T. as treasurer, only the combination being averred.[5]

Mere civil trespass or fraud not enough; otherwise as to forcible entry and detainer of premises.

[1] *Infra*, § 1359; R. *v.* Turner, 13 East, 228; State *v.* Straw, 42 N. H. 393. As to R. *v.* Turner, see comments, *infra*, § 1359.

[2] R. *v.* Pywell, 1 Stark. 402.

[3] R. *v.* Stratton, 1 Camp. 549, n.

[4] Com. *v.* Prius, 9 Gray, 127.

[5] Horseman *v.* R., 16 Up. Can. Q. B. 543. *Infra*, § 1359.

It has been held in Massachusetts that an indictment does not lie for a conspiracy to defraud a *feme covert* of a promissory note, given for her separate use in consideration of her distributive share in an estate. Com. *v.* Manley, 12 Pick. 173. But the point ruled, though the case has been cited for other purposes, was simply that, in such case, the property of the note being in the husband, the fraud should have been laid as directed against him.

In New Jersey it has been held, under the peculiar statute of that State, not to be an indictable offence for several persons to conspire to obtain money from a bank by drawing cheques on it when they had no funds there. State *v.* Rickey, 4 Halst. 293. Such a position, however, cannot stand at common law in those States in which obtaining money by false pretences is by statute indictable, and is questionable even at common law. It is not, indeed, a cheat for a party to draw money out of bank beyond his deposits. But if this be done by a combination of persons, by means of tricks, by which the bank is imposed upon, a conspiracy is made up. *Supra*, §§ 1347, 1357.

The reasoning of the court in State *v.* Rickey rested principally on the assumption that the Revised Statutes of New Jersey limited conspiracies to the single act of getting an innocent man *indicted* by malice and false evidence. The indictment charged that the defendants conspired "to obtain large sums of money and bank bills, the property of the President, Directors, and Company of the State Bank of Trenton, by means of the several cheques and drafts of the said" defendants "respectively, to be drawn on the cashier of the said the President, Directors, and Company of the State Bank of Trenton, when they, the said" defendants "had no funds in

But it is an indictable offence to conspire to forcibly enter certain premises and exclude from them their owner.[1]

Conspiracy in fraud of bankrupt or insolvent laws indictable.

§ 1351. The bankrupt acts generally make indictable the removal of goods, in contemplation of bankruptcy, with intent to defraud creditors. Under the English act (and the same rule as to frauds on public justice would apply at common law), a conspiracy to remove goods in contemplation of bankruptcy is complete, even though no adjudication of bankruptcy has taken place.[2] Under the United States statutes, others than the bankrupt may be indictable for a conspiracy with him to violate the provisions of the statute.[3] Such, also, is the case

said bank for the payment of the said cheques and drafts." Overt acts followed, none of them showing a specific misdemeanor; and with so lax a statement of the cause of prosecution, there is no ground for surprise that the court thought proper to quash the indictment, even had the statutory objection not obtained. There is no averment that the defendants *knew* they had no funds in the bank; there is no averment that they were to have no funds ready at the time the cheques were presented. The indictment was to be treated in the same way as if it had charged the defendants with an attempt to "defraud" an individual by drawing bills on him when they had no funds in his hands. To make the offence a misdemeanor, it would be necessary to introduce averments, showing that by some fraudulent means the bank was to be induced to believe that the defendants really *had* funds in its custody. Now it is plain that unless the drawing cheques on a bank where the drawer has no funds is made penal by statute in New Jersey, the indictment in State *v.* Rickey was too broad. It showed a conspiracy to effect an object neither *per se* indictable, nor a misdemeanor at common law. If it had contained such averment the indictment, on the principle of R. *v.* Gill, would have been good. And so far as State *v.* Rickey conflicts with the position in the text it is much shaken by State *v.* Norton, 3 Zab. 33. See State *v.* Cole, 10 Vroom, 324.

In Lambert *v.* People, 7 Cowen, 167; 9 Ibid. 578, the indictment was even more general—it merely charging the defendant with conspiring "*wrongfully, injuriously, and unjustly, by wrongful and indirect means, to cheat and defraud*" the prosecutors of their goods, and chattels, and effects," etc. This is certainly loose pleading, but bad as it was, it was sustained in the Supreme Court, and the judgment on it only reversed in the Court of Errors, after a vigorous struggle, by a majority of one. But the opinion of the majority of the court has been subsequently recognized and reaffirmed. People *v.* Brady, N. Y. 182–189.

[1] Wilson *v.* Com., 96 Penn. St. 56.

[2] Heymann *v.* R., L. R. 8 Q. B. 102; 12 Cox C. C. 383. See 8 Cox App. 1432. For other illustrations, where conspiracies to violate a statute have been held indictable, see R. *v.* Bunn, 12 Cox C. C. 316.

[3] U. S. *v.* Bayer, 4 Dillon, 407. See *supra*, § 1340 *a*.

in New York, in which State a conspiracy to remove or secrete property so as to defraud creditors is good, if stated in the words of the statute.[1] In Pennsylvania[2] greater particularity is required, it being held that an indictment charging the defendant with "removing and secreting divers goods and merchandises of the value of $5000, the description, quantity, and quality of the said merchandises being yet unknown," is bad. "Neither time, place, nor circumstances," said the chief justice, "is given, and the goods are not attempted to be described by the place where they were kept, or by the person who had them in custody. They may even not have been in the State, and a conspiracy to secrete them abroad, having for its object no infraction of our laws, would not be criminal at home. It is not averred even that the defendants had any merchandise at all, here or elsewhere; and unless they had it, a conspiracy to conceal it would have been a conspiracy to do what was impossible. It might be inferred from the motive imputed that they had it; but Hawkins says[3] that 'in an indictment nothing material shall be taken by intendment or implication.' Nor are all the creditors named whom the defendants are charged with having conspired to defraud. The prosecutors are named 'with divers other persons' not named; but unless the additional clause were rejected as surplusage at the trial, the accused would be called upon to defend themselves in the dark."[4]

And so of conspiracies to violate lottery laws.

§ 1352. The only cases in the books of conspiracies to violate lottery laws arise in Pennsylvania, and were produced by the rigor with which the courts in that State applied the doctrine of variance to the setting out of lottery tickets. When the intentional complexity of lottery tickets is taken into consideration it is no wonder that the pleader, under the pressure of a rule which held "Burrill" for "Burrall" to be a fatal variance in the setting forth of the ticket, should insure beforehand against any vices in the statutory count, by adding to it a count for conspiracy. This device was counte-

[1] People *v.* Underwood, 16 Wend. 546. See *supra*, §§ 1238-39; Whart. Prec. 507.

[2] Com. *v.* Hartmann, 5 Barr, 60. See *supra*, § 1348, note, where this case is more fully noticed.

[3] Hawk. b. 2, c. 25, s. 60.

[4] As to Iowa statute, see State *v.* Harris, 38 Iowa, 242; as to Massachusetts statute, see Com. *v.* Barnes, 132 Mass. 242.

nanced by the Supreme Court,[1] in a case virtually resting on the authority of R. *v.* Gill, discussed in a previous section.[2] The defendants were charged, in eight out of nine counts, with the statutory offences of selling lottery tickets, offering them for sale, and advertising them; some of the counts setting out tickets in full, others merely charging the sale of "a lottery ticket," etc., in the language of the act. The first count was for a conspiracy to "sell and expose to sale, and cause and procure to be sold and exposed to sale, a lottery ticket and tickets in a lottery not authorized by the laws of the Commonwealth:" therein precisely following the statute. On motion for a new trial, and in arrest of judgment, the court held: 1. That the counts stating the offence in the words of the statute, without setting forth the ticket, were bad from want of sufficient particularity; 2. That there must be a new trial on the count setting forth the ticket, in consequence of a variance between the ticket and the indictment; but, 3. That the conspiracy count was enough to sustain a conviction at common law. This was in 1822; and in 1827, after a conviction on both classes of counts, on an indictment of the same character (except that there was but one defendant, who was charged with conspiring with others to the grand jury unknown), the court inflicted the statutory punishment, being a fine to the Union Canal Company on the statutory counts, and a fine at common law on the conspiracy counts.[3] Two points may be extracted from these cases: 1. That though under the lottery statute in force at the time, the indictment must go beyond the words of the statute and set out the tenor of the ticket, yet for a conspiracy to effect the sale of such a ticket, it is enough to follow the statute strictly without the specification of detail; 2. That the conspiracy, when properly pleaded, may, when covering a distinct offence in a separate count, be punished as a common law offence, without reference to the statutory penalty.[4]

[1] Com. *v.* Gillespie, 7 S. & R. 469. See for form Whart's Prec. 624.

[2] See *supra*, § 1348.

[3] Com. *v.* Sylvester, 6 Pa. L. J. 283; Brightly R. 331.

[4] The first point is abundantly demonstrated in the argument of Duncan, J. After showing that to transcribe the language of the act was not the proper way to frame a count for the individual misdemeanor, he proceeded to recognize the distinction indicated by Ld. Mansfield in R. *v.* Eccles, between a conspiracy to commit an offence and its actual commission. "But the same reason does not apply to the first count, for the conspiracy itself is the crime. It is different from an indictment for stealing, or action for trespass, where the offence consists of an act done, which it is clearly within the power of the prosecutor to lay with certainty. The conspiracy here was, to sell prohibited lottery tickets, any that he could sell; not of any particular lottery, but of all. The conspiracy was the *gravamen*, the *gist* of the offence." 7 S. & R. 476. The second point is established by the fact, that though at the time the cases in question were determined, the statutory punishment on the sale of lottery tickets *was a fine to the Union Canal Company*, the sentence imposed on the conspiracy counts was a fine at common law to the State. The position, however, may be considered as now qualified, in Pennsylvania (Com. *v.* Hartmann, 5 Barr, 60), in a case which determined that a conspiracy to commit a statutory offence is never to be punished more heavily than the offence itself.

§ 1353. No doubt a conspiracy to get up a public disturbance is indictable, and pointed illustrations of this are found in cases which, in another relation, will be subsequently considered, viz: conspiracies to hiss an actor from the stage, so as to stimulate a riot,[1] and to prevent by violent means the introduction of the English language into a church.[2] Precedents, also, are not uncommon for conspiracies to commit riots.[3] But whether the rioters themselves, according to the views heretofore expressed could be indicted for conspiracy, is open to doubt.[4]

And so of conspiracies to commit breaches of the peace.

§ 1354. A conspiracy to commit an assault and battery is held to be an indictable offence at common law.[5]

And so to assault.

§ 1355. So no doubt is it with a combination to falsely imprison. Yet in such case it is a good defence that the object was the restraint of a relative believed *bonâ fide*, and on probable ground, to be insane.[6]

And so to falsely imprison.

[1] Clifford *v.* Brandon, 2 Camp. 358. In R. *v.* Leigh, 1 C. & K. 28, n.; 2 Camp. 372, the "defendants were convicted, but the matter being settled, no judgment was passed; and, therefore, as the learned reporters of Manning & Grainger's Reports (6 M. & G. 217, n.) observe, 'the defendants had no opportunity, if they had been so advised, of questioning the sufficiency of the indictment by a motion in arrest of judgment.' Moreover, it is doubtful whether the indictment (which is set forth in 4 Wentw. Pl. 443) in this case was for a conspiracy. The charge laid in each count is riot and obstruction of the play." Wright's Consp. 39. To the same effect is note in 1 C. & K. 28. The cases affirming civil liability in such cases are no authority for a criminal prosecution; and *dicta* in them to this effect are aside from the issue.

[2] Com. *v.* Eberle, 3 S. & R. 9. *Supra*, § 1348, n.

[3] 2 Chit. Cr. Law, 506, n. ( ); R. *v.* Vincent, 9 C. & P. 91.

[4] See *supra*, § 1339.

[5] Com. *v.* Putnam, 29 Penn. St. 296.

[6] Mintzer's Case, 28 Leg. Int. Rep. 372.

So of seditious conspiracies.

§ 1356. All conspiracies to "excite disaffection," to use the language of Alderson, B., are indictable at common law.[1] And it is sufficient to charge that the defendants did conspire and agree "to raise discontent and disaffection among the subjects of her majesty, and to excite such subjects to hatred and contempt of the government and constitution of this realm as by law established, and to unlawful and seditious opposition to the government and constitution; and also to stir up jealousies, hatred, and ill-will between different classes of her majesty's subjects," etc.[2]

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

§ 1356 *a*. By § 5440 of the federal revised statutes, which is a re-enactment of the 30th section of the Act of Congress of Feb. 3, 1867,[3] where there is a conspiracy "to commit any offence against the government of the United States, or to defraud the United States in any manner whatever, and one or more of the parties to said conspiracy shall do any act to effect the object thereof,[4] the

[1] R. *v.* Vincent, 9 C. & P. 91; 2 Russ. on Cr. 681. See R. *v.* Shellard, 9 C. & P. 277; R. *v.* Hunt, 3 B. & Ald. 566. *Infra*, §§ 1790 *et seq.*; and comments in London Law Times of February 12, 1881, on the Irish State Trials.

Cf. Lord Macaulay's striking observations on this point in his Report on the Indian Code, tit. Conspiracy.

An association, the members of which are bound by oath not to disclose its secrets, is an unlawful combination and confederacy (unless expressly declared by some act of parliament to be legal), for whatever purpose or object it may be formed; and the administering of an oath not to reveal anything done in such association is an offence within 37 Geo. III. c. 123, s. 1. R. *v.* Lovelass, 6 C. & P. 596; 1 M. & Rob. 349.

The precise form in which the oath is administered is not material; it is an oath within the meaning of the act, if it was understood by the party tendering, and the party taking it, as having the force and obligation of an oath. Ibid.

[2] O'Connell *v.* R., 11 C. & P. 155. But a count charging the defendants with conspiring to cause and procure divers subjects to meet together in large numbers for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitutions of the realm, is bad; first, because "intimidation" is not a technical word, having a necessary meaning in a bad sense; and, secondly, because it is not distinctly shown what species of intimidation is intended to be produced, or on whom it is intended to operate. O'Connell *v.* R., *ut supra*; Roscoe's Cr. Ev. (by Sir J. F. Stephen) 421.

[3] Rev. Stat. § 5440. This section is hereafter discussed in connection with revenue offences. *Infra*, § 1373.

[4] As to construction of this clause see U. S. *v.* Donan, 11 Blatch. 168, cited *infra*, § 1373.

parties to said conspiracy shall be deemed guilty of a misdemeanor," etc.; and any district in which a part of the offence is committed has jurisdiction.[1] In construing this statute the following points may be stated:—

(1) "Offence against the government of the United States," in the first clause, must be regarded, in harmony with the rule that the United States has no common law jurisdiction,[2] as limited to offences against the government of the United States made such by statute. In the second clause, the word "defraud" should be construed in the sense of committing a fraud which is itself indictable by federal statutes.[3]

(2) The indictment, under the statute, must set forth the illegal acts which the conspiracy was designed to effect.[4] But the averment of a performed overt act is held not to be necessary; nor, does such averment, if made, cure any defect in the conspiracy charge of the indictment.[5]

[1] Bright. Dig. Sup. p. 158. *Infra*, §§ 1790 *et seq.*

[2] *Supra*, §§ 253, 256.

[3] *Supra*, § 1347; U. S. *v.* Hirsch, 100 U. S. 53; cited *infra*, § 1373, and cases cited to last note in this section.

[4] U. S. *v.* Watson, 17 Fed. Rep. 145; 4 Cr. Law Mag. 891.

[5] U. S. *v.* Donan, 11 Blatch. 168; cited *infra*, § 1373; U. S. *v.* Britton, 107 U. S. 655; 11 Wash. L. Rep. 436.

As to conspiracies to intimidate settlers on public lands, see U. S. *v.* Waddell, 16 Fed. Rep. 221; 112 U. S. 651.

As to conspiracy to make settlement on Indian lands, see U. S. *v.* Payne, 22 Fed. Rep. 496, cited *infra*, § 1356 *b*.

As to the further construction of this section, see Callicott, *in re*, 1 Am. L. T. 120; 8 Int. Rev. Rec. 169; U. S. *v.* Sacia, 2 Fed. Rep. 754.

That it is not to be considered part of the revenue legislation of the United States, and is not subject to the limitations imposed by such legislation, see U. S. *v.* Hirsch, 100 U. S. 32, cited in § 1373.

For conspiracy to defraud of tax on spirits, see U. S. *v.* Rindskopf, 6 Biss. 259. *Infra*, § 1373.

Under this section falls a conspiracy to plunder a wrecked vessel within admiralty jurisdiction. U. S. *v.* Sauche, 7 Fed. Rep. 715. For other cases of conspiracies to defraud the revenue, see *infra*, § 1373.

That unless a defendant was implicated in the conspiracy he cannot be convicted on account of overt act, see U. S. *v.* Hirsch, 100 U. S. 33.

That under this section there must be an overt act, see U. S. *v.* Crafton, 4 Dill. 145; U. S. *v.* Britton, 107 U. S. 655; U. S. *v.* Watson, 17 Fed. Rep, 145; Whart. Cr. Pl. & Pr. § 220. But that the overt act need not be pleaded, see U. S. *v.* Donan, 11 Blatch. 168; U. S. *v.* Sauche, *ut sup.*

In U. S. *v.* Gordon, 22 Fed. Rep. 250 (Oct. T. 1884), it was decided by Nelson, J., in the U. S. District Court for Minnesota, that under sec. 5440 of the U. S. Rev. Stat. a count is not demurrable because it charges simply that the defendants conspired to defraud the government out of certain lands. "It is

§ 1356 *b*. By § 5508 of the Revised Statutes, "if two or more persons conspire to injure or oppress, threaten or intimidate, any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or because of his having so exercised the same," etc., they shall be fined not more than five thousand dollars, and imprisonment not more than ten years; and shall, moreover, be thereafter ineligible to an office or place of honor, profit, or trust created by the constitution or laws of the United States."[1]

So to interfere with civil rights.

immaterial," so said the court, "what means were used to defraud, as it is criminal to conspire to defraud the United States in any manner or for any purpose, and the court does not care to know whether the mode adopted to accomplish the end proposed is made criminal or not." I do not concur in this conclusion. There are multitudes of frauds which are not indictable when the party injured is a private person, *e. g.*, not giving up, by an officer, of a due amount of time to his employer, or craftily shirking duty, or telling falsehoods in way of puffs or evasions; and these frauds do not become indictable because the party injured is the government. And aside from this objection, which by itself should be fatal, the ruling before us is in conflict with the position that in an indictment it is not enough to charge a conclusion of law. (See Whart. Cr. Pl. & Pr. § 221, and cases there cited.) In conspiracy, it should be remembered, the furthest limits to which the courts have gone has been to sustain a charge of conspiracy to cheat by "false pretences," cheating by false pretences being a statutory offence. Again, the ruling before us is open to the objection of disregarding the principle that the federal courts have no common law jurisdiction. So far as concerns cheats by more than one person, all that would be necessary in order to give the federal courts jurisdiction, if the view here contested be true, would be to charge a conspiracy, and this would give those courts a jurisdiction even beyond the limits of the common law. See U. S. *v.* Walsh, 5 Dill. 58, cited *infra*, § 1373, to effect that the facts of the conspiracy must be specified.

The exceptions above stated do not apply the ruling of the court in the same case sustaining a count charging a conspiracy to defraud the United States by presenting for approval to the register and receiver of a land office false and fraudulent affidavits and proofs of settlement and improvement, under the pre-emption law, of twenty-eight persons, stating that such persons were entitled to enter public lands, and had severally complied with the pre-emption laws, and had severally entered such lands for their individual benefit.

Nor can exception be taken to the ruling sustaining a count charging a conspiracy to defraud the United States by hiring twenty-eight persons to enter at a land office, under color of the pre-emption laws, certain public lands of the United States, solely for the purpose of selling the same, on speculation, to defendant and L., and some other person to the grand jury unknown, is not demurrable.

[1] This statute has been held constitutional; Yarbrough, *ex parte*, 110 U. S. 651; and in U. S. *v.* Waddell, 112 U. S. 76, it has been held applicable to a conspiracy to drive by force a citizen of the United States from a homestead entry on unoccupied public lands. It is questioned, however, in the latter case, whether the proceedings could be by information. See Whart. Cr. Pl. & Pr. § 89; and see *infra*, §§ 1372, 1832, 1848 *a*.

As to indictment under § 5520 for conspiracy to drive off a voter by force, see U. S. *v.* Goldman, 3 Woods, 187.

That a conspiracy to make settlements on Indian lands is not within the statute, see U. S. *v.* Payne, 22 Fed. Rep. 426.

§ 1357. A conspiracy to make false or illegal notes is indictable at common law.[1] The rule has been held to apply to the case of a conspiracy to cheat by offering to sell forged foreign bank notes, of a denomination whose circulation is prohibited in the State where the indictment is found;[2] to a conspiracy to induce others to violate the laws forbidding such notes to circulate;[3] and to a conspiracy to destroy or erase an indorsement.[4]

And so to make false or illegal notes.

III. CONSPIRACIES TO MAKE USE OF MEANS THEMSELVES THE SUBJECT OF INDICTMENT, TO EFFECT AN INDIFFERENT OBJECT.

§ 1358. This class is here separately mentioned because it has usually been placed under a distinct head by text-writers, though on principle it is difficult to distinguish it from cases where an indictable offence is the direct and immediate object of the conspiracy. In one case the defendants conspire to commit an indictable offence for the sake of itself, in the other they conspire to commit it for the sake of some other object; but when the cases usually put under the first head are analyzed, they will be found, many of them, to fall under the second. Thus, in a conspiracy to produce the marriage of a young woman by coercion, to procure an appointment by corruption, to make a change in government by seditious means, and to fraudulently effect a change in the government of a corpo-

When the illegality is in the means, these means must be set forth.

[1] Clary *v.* Com., 4 Barr, 210; Com. *v.* McGowan, 2 Parsons, 341. See R. *v.* Haven, 2 East P. C. 858; Whart. Prec. 635 *a*.

[2] Twitchell *v.* Com., 9 Barr, 211. See *supra*, § 1349.

[3] Hazen *v.* Com., 23 Penn. St. 355. Thus, in 1854, on a conviction for conspiracy to "solicit, induce, and procure" the officers of a particular bank to "violate and disobey the 28th and 49th sections of the Act of 16th of April, 1850," prohibiting the circulation of foreign notes under $5, the Supreme Court declared the conviction good, and that it was not necessary for the indictment to do more than to aver a conspiracy for this purpose, without setting forth the means or contract. Ibid.

[4] State *v.* Norton, 3 Zabr. 33.

ration,[1] as well as in many parallel cases, the end is indifferent, but the means constitute the offence. It is enough to say, in such cases, that as the conspiracy rests on the alleged indictability of the constituent misdemeanor, such misdemeanor must be specified.[2]

The general rule, therefore, is, that when the combination is to do an act not in itself unlawful, but which it is agreed to accomplish by criminal or unlawful means, then those means must be particularly set forth, and be such as to constitute an offence either at common law or by statute.[3] Thus, on an indictment for a combination to procure a marriage of paupers, in order to throw the burden of maintaining them on another parish, it is necessary to show that some threat, promise, bribe, or other unlawful device was used, because the act of marriage being in itself lawful, the procuring it requires this element in order to be charged as a crime. In such case it is essential to show the intent of the combination, by stating that the husband was a pauper, and the wife legally settled in the parish from which she was taken.[4]

IV. CONSPIRACIES TO DO AN ACT, THE COMMISSION OF WHICH BY AN INDIVIDUAL MAY NOT BE INDICTABLE, BUT THE COMMISSION OF WHICH BY TWO OR MORE, IN PURSUANCE OF A PREVIOUS COMBINATION, IS CALCULATED TO AFFECT THE COMMUNITY INJURIOUSLY.

§ 1359. We here strike a distinction which is essential to the true conception of conspiracy, as defined by the English common law. On the one side, we have arrayed before us a series of acts which have the essence but not the form of crime; and, wanting the necessary objective constituents, they escape judicial cognizance. On the other hand, we have a series of indifferent acts, not criminal in their essence, and which, therefore, no matter in what shape they are presented (provided that shape be not *per se* criminal), cannot become the objects

Acts which derive their indictability from plurality of actors.

[1] State v. Burnham, 15 N. H. 396.

[2] 1 Leach, 38; 3 Burr. 1439; 1 Wils. 41; 8 Mod. 321; People v. Barkelow, 37 Mich. 455.

[3] R. v. Fowler, 1 East P. C. 461, 462; R. v. Seward, 3 N. & M. 557 (cited *infra*, § 1362); Alderman v. People, 4 Mich. 414; State v. Mayberry, 48 Me. 218; Cole v. People, 84 Ill. 216; State v. Potter, 28 Iowa, 554.

[4] R. v. Tanner, 1 Esp. 304, 307; R. v. Edwards, 8 Mod. 320. *Infra*, § 1572.

of criminal prosecution. Acts of the first class (*e. g.*, immoral acts, unindictable cheats), the courts have held to be invested by conspiracy with a garb which exposes them to the penalties of the law. Before this they had the essence of crime; now, it is argued, by means of a conspiracy which gives an unfair and mischievous advantage to the aggressors, they have its form presented in such definiteness that they can be taken hold of and punished.[1] For two to more persons to coöperate in effecting a fraud, one referring when required by the exigencies of the case to another, and each conspirator vouching the other as an innocent referee, gives to a cheat the quality of "false token" which makes it indictable at common law. It has both of the elements of such indictability—it is latent, and it is so complex as to affect any one whom it may reach.[2] But acts though in themselves immoral may be committed by a confederacy, and yet if not attempted by a fraudulent combination of pretended innocent co-workers, present nothing indictable if they would not be indictable when committed singly by an individual.[3] And

[1] See R. v. Rowlands, 2 Den. C. C. 364; 17 Q. B. 671; R. v. Carlisle, Dears. 337; R. v. Ormann, 14 Cox C. C. 381; State v. Rowley, 12 Conn. 101.

[2] See *supra*, §§ 1118, 1347.

[3] R. v. Turner, 13 East, 228; R. v. Warburton, L. R. 1 C. C. 274; 12 Cox C. C. 584; State v. Straw, 42 N. H. 393; Com. v. Manley, 12 Pick. 173. R. v. Turner, if it decides that an agreement to make an armed trespass is not a conspiracy, is not now sustainable. See remarks of Gibson, C. J., in Mifflin v. Com., 5 W. & S. 461. Sir J. F. Stephen, in Roscoe's Cr. Ev. p. 410, writes: "With regard to civil injuries, it may be observed that wherever a combination to commit such an injury has been held to be criminal the injury has been malicious; that is to say, the parties have not been under a *bonâ fide* mistake as to a matter of fact, which, if true, would have justified their conduct. Thus, a combination to walk over a field, or to pull down fences, would not be a conspiracy, if the object was to try a question as to a right of way, though it certainly would be a combination to commit an act unlawful in the sense of being a tort. On the other hand, a conspiracy to commit a fraud may be indictable, though the fraud is not in itself indictable. In the case of R. v. Warburton, the defendant and another person conspired to defraud the defendant's partner of partnership property under such circumstances that the fraud was perhaps not criminal in itself. Cockburn, C. J., in delivering the judgment of (L. R. 1 C. C. R. 274–77) the Court for Crown Cases Reserved, said: 'It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, *i. e.*, amount to

the same distinction is applicable to a conspiracy by two or more persons to use violence, which derives its indictability, as in riot, from the plurality of persons concerned,[1] and to a conspiracy to injuriously affect the body politic.[2]

Conspiracy to commit such acts is indictable.

§ 1360. It is not essential, therefore, it should be repeated, in cases where the offence consists in the union of a plurality of persons either in a joint cheat or a joint application of force, that the means employed should be of themselves of such a character as to make their employment by a single person the ground for indictment.[3] Cases to this effect have been already noticed,[4] and others will be given in the succeeding sections. At the same time it is important to keep in mind, especially at this point, the principles heretofore announced,[5] that indictments for conspiracy, always perilous to liberty from the extent and vagueness of the province which they overshadow, are never so perilous as when they undertake to punish acts of whose

a civil wrong.' The generality of these expressions must probably be confined by reference to the particular class of civil wrongs under consideration, namely, 'civil wrongs by fraud and false pretences.'"

To these remarks it may here be added that the facts in R. *v.* Warburton show that the defendants attempted to consummate the offence by fraudulent reciprocal references; and in this, by imposing on the party cheated, confederates, in the shape of innocent referees, are guilty of a common law cheat. Now, though it be conceded that neither the act itself, nor the means taken to effect it, were such that if undertaken by an individual they would have been indictable, yet as the object (cheating) was immoral and *quasi* criminal, it was, when infected by such conspiracy, purged of its indifference, and transmuted into a criminal act.

The same criticism applies to the numerous cases heretofore cited of bare conspiracies to cheat. *Supra*, § 1347.

An indictment charged the defendants with conspiring to cause goods which had been imported, and on which certain duties of customs were payable to the queen, to be carried away from port without payment of the duties, with intent to defraud the revenue, and there were also counts charging the defendants generally with conspiring to defraud the queen of duties, by false and fraudulent representations of the value and nature of the goods; it was held, that the gist of the indictment being the conspiracy, the indictment was sufficiently certain, without further specifying facts to show either an indictable object or indictable means. R. *v.* Blake, 6 Q. B. 126; 13 Law J. N. S. M. C. 256.

[1] *Supra*, § 1338.

[2] Ibid. *Infra*, §§ 1366 *et seq.* *Supra*, §§ 1118 *et seq.*

[3] State *v.* Burnham, 15 N. H. 396. See R. *v.* Warburton, *supra*, § 1359.

[4] *Supra*, § 1349.

[5] *Supra*, § 1338.

intrinsic criminality the law gives no prior notice. If indictments of this class, by stress of settled adjudications, must be hereafter tolerated, the doctrine on which they rest should be carried no further than the letter of these adjudications requires. No man should be held penally responsible for acts which at the time of their commission were not pronounced by the law to be criminal. As to conspiracies of this class, such pre-announcement of criminality is not pretended. Neither the confederacy, nor the means, nor the end, are singly indictable. All that is claimed is that indictability is produced by the fact of a masked coöperation in the nature of a deceit, or a coöperation in application of force constituting an attempt at riot. To punish for a conspiracy which does not fall under one of these heads, or which is not aimed at the commission of some other indictable offence, or at the perversion of public justice, is, independently of other objections, to punish by an *ex post facto* law, and hence virtually unconstitutional.[1]

1. *To commit an Immoral Act; such, for instance, as the Seduction of a Young Woman, or to produce an Abortion.*

Conspiracy to seduce or abduct is indictable.

§ 1361. A combination to assist in the elopement of a female infant from her father's house, with a view to her marriage without his consent, has been held to be a common law offence, and is indictable as a conspiracy at common law; abduction, when consummated, being an indictable offence.[2] So a conspiracy to seduce without marriage is clearly indictable, even where seduction is not a misdemeanor, fornication being an ecclesiastical if not a common law offence.[3]

§ 1362. To conspire to procure a forced or fraudulent marriage is indictable at common law.[4] Hence a conspiracy to cause a marriage

[1] See U. S. *v.* Goldberg, 7 Biss. 175. That rights for whose infringement an indictment of conspiracy lies must be those secured by law, see U. S. *v.* Cruikshank, 92 U. S. 542.

[2] Mifflin *v.* Com., 5 W. & S. 461.

[3] State *v.* Savoye, 48 Iowa, 562; Anderson *v.* Com., 5 Rand. (Va.) 627; Smith *v.* People, 25 Ill. 17. See, for forms, Whart. Prec. 651, etc.; and see R. *v.* Delaval, 3 Burr. 1435; R. *v.* Thorp, 5 Mod. 221; R. *v.* Mears. *infra*; R. *v.* Grey, 1 East P. C. 460; Twichell *v.* Com., 9 Barr, 211.

[4] Resp. *v.* Hevice, 2 Yeates, 114; R. *v.* Wakefield, 2 Townsend, St. Tr. 112–6. See R. *v.* Tarrant, 4 Burr. 2106; R. *v.* Seward, 3 Nev. & M. 557; 1 Ad. & El. 706; R. *v.* Edwards, 8 Mod. 320; 2 Stra. 707; R. *v.* Fowler, 1 East P. C. 461; *supra*, § 1358; *infra*, § 1371.

falsely to appear of record, with intent to prevent a person from contracting another marriage, is indictable.[1] An indictment, also, has been sustained which alleges a conspiracy falsely and fraudulently to seduce from virtue and carnally to know an unmarried female, by procuring the consent of herself and parents to her marriage with one of the conspirators, and then, in furtherance of such conspiracy, producing a forged license, assuring them of its genuineness by falsely and fraudulently representing another of the conspirators to be authorized to celebrate the espousals, who actually performed the ceremony, in consequence of all which the daughter and her father and mother were deceived, etc., and she cohabited with her pretended husband.[2] On the same reasoning a conspiracy to obtain a fraudulent divorce is indictable.[3]

So to procure a fraudulent marriage or divorce.

§ 1363. And, generally, a conspiracy to debauch is indictable. Of this we have a conspicuous illustration in an English case where the prisoners induced the prosecutrix, a girl of fifteen years of age, who had left her place as a servant, to go to their house; where one of them pretended that she had known the deceased parents of the prosecutrix, and said that she should keep her until she got a place, and that they would both assist her in getting one. The prisoners were women of bad character, and the place where they resided was a house of ill-fame. It was false that either of them had known the parents of the prosecutrix, and they took no steps whatever to get her a place, but urged her to have recourse to prostitution. They introduced a man to her, and attempted, by persuasion, and holding out prospects of money, to induce her to consent to illicit connection with him. The prosecutrix refused to consent, and declared her intention of quitting the house; the prisoners refused to give her her clothes, and she left without them. It was held that the offence was conspiracy at common law as well as conspiracy under statute 12 & 13 Vict. c. 76.[4]

So to debauch.

[1] Com. *v.* Waterman, 122 Mass. 43.

[2] State *v.* Murphy, 6 Ala. 765.

[3] Cole *v.* People, 84 Ill. 216. In this case two judges dissented on the ground, well put, that the indictment did not specify the fraudulent means.

[4] R. *v.* Mears, 1 Eng. L. & Eq. 581; 2 Den. C. C. 79; T. & M. 414; 4 Cox C. C. 423; 1 Ben. & H. Lead. Cas. 462.

In the last case it might be said that the appropriation of the girl's clothes, and her prior chastity, were essential

§ 1364. In cases of conspiracy to produce an abortion, it is unnecessary to aver specifically in what stage of pregnancy the mother was, or what were the instruments to be used.[1] If the conspiracy were unexecuted, it is proper, as in all cases of unexecuted conspiracies, for the grand jury to aver that they are unable to set out the particulars of the plan, because it was never carried into execution. But an averment of conspiracy to murder a living infant will not be sustained by evidence of conspiracy existing before the birth of the child, unless the conspiracy be proved to have been pursued subsequently to the birth.[2]

So to produce an abortion.

§ 1365. An indictment lies at common law for a conspiracy to prevent the interment of a dead body.[3]

To prevent interment of a dead body.

2. *To prejudice the Public or the Government generally; as, for Instance, by unduly elevating or depressing the Prices of Wages, or Toll, or of any Merchantable Commodity, or by defrauding the Revenue; or to impoverish or defraud any Individual or Class.*

§ 1366. The old law in relation to business combinations was an outgrowth of the old system of political economy, and of the theory of absolutism which was essential to the maintenance of that system. Prices of the necessaries of life, at least, were to be fixed by the State; and as labor is as much a necessity as corn, the price of labor was to be fixed in the same way. The arguments for governmental direction in such matters it would be out of place here to recall; though it cannot be denied that in some relations,—*e. g.*,

Conspiracy to forcibly or fraudulently raise or depress the price of labor is indictable.

constituents of the offence. The following case brought up the question separated from these qualifications. The prisoners were found guilty upon an indictment charging them with conspiring to solicit, persuade, and procure an unmarried girl, of the age of seventeen, to become a common prostitute, and with having, in pursuance of that conspiracy, solicited, incited, and endeavored to procure her to become a common prostitute. It was held, that although common prostitution was not an indictable offence, it was unlawful, and the indictment therefore good, without averring that the prosecutrix was a chaste woman at the time of the conspiracy. R. *v.* Howell, 4 F. & F. 160. See discussion of this case in London Law Times, Sept. 3, 1881.

[1] Com. *v.* Demain, Brightly R. 441. See *supra*, §§ 592 *et seq.*; Whart. Prec. 629.

[2] R. *v.* Banks, 12 Cox C. C. 393.

[3] Hood's Ex. 47. *Infra*, § 1432 *a*.

in sustaining a protective tariff for mere purposes of protection, and in excluding certain classes of laborers from the market,—they are still appealed to; nor can it be denied that there is a reactionary tendency in Germany, if not elsewhere, to assert both the right and authority of the government to intervene for the purpose of regulating labor.[1] We must also remember that it is now settled by the

[1] Thus, in the preface to "Lothair," Lord Beaconsfield declares it is a "principle" that labor requires regulating no less than property.

See, as authorities bearing on the position in the text, R. *v.* Ferguson, 2 Stark. 489; R. *v.* Rowlands, 17 Q. B. 671; 5 Cox C. C. 436; R. *v.* Duffield, Ibid. 404; R. *v.* Hewitt, Ibid. 162; Hilton *v.* Eckersley, 6 E. & B. 47; R. *v.* Shepherd, 11 Cox C. C. 325; R. *v.* Bunn, 12 Ibid. 316; R. *v.* Hibbert, 13 Ibid. 82; Master Stevedores' Ass. *v.* Walsh, 2 Daly, 1; State *v.* Donaldson, 3 Vroom, 151; Com. *v.* Carlisle, 1 Journ. Juris. 225; Com. *v.* Haines, 15 Phila. 356. For forms see Whart. Prec. 656 *et seq.*

In Hilton *v.* Eckersley, 6 E. & B. 62, Lord Campbell said: "I am not prepared to say that the combination which has been entered into between the parties to this bond would be illegal at common law, so as to render them liable to an indictment for a conspiracy. Such a doctrine may be deduced from the *dictum* of Grose, J., in R. *v.* Mawbey. Other loose expressions may be found in the books to the same effect, and if the matter were doubtful, an argument might be drawn from some of the language of the statutes respecting combinations. But I cannot bring myself to believe, without authority much more cogent, that if two workmen who sincerely believe their wages to be inadequate should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence or any illegal means for gaining their object, they would be guilty of a misdemeanor, and liable to be punished by fine and imprisonment. The object is not illegal, and therefore if no illegal means are to be used, there is no indictable conspiracy. Wages may be unreasonably low or unreasonably high; and I cannot understand why, in the one case, workmen can be considered as guilty of a crime in trying by lawful means to raise them, or masters, in the other, can be considered guilty of a crime in trying by lawful means to lower them."

On this Sir J. F. Stephen, in Roscoe's Cr. Ev. p. 424, comments: "It is difficult to answer this reasoning upon general grounds, but the authorities quoted above appear to prove that the opinion of Lord Campbell's predecessors as to what sort of conduct was highly injurious to the public interests differed from those of Lord Campbell himself. Surely the judgments referred to above are not adequately described by the phrase 'loose expressions.' Of the four cases cited two are decisions of the Court of Queen's Bench, directly upon the very point itself. The *dicta* of Lord Mansfield and Grose, J. (that the agreement of several journeymen to stand for higher wages is illegal) are closely pertinent to the matters then under discussion, and are the more weighty because each of the judges assumes that the illegality of the combinations in question is so clear that it may be used as a proof of matter in itself more obscure.

Supreme Court of the United States that a State has the constitutional power to regulate the prices to be received by railroad corpo-

They are certainly as much in the nature of judgments as Lord Campbell's own language in Hilton *v.* Eckersley; and the language of the now repealed statute of 6 Geo. IV. c. 129, is unintelligible if the legislature did not believe that the combinations which it expressly permitted would have been crimes in the absence of such express permission. The general result appears to be, that all combinations to effect any alteration in the rate of wages, except those which were expressly excepted by 6 Geo. IV. c. 129, ss. 4, 5, were indictable conspiracies at common law.

"The result, however, cannot be regarded as free from doubt, and it would be difficult to find a stronger illustration of the uncertainty produced by the absence of precise and universally binding definitions of crimes than is supplied by this branch of the law. The whole matter is discussed in full detail by Mr. Wright (Law of Criminal Conspiracies, pp. 43–62)."

In R. *v.* Bunn, 12 Cox C. C. 316, 339, 340, Brett, J., when summing up, said: "Now I shall first ask you this: Was there an agreement or combination, which is practically the same thing, between the defendants, or between the defendants and others, or by some of them, to force Mr. Trewby, or the Gas Company, to conduct the business of the company contrary to their own will by an improper threat, or improper molestation; and I tell you that there is improper molestation if there is anything done with an improper intent, which you shall think is an annoyance or an unjustifiable interference, and which in your judgment would have the effect of annoying or interfering with the minds of the persons carrying on such a business as this gas company was conducting. . . . I tell you that the mere fact of these men being members of a trades union is not illegal, and ought not to be pressed against them in the least. The mere fact of their leaving their work—although they were bound by contract, and although they broke their contract—I say the mere fact of their leaving their work and breaking their contract is not a sufficient ground for you to find them guilty upon this indictment. This would be of no consequence of itself, but only as evidence of something else. But if there was an agreement among the defendants by improper molestation to control the will of the employers, then I tell you that that would be an illegal conspiracy at common law, and that such an offence is not abrogated by the Criminal Law Amendment Act, which you have heard referred to. This is a charge of conspiracy at common law, and if you think that there was an agreement and combination between the defendants, or some of them, and others, to interfere with the masters by molesting them, so as to control their will; and if you think that the molestation which was so agreed upon was such as would be likely, in the minds of men of ordinary nerve, to deter them from carrying on their business according to their own will, then I say that is an illegal conspiracy, for which these defendants are liable." See, to same general effect, remarks of Bramwell, J., in R. *v.* Druitt, 10 Cox C. C. 592.

In Fawcett's Political Economy (London, 1865) the subject of trades unions

rations who are common carriers within its borders; and that the reasoning on which this conclusion rests would authorize the statu-

and strikes occupies a chapter from which are taken the following conclusions:—

1. Any combination to limit the number of workmen is calculated to depress trade and injuriously affect all classes of the community.

2. As to the abstract question of the union of workmen to strike for higher wages there can, it is argued, be no doubt as to the "right." "If employers are freely permitted to invest their capital to the greatest possible advantage, we conceive that the employed may equally claim to be allowed to obtain the highest wages they can for their labor. If, therefore, any of them choose to form themselves into a combination, and refuse to work for the wages which are offered to them, they are, we think, as perfectly justified in doing this as capitalists would be if they refused to embark their capital because the investment offered was not sufficiently remunerative. Workmen, however, do an illegal and most mischievous act, which ought to be punished with the utmost rigor of the law, if they attempt to sustain the combination by force, and if they coerce individuals to join in it by threatening to subject those who keep aloof either to annoyance or personal violence."

3. The increase of wages implies a diminution of profits, and, therefore, cannot be permanent unless the number of laborers is restricted.

4. The interests of workmen and their employers are only identical in the sense in which the interests of buyers and sellers are identical, which, though true in the long run, is not so at the immediate moment.

5. Temporary influences giving the buyer of labor special advantages over the seller may be put right by combinations of workmen. This cannot be done in periods of adversity, as in such cases strikes rather benefit the employer, enabling him to weed out his force and reduce his expenses, while the result is ruinous to the employé. In times of prosperity, however, strikes, conducted in good temper, and without such violence as to incur penal responsibility, may produce a temporary benefit. The workman says: "Why should I wait until you choose to arrive at this joint decision (to raise wages)?" "The master would very naturally persist in his refusal; for he would feel confident that the workman, being a poor man, could not live without employment; and as the wages paid in the trade are uniform, the workman would have no chance of obtaining higher wages from another employer." Supposing, however, there should be a general union of the workmen in the business to the same effect, "the masters would know that they themselves would suffer a most severe loss, if such a determination were carried out; for their business would be stopped at a time when it was most profitable. They would, therefore, have every inducement to grant their workmen what they claimed, if the demands were really justifiable." "If the employers possess a power of combination and the laborers do not, then we think that one party has a chance of obtaining a better bargain than the other; but if this power of combination is exerted by both, then they are both placed in a position of perfect equality."

6. Combinations of this class may become beneficial to both the employer and the employé, these advantages being by no means dependent upon

tory imposition by law of fixed prices of labor in other industries besides those of the common carrier. Yet, after making all these

strikes. "When this power of combination is fully recognized, all that can be received by it will be peacefully conceded; and, therefore, instead of enmity being perpetuated, increased harmony and good will will be guaranteed. The workman will become a participator in his master's prosperity; and if he shares in his prosperity, he will learn to suffer with him in the time of adverse trade. The workman will be thus gradually taught one of the most valuable of lessons, namely this, that capital is not a tyranical power which oppresses him, but is the source from which he obtains his livelihood."

Professor Walker, of Yale College, in his work on the Wages Question, N. Y. 1876, c. xix., discusses at length the question whether any advantages may be acquired by the "wages class" through strikes or trades unions. That these are legal, he properly assumes, viewing the old legislation and the old jurisprudence to this effect as now obsolete. It is admitted, at the outset, that in cases where wages appear inadequate, "if bodies of labor can be put under discipline so that they shall proceed in order and with temper, great injury may be averted, injury which once wrought may be permanent." It is stated that illustrations might be multiplied "showing how an advance of wages which masters were unwilling to concede, and which workmen through their isolated and mutually jealous and suspicious action would be unable to command, if effected through united action might prove to be for the interest of both master and men." While admitting that strikes are "only of questionable utility in the first stages of the elevation of masses of labor long abused and much abused," he justly attributes the repeal of the English combination statutes, noticed hereafter, to the fear produced by the "strikes." A summary of subsequent legislation is then given. But while for temporary purposes trades unions are held to have produced valuable effects, the value of their permanent existence, as wages-settling agencies, is seriously questioned.

In Roscher's Political Economy (N. Y. 1878), and in Lalor's notes, vol. ii. § 176, pp. 84 *et seq.*, the history of strikes is given in detail. The result in such cases, it is said, "must generally issue in the victory of the richer purchasers of labor." On the other hand, "when wages in general tend to rise, but by force of custom are kept below their natural level, a strike may very soon attain its end. And workmen are all the more to be wished godspeed as employers are slow to decide of their own motion upon raising wages." It is of course otherwise with the struggle of workmen against the natural conditions which determine the rate of their wages, in which they might in turbulent times possibly succeed temporarily, but would in the long run have to fail. He also calls attention to to the fact that trades unions, so far as concerns their action in adjusting wages, and providing a provident fund, are the successors of the old "guilds," whose legality was never disputed. See Thornton on Labor, iii. c. 4; London Quart. Rev. Oct. 1867; Edinburgh Rev. Oct. 1867. Thorold Rogers on Work and Wages, 411 *et seq.*

On the question of lawfulness, we have the following conclusion:—

"Where there exists a very high

allowances, though we may not hold absolutely that the government has no right to intervene to settle prices of either labor or produce,

degree of civilization, there is a balance of reasons in favor of the non-intervention of governments, but only so as the striking workmen are guilty of no breach of contract and of no crime. . . Coalitions of purchasers of labor for the purpose of lowering wages, which are most frequent, though noiselessly formed, the police power of the State cannot prevent. If now it were attempted to keep the working class alone from endeavoring to correspondingly raise their wages, the impression would become general, and be entertained with right, that the authorities were given to measuring with different standards."

Several English statutes must be taken into consideration in connection with the rulings of the courts. The first is the now repealed Act of 6 Geo. IV. c. 120, making threats to effect certain ends indictable. Under this statute the "threats" of trades unions have been, by some judges, considered included. Walsby *v.* Anley, 3 E. & E. 516; though see *contra*, R. *v.* Druitt, 10 Cox C. C. 592; R. *v.* Selsby, 5 Ibid. 495, n.; R. *v.* Sheridan, cited Wright's Conspiracy, 47. This statute, it should be remembered, was only in force in England for a few years, and is not to be found in any of our American codes. A statute also was adopted in England in 1871, 34 & 35 Vict. c. 32, by which agreements in restraint of trade, when no force or fraud is used, are treated as non-indictable; but this statute does not change the common law. Of the statutes regulating breaches of contract by workmen Mr. Wright (Conspiracy, 59) thus speaks:—

"Where, however, the agreement is for conduct involving a breach of contract by workmen, different considerations occur. Acts have been for many years in force for punishing breaches of contract by workmen of most kinds, and an agreement to break those acts, or to procure a breach of them, may be criminal on the general principle established in the seventeenth section. A difficulty may, indeed, occur at the present time from the fact that 'The Master and Servant Act, 1867,' appears to suspend the provisions of most of the former acts for punishing breaches of contract, and to substitute the discretion of a magistrate as to whether the wrong ought to be regarded as criminal or as merely civil, so that a breach of contract may be thought to be of an indeterminate character, both when it is proposed and when it is executed; nor does there seem to be any case in which the effect of this condition of the law has been considered in its relation to combinations. Either view of its effect is attended with difficulty. On the one hand, the provisions of the nineteenth section, which expressly preserves the procedure by indictment in cases of malicious injury to person or property, may perhaps raise some presumption that procedure by indictment was intended to be excluded in the case of other kinds of misconduct within the purview of the statutes whose penal clauses are suspended. On the other hand, it seems unlikely that the legislature should have intended to relieve without express words from the criminality which has long attached to agreements for breaches of contract, where those breaches were in violation of penal acts.

"Agreements for breaches of contracts of service, in cases to which no

we must assert that it has no right to make such settlements by means of common law criminal prosecutions. Undoubtedly if a

penal act applies, seem never to have been determined to be criminal."

In Sheridan's Case, 1868 (Wright's Consp. 50), Lush, J., is said to have ruled that there was nothing unlawful either in a strike for compelling a master to comply with certain regulations, or informing him of the object of the strike, or in picketing his premises, so long as there was no violence or intimidation.

In R. *v.* Shepherd, 11 Cox C. C. 325 (1869), the same view was repeated by the same judge.

Rowland's Case, 2 Den. C. C. 364; 5 Cox C. C. 407; 17 Q. B. 671 (1851), is explained by the fact that "molestation" was made penal under 4 Geo. IV. c. 34. *Infra*, § 1367.

"Neither in Druitt's case, nor in Bunn's case," says Mr. Wright, in his work on Conspiracy, "was there any apparent opportunity of obtaining a confirmation or explanation of the rules laid down for the guidance of the jury by appeal on a case reserved for the Court of Criminal Appeal." See Act of 34 & 35 Vict. determining that no act shall be illegal merely because in restraint of trade.

In a New York case, on a statute making it indictable to conspire to commit acts "injurious to trade or commerce," where journeymen shoemakers conspired together and fixed the price of making coarse boots, and entered into a combination that if a journeyman shoemaker should make such boots for a price below the rate thus fixed, he should pay a penalty of ten dollars; and if any master shoemaker employed a journeyman who had violated their rules, that they would refuse to work with him, and would quit his employment; and carried such combination into effect by leaving the employment of a master workman, in whose service was a journeyman who had violated their rules, and thus compelled the master shoemaker to discharge him; it was held that the parties thus conspiring were guilty of a misdemeanor. People *v.* Fisher, 14 Wend. 9. But this decision goes too far, and cannot now be sustained. Master Stevedores' Ass. *v.* Walsh, 2 Daly (N. Y.), 1. Undoubtedly to absorb, by fraud or coercion, all of a particular class of the staples, or currency, or labor, in a community, so as to produce a dearth in any actual necessity of life and in this way to produce misery on one side and extortionate gains on the other, is an indictable offence. 1 Hawk. P. C. c. 80, s. 3; 3 Inst. 196; 4 Bl. Com. 158; R. *v.* Webb, 14 East, 406; R. *v.* Waddington, 1 East, 143; 7 Dane Ab. 39; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Penn. St. 173. And *a fortiori* is a conspiracy to effect any of these objects indictable. On the same reasoning a conspiracy by coercion or bribes to compel a raising of wages, or prevent a fellow-workman from obtaining employment, is indictable. Com. *v.* Hunt, 4 Met. 111. But a mere combination between workmen of a particular group not to work for a particular master except for higher wages, when such a combination does not include the whole market, so as to prevent the employer from obtaining other employés, or when the means adopted by those thus combining are not in themselves unlawful (*e. g.*, intimidation through threats of injury), is not in itself the subject of criminal prosecution. If it were, there are few joint operations for money making which could escape indictment. The

statute is passed (however impolitic it may be) making it a criminal offence to refuse to work at a fixed price, or to sell a commodity at a fixed price, the courts, should such a statute be held constitutional, would be bound to enforce it. But when there is no such statute, the day is past when, either in England or in the United States, a court is justified in pronouncing indictable a combination of laborers agreeing, in furtherance of this combination, only to work at prices fixed by themselves. And this is not merely because such rulings would unduly impair the liberty of the laborer, and rudely interfere with the adjustment of business relations which depend upon the consent of the parties, influenced by the condition of the markets. These are strong reasons against such interference, but there is another reason, which, if not equally strong, is certainly equally practical. We cannot indict employés who combine, without indicting capitalists who combine. If inadequacy of remuneration be no defence for laborers refusing to invest their labor in an enterprise, then inadequacy of remuneration is no defence to capitalists who decline to venture their capital in an enterprise in which laborers might be employed. If in the one case it be a crime to agree to withhold labor from the market, in the other case it is a crime to agree to withhold capital from the market. The capitalist would be compelled by indictment to keep his capital constantly active, if the workman is thus compelled to keep his labor constantly active. But I am entitled to sell either my labor or my capital for what I can get; and if I can do this without penal liability when acting by myself, I can do so without penal liability when acting with others.[1]

regulation of industry would be left, not to private enterprise and experience, but to the criminal courts.

As to Pennsylvania legislation, see Com. *v.* Haines, 15 Phila. 356.

That a combination to raise wages is not by itself indictable at common law, see 3 Steph. Hist. Cr. Law, 210.

[1] As an illustration of the change of opinion in England in reference to trades unions may be mentioned the following:—

On Nov. 13, 1879, a deputation of leading trades unionists, men and women, waited upon the Archbishop of Canterbury, at Lambeth Palace, to request him, as President of the National Society, to induce the Society to withdraw a book containing certain passages from sale, and to stop the reading of those passages in the national schools. The objectional paragraphs, which were quotations from Archbisholi Whately's "Lessons on Political Economy," were duly read out to Archbishop Tait, and commented upon by various speakers, with the view of showing their injustice and untruthfulness. Archbishop Tait, while speaking highly of Archbishop

At the same time I am not entitled, by force or threats or false pretences, to prevent others from accepting the terms which I reject. To assault, to threaten, for the purpose of obtaining from another anything of value, to obtain anything of value from him by false pretences, are offences either at common law or by statute. If so, conspiracies to effect any of these objects or to use any of these means are indictable at common law.[1]

Unlawful means should be averred.

§ 1367. As the gist of the offence, according to the view just stated, consists in the unlawfulness of the means, these means must be set forth. Hence it has been held in Massachusetts, that an indictment which charged that the defendants, journeymen boot-makers, unlawfully, etc., confederated and formed themselves into a club, and agreed together not to work for any master boot-maker, or other person, who should employ any workman or journeyman not a member of said club, after notice given to such master or other person to discharge such workman, contains no sufficient averment of any unlawful purpose or means. An indictment for a conspiracy, it was said, which does not directly aver facts sufficient to constitute the offence, is not aided by matter which precedes or follows the direct averments; nor by qualifying epithets, as "unlawful, deceitful, pernicious," etc., attached to the facts averred.[2]

Yet the means, when unlawful by statute, need not be given in detail. Thus in conspiracy to injure a tradesman, under 6 Geo. IV. c. 129, it is sufficient to allege that the defendants conspired, etc., by "molesting," "using threats," "intimidating," and "in-

Whately as a liberal statesman, went on substantially to say that when Whately wrote, the science of political economy was in its babyhood, and further thought and discussion, from various points of view, have done much to modify principles and conclusions which he announced with absolute confidence; and, upon the other hand, the action of trades unions has within recent years been moderated by the softening temper and improving manners of the times. The book containing the extracts, it was further announced, was consequently withdrawn from among the publications of the society. London World, Nov. 21, 1879. For a sketch of English law in this relation, see 3 Steph. Hist. Cr. Law, 203. By the N. Y. Penal Code of 1882, § 673, breach of contract by an employé is made under certain circumstances a misdemeanor.

[1] The policy of subjecting business combinations of this class to the jurisdiction of the criminal courts is discussed by me in 3 Cr. Law Mag. 1 *et seq.* (Jan. 1882).

[2] See Com. *v.* Hunt, 4 Met. 111, and cases cited *supra*.

toxicating" workmen hired by the tradesman, in order to force them to depart from their work; and also that they conspired, etc., to "molest," and "obstruct" the tradesman and the workmen with the same object, and in order to force him to make an alteration in the mode of carrying on his trade; the words used being those employed in the statute, and it not being necessary to set out the means of molestation, intimidation, etc., more specifically.[1] It was also held, that counts framed upon this statute, which charged that the defendants conspired, etc., by "molesting" and "obstructing," and by "using threats and intimidations," to obstruct such workmen as might be willing to be hired by the tradesman, and to prevent them from hiring themselves to him, were sufficient.

So of conspiracy by unlawful means to keep an operative out of employment.

§ 1368. On the same reasoning, a conspiracy to prevent, by means of threats or other unlawful means, an operative from obtaining any employment in his business, is indictable.[2] It is also indictable, as we have seen, to conspire to molest and obstruct workmen, with a view to induce them to leave their employment.[3] But force or threats of force must be used to constitute such an offence. Mere argumentative appeals to induce an operative to leave his employment are not enough.[4]

So to engross any particular business staple or transportation.

§ 1369. It has also been held to be indictable to combine to engross by coercion or fraudulent means, under one control, any particular business staple (*e. g.*, wheat, gold, cotton, coal), so as to force its purchase by the community at exorbitant prices.[5] A learned Pennsylvania judge has gone so far as to say that a combination between miners in a particular market, controlling the coal in that market, to hold up the price of coal in such market, is indictable at common law. "When competition is left free," said Agnew, J., "individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their

[1] R. *v.* Rowlands, 9 Eng. Law & Eq. 287; 17 Q. B. 671; 5 Cox C. C. 436.

[2] R. *v.* Hewitt, 5 Cox C. C. 162.

[3] R. *v.* Rowlands, *ut supra*; R. *v.* Hibbert, 13 Cox C. C. 82; 13 Moak's Eng. R. 433. See to same case a valuable note by Mr. Moak.

[4] See Com. *v.* Sheriff, 15 Phila. 393.

[5] R. *v.* Norris, 2 Kenyon, 300. *Supra*, § 1366. As to engrossing see further, *infra*, § 1851.

entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the lakes. This combination has a power in its confederated form which no individual action can confer. . . . The influence of a lack of supply, or the rise in the price of an article of such prime necessity, cannot be measured. It permeates the whole mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offence."[1] But this cannot be sustained unless the combination acts through coercive or fraudulent means, or involves the absorption of an entire necessary staple. If there is no fraud, or no intimidation, in the means adopted, rulings making penal agreements between particular owners to keep up prices, are open to the following objections: (1) They would be futile. Combinations, if desirable to the owners of a particular commodity to keep up its price, would consist of a tacit understanding, which no legal process could reach. (2) If effective, such rulings would cover every combination to obtain remunerative prices; yet without such a combination, no great staples could be brought into the market. (3) They put a prerogative which can be best exercised by individuals, as the exigencies of the time prompt, into the hands of the State, in defiance of the principle that it is not within the province of the State to do that which can be best done by individuals. (4) They establish a standard which is fixed, and therefore often harsh and oppressive, in place of one which is elastic, yielding to the necessities of the market. A governmental standard once determined by law can only be changed by long and difficult processes. But combinations to keep up prices of staples, even if occasionally operative, are short-lived from their own nature. And if all combinations to keep up prices are made indictable, the only reliable guard against sudden and destructive panics is removed. At the same time a secret combination to obtain control, for extortionate objects, of an entire necessary staple, is an indictable conspiracy at common law.[2] On the same reasoning a "pooling" arrangement between several com-

[1] Morris Run Coal Co. *v.* Barclay Coal Co., 68 Penn. St. 173.

[2] Ibid.

mon carriers, having control of the market, by which arrangement exorbitant tolls are to be charged, is indictable.[1]

To suppress competition at a public auction.

§ 1370. It has been also said that it is an indictable offence for parties attending an auction to agree together that one only of them should bid for each article sold, and that all articles thus bought by any of them should be sold again among themselves at a fair price, and the difference between the auction price and the fair price divided among the several parties concerned in the fraud,[2] though this does not apply to combinations between parties *bonâ fide* buying property in a block for a business purpose, and not for the purpose of crushing out competition.[3] It is clearly a conspiracy to agree by fraudulent contrivance to cheat at a mock auction.[4]

§ 1371. Whenever there is a combination to oppress or defraud the public by a fraudulent or coercive confederacy, such combination is an indictable conspiracy at common law.[5] Thus an indictment

[1] See, to this effect, a remarkable opinion by Judge Grier (afterwards of the Federal Supreme Court), in 1842, when sitting in Pittsburg as a judge of the State District Court, that a "pooling" combination by which all the transportation companies of a particular region agree to enforce extortionate prices is an indictable conspiracy. See Whart. Prec. of Indictments, No. 658. In this case the defendants, among whom were some of the most prominent citizens of Pittsburg, were indicted for conspiracy, convicted, and then sentenced; but were then pardoned by the governor. The case was in the Quarter Sessions, June T. 1842, No. 37. See 7 Penns. Mag. 167. The trial was before Judge Patton, before whom the defendants were convicted and sentenced to a fine of $100 and two months' imprisonment. The case came before Judge Grier before the bill was found, on a writ of *habeas corpus*. The defendants were pardoned by the governor, who, afterwards, in his annual message, stated that by the conviction alone the "conspiracy" had been broken up. The ruling is good law in all cases in which the effect of the pooling is to extort by unreasonable rates. Whart. on Cont. § 442 *a*.

[2] Levi *v.* Levi, 6 C. & P. 239; Cocks *v.* Izard, 7 Wal. 559; Gibbs *v.* Smith, 115 Mass. 592. See Whart. on Cont. § 443. As to constitutionality of statutes, fixing prices of common carriers, see Whart. Com. Am. Laws, §§ 488 *et seq.*

"The ruling in Levi *v.* Levi," says Mr. Wright, "may be explained on the ground that had the auctioneer known of the combination he would not have knocked down the goods to any of the persons concerned in it; that his consent to the transfer of property was obtained by a false appearance of competition." Wright's Conspir. 34. Perhaps a better view is that for two or more persons to attempt to get property by deceptive reciprocal references is a cheat at common law, in the nature of the presentation of false tokens.

[3] Whart. on Cont. §§ 442 *et seq.*

[4] R. *v.* Lewis, 11 Cox C. C. 404.

[5] See *supra*, § 1349.

holds for a conspiracy to raise the price of the public funds by false rumors, as being a fraud upon the public;[1] for a conspiracy to cheat by betting;[2] for a conspiracy by persons to cause themselves to be reputed men of property, in order to defraud tradesmen;[3] for a conspiracy, as in a case already noticed, by violence, threats, contrivance, or other sinister means to procure the marriage of a pauper of one parish to a pauper of another, in order to charge one of the parishes with the maintenance of both;[4] for a conspiracy to defraud the public by issuing and negotiating bills in the name of a fictitious and pretended banking firm;[5] for a conspiracy fraudulently to induce brokers to advance money;[6] for a conspiracy untruly and fraudulently to overvalue a commodity;[7] for a conspiracy to cheat railroad companies by fraudulently filling up stolen blank tickets;[8] for a conspiracy fraudulently to raise tolls on the public works;[9] for a conspiracy fraudulently and corruptly to interfere with or to pervert public justice;[10] for a conspiracy to obtain money by selling a public office.[11] But public officers who purchase supplies without advertising for bidders, in contravention of a statute of the State, are not guilty of an indictable conspiracy unless they act corruptly in refusing to advertise.[12]

And so to combine to do public wrong.

So to tamper with an election.

§ 1372. It is clear that to conspire to fraudulently tamper with an election is indictable at common law when such election is appointed by the applicatory local law.[13] The same principle extends to elections in private corpora-

[1] R. *v.* De Berenger, 3 M. & S. 67.

[2] R. *v.* Bailey, 4 Cox C. C. 390; R. *v.* Hudson, 8 Ibid. 305.

[3] R. *v.* Roberts, 1 Camp. 399; Gardner *v.* Preston, 2 Day, 205. See State *v.* Clary, 64 Me. 369.

[4] R. *v.* Tarrant, 4 Burr. 2106; R. *v.* Tanner, 1 Esp. 304; R. *v.* Seward, 1 Ad. & El. 706; and see 1 East P. C. 461, 462; 8 Mod. 620. *Supra*, § 1362.

[5] R. *v.* Hevey, 2 East P. C. 858. See State *v.* Norton, 3 Zabr. 33.

[6] Com. *v.* Wrigley, 6 Phila. 169.

[7] R. *v.* Stenson, 12 Cox C. C. 111; R. *v.* Kenrick, Dav. & M. 208; 5 Q. B. 49; R. *v.* Levine, 10 Cox C. C. 374. *Supra*, § 1349.

[8] Bloomer *v.* State, 48 Md. 521.

[9] Wharton's Prec. 658, as cited *supra*, § 1369.

[10] *Supra*, § 1332; *infra*, § 1380.

[11] R. *v.* Pollman, 2 Camp. 229; R. *v.* Vaughan, 4 Burr. 2494. *Infra*, § 1375.

[12] People *v.* Powell, 63 N. Y. 88.

[13] *Infra*, § 1832; Com. *v.* McHale, 97 Penn. St. 397. See 7 Cox App. 15; R. *v.* Haslam, 1 Den. C. C. 73. As to prosecutions under federal statute protecting civil rights, see *supra*, § 1356 *a*. U. S. *v.* Crosby, 1 Hughes, 448; Yarborough, *ex parte*, 110 U. S. 651; U. S. *v.* Waddell, 112 Ibid. 76. *Infra*, § 1848 *a*.

tions. Thus an indictment for a conspiracy alleged that the defendants, fraudulently contriving to procure the election of certain persons as directors of an insurance company; and thereby cause themselves to be employed in the service of the company, fraudulently conspired to induce persons, by issuing to them fraudulent policies of insurance, to appear at the annual meeting of the company and vote for directors. It was held, that while the ultimate object of the respondents, that is, to procure themselves to be employed by the company, was lawful, the means were fraudulent, immoral, and illegal, it appearing that the defendants had agreed with the insured that the policies should be held and treated as mere nullities for every purpose but that of authorizing the holders to vote thereon at the annual meeting, although the defendants agreed also that the policies should be duly approved by the requisite numbers of directors, not cognizant of the intended fraud, upon applications in regular form, and although the policies might be binding on both parties.[1]

So to defraud revenue.

§ 1373. The general features of § 5440 of the Revised Statutes of the United States, based on the 30th section of the act of Feb. 3, 1867, have been already noticed.[2] It may be here particularly observed that a conspiracy to defraud the government of revenue is indictable under this statute.[3]

[1] State *v.* Burnham, 15 N. H. 396.

[2] *Supra*, § 1356 *a*.

[3] U. S. *v.* Boyden, 1 Low. 266; U. S. *v.* Smith, 2 Bond, 323; U. S. *v.* Rindskopf, 6 Biss. 259; U. S. *v.* Babcock, 3 Dill. 581. For conspiracy to import goods without duty, see U. S. *v.* Graff, 14 Blatch. 381; and see U. S. *v.* Miller, 3 Hughes, 553; U. S. *v.* Walsh, 5 Dill. 58. *Supra*, § 1356 *a*.

In U. S. *v.* Hirsch, 100 U. S. 32, it was held that the statute above noticed (§ 5440 Rev. Stat.) was not a revenue law, and that a person indicted thereunder for defrauding the revenue is entitled to plead the limitation of Revised Statutes, section 1044, of three years, and that the limitation of section 1046, of five years, for "any crime arising under the revenue laws," does not apply. It was further said that a conspiracy to defraud the government, though it may be directed to the revenue as its object, is punishable by the general terms of the statute, which makes penal all conspiracies to defraud the United States, and cannot be said, in any just sense, to arise under the revenue laws. See comments, *supra*, § 1356 *a*.

In U. S. *v.* Donan, 11 Blatch. 168, it was said by Benedict, J.: "The 30th section of the Act of March 2, 1867, creates an offence which may be committed without any other action on the part of the accused than that of conspiring with another to commit an offence against the laws of the United States, or to defraud the United States. The unlawful agreement is, therefore,

So to publish a false statement of the affairs of a banking or trading company.

§ 1374. We now recur to the same distinction as was announced in discussing cheats at common law. Mere bragging declarations, being matters of opinion, are not indictable; when, however, there is a combination to induce, by means of artful falsification of fact, the public to take stock in a worthless concern, then the offenders are guilty of conspiracy.[1] Thus, in an English case, tried 1858, the directors of a joint stock bank, knowing it to be in a state of insolvency, issued a balance sheet showing a profit, and

the gist of the offence which this section intended to create. The requirement that some act to effect the object of the conspiracy be done by some one of the conspirators is intended to afford a *locus poenitentiae*. Until some act be done by some one of the conspirators to effect the object of the unlawful agreement, all parties to the agreement may withdraw, and thus escape the effect of the statute. After such an act all are liable to the penalty. The act to effect the object of the conspiracy, which the statute calls for, is not designated as an overt act, and was not intended to be made an element proper of the offence. The offence is the conspiracy. Some act by some one of the conspirators is required, to show, not the unlawful agreement, but that the unlawful agreement, while subsisting, became operative. The offence of conspiracy is committed when to the intention to conspire is added the actual agreement; and this intent to conspire, coupled with the act of conspiring, completes the offence intended to be created by the statute, notwithstanding the requirement that the prosecution show, by some act of some one of the conspirators, that the agreement went into actual operation.

"If then an indictment correctly charges an unlawful combination and agreement as actually made, and, in addition, describes any act by any one of the parties to the unlawful agreement, as an act intended to be relied on to show the agreement in operation, it is sufficient, although, upon the face of the indictment, it does not appear in what manner the act described would tend to effect the object of the conspiracy." For statute see *supra*, § 1356 *a*.

[1] In an English case determined in 1876, the second count alleged that the defendants, who were directors, etc., of a new company, had conspired to deceive the members of the committee of the Stock Exchange, and to induce them, contrary to the intent of certain of their rules, to order a quotation of the shares of the company in the official list of the Stock Exchange, and "thereby to persuade divers liege subjects, who should thereafter buy and sell the shares of the said company, to believe that the said company was duly formed, and had complied with the said rules, so as to entitle the company to have their shares quoted in the official list of the Stock Exchange." It was ruled (affirming the decision of the Queen's Bench Division below), that the second count contained averments which, if taken to be proved in a sense adverse to the defendants, sufficiently supported the charge of criminal conspiracy. R. *v.* Aspinall, 36 L. T. Rep. (N. S.) 297; 13 Cox C. C. 563; L. R. 1 Q. B. D. 730. See Whart. on Cont. § 376.

thereupon declared a dividend of six per cent. They also issued advertisements inviting the public to take shares, upon the faith of their representations that the bank was in a flourishing condition. On an *ex officio* information filed by the attorney-general they were found guilty of a conspiracy to defraud.[1]

So to attempt corrupt bargains with or for government.

§ 1375. It has been already observed,[2] that a conspiracy to corruptly procure office is indictable. In an early Virginia case it was held indictable for two justices, in whom was vested certain county nominations, to agree that one would vote for A. as commissioner, if the other would vote for B. as clerk.[3] But if this principle be logically extended, few legislative or executive compromises could stand.[4]

[1] R. *v.* Brown, 7 Cox C. C. 442; R. *v.* Esdaile, 1 F. & F. 213. See R. *v.* Gurney, 11 Cox C. C. 414. *Supra*, § 1349.

[2] R. *v.* Pollman, 2 Camp. 229. *Supra*, § 1371. As to bribery, see *infra*, § 1858.

[3] Com. *v.* Callaghan, 2 Va. Cas. 460.

[4] See *supra*, § 1360.

This principle, however, was declared by the late Judge B. R. Curtis, in his address on behalf of the Whig representatives to the people of Massachusetts, to apply to the coalition, in 1851, of the Free Soil and Democratic representatives in the Massachusetts legislature; the purpose of which coalition was the election of Democrats to State offices and a Free Soiler to the U. S. Senate. He thus characterizes it:—

"But this is not a coalition. A compact between two distinct parties, having different political principles, for the purpose of dividing public offices between them,—a compact to do this by electing a man for governor in whom the one party does not confide,—is not a coalition, but a factious conspiracy. And when such a compact is made between those who have merely a delegated authority, held in trust, to be used, under the sanction of an oath to place in office only those in whom the trustees do confide, *it is a factious conspiracy to violate a public trust, and as such criminal, not only in morals, but in the law of the land.* It is true the statute of the State has not defined this offence, as it has failed to do others. . . . . But the common law which pervades society, and enters into the relations of life both public and private, with its benign but bracing influence, deems such an abuse of a public trust a misdemeanor, punishable by indictment. And there is high authority that a bargain like this, even when made by single persons, and in reference to subjects of far less public concern than this, is an indictable offence. In the year 1825, a case came before the highest criminal court of one of our sister States, wherein it appeared that A. and B. were justices of the peace, and as such had the right to vote in the county court for certain county officers; that they agreed together that A. would vote for C. for commissioner, in consideration that B. would vote for D. for clerk; that they voted in pursuance of that agreement. The statute of the State, like ours, did not reach the case. But their common law, the same as ours, declared: 'The defendants were justices of the peace, and as such held an office of trust and confidence. In that character they were called upon to vote for others, for offices also implying high trust and confidence. Their duty required them to vote in reference only to the merit and qualifications of the officers; and yet, upon the pleadings in this case, it appears that they wickedly and corruptly violated their duty, and betrayed the confidence reposed in them, by voting under the influence of a corrupt bargain, or reciprocal promise, by which they had come under a reciprocal obligation to vote respectively for a particular person, no matter how inferior their qualifications to their competitors. It would seem, then, upon these general principles, that the offence in the information is indictable at common law.' Com. *v.* Callaghan, 2 Va. Cas. 460.

"This is the manly and clear response of the common law,—the inheritance of our fathers and ourselves,—not only in that State, but wherever it prevails. And now what are the differences between that crime and the case we lay before you? The parties to that bargain were the electors in the court of a county; the parties to this bargain were electors in the Legislature of Massachusetts. The parties to that bargain were two individuals, and their compact controlled two votes; the parties to this bargain were numerous, and their compact controlled many votes; and every reflecting man must see that a conspiracy becomes more criminal the more persons it embraces, and the more power it wields. The parties to that bargain made it 'without reference to the qualifications of the candidates;' the parties to this bargain entered into it with an open declaration that one of the candidates was distrusted by one party, and the person who has to be voted for by the other party was not even selected, nothing being known, except that he was not to act on the principles which one of the parties who were to vote for him had long professed to hold dear. The subjects of the bargain in that case were a county clerk and a county commissioner; the subjects of this bargain were the governor of Massachusetts and one of its senators in the Congress of the United States. And finally, in that case, it does not appear that the officers voted for by the criminals were actually elected; while in this case it is known that this corrupt agreement made one man governor, and caused another to be declared elected a senator in Congress." Life and Writings of B. R. Curtis, vol. i. pp. 143–145.

In Marshall *v.* R. R., 16 How. U. S. 336, the court said, though this was not the point before them, "that what in the technical language of politicians is termed long-rolling, is a misdemeanor at common law, punishable by indictment."

[1] People *v.* Powell, 63 N. Y. 88.

[2] Shircliff *v.* State, 96 Ind. 369.

To constitute a conspiracy in such cases it is necessary that there should be a corrupt intent to contravene either a statute or a settled provision of the common law.[1] But in any view a conspiracy to bribe a public officer is indictable.[2]

3. *To falsely accuse another of Crime, or use other Improper Means to injure his Reputation, or extort Money from him.*

Conspiracy to falsely prosecute is indictable.

§ 1376. A conspiracy to falsely charge a man with any indictable offence has frequently been held the subject of indictment;[1] but it is not an indictable offence for two or more persons to consult and agree to prosecute a person who is guilty, or against whom there are reasonable grounds of suspicion.[2] The proof of guilt, however, must be confined in the latter case to the offence charged.[3]

Conviction no bar.

§ 1377. Even the legal conviction of an innocent man is no bar to an indictment against those who by such combination procured the conviction.[4] And an indictment was sustained against three defendants for a conspiracy in combining to arrest one C. C., a resident of the county of Philadelphia, on the false charge of deserting the army of the United States, in the year 1847; and after arresting him, in forcibly carrying him to New York, for the purpose of obtaining the reward of $30, which had been offered by the government for the arrest and safe delivery of a soldier who had deserted by that name.[5]

It has been held a conspiracy to combine to induce a tavern-keeper to furnish beer on Sunday, and thus to violate the Sunday liquor law.[6]

[1] Foster, 130; 1 Hawk. c. 72, s. 2; Ashley's Case, 12 Co. 90; R. v. McDaniel, 1 Leach, 45; R. v. Spragg, 2 Burr. 993; R. v. Best, 2 L. Raym. 1167; Salk. 174; Com. v. Tibbetts, 2 Mass. 536; Elkin v. People, 58 N. Y. 177; State v. Buchanan, 5 Har. & J. 317; Johnson v. State, 2 Dutch. 313; Slomer v. People, 25 Ill. 70. See Davenport v. Lynch, 6 Jones, N. C. 545.

As to extorting hush money see R. v. Hollingberry, *infra*, § 1379. That a conspiracy to slander is indictable see State v. Hickling, 41 N. J. L. 209, 1879. *Infra*, § 1379.

Acusations for the purpose of extortion are elsewhere discussed. *Infra*, § 1664.

[2] R. v. Best, 1 Salk. 174; 2 L. Raym. 1167; Com. v. Tibbetts, 2 Mass. 536; Com. v. Leeds, 9 Phila. 569; Com. v. Dupuy, Brightly, 44. See as to associations to detect crime, Wh. Cr. Pl. & Pr. § 668; People v. Saunders, 25 Mich. 120.

[3] Com. v. Andrews, 132 Mass. 263.

[4] Com. v. M'Clean, 2 Parsons, 367.

[5] Ibid. A count in an indictment for conspiracy, averring that defendants corruptly charged one with being the father of a child to be born bastard, and did various acts to effect the object of the conspiracy, is good. Johnson v. State, 2 Dutch. 313.

[6] Com. v. Leeds, 9 Phila. 569.

Indictment need not detail imputed crime.

§ 1378. When the object of the combination is to indict the prosecutor, it is not necessary to show with what particular offence it was intended to charge him, but it will suffice to say that they conspired to indict him of a crime punishable by the laws of the land, and then it may be alleged that they, according to the conspiracy, did falsely indict him.[1] It is not necessary to aver that the man is innocent of the offence;[2] for he will be presumed to be innocent until the contrary appear.[3]

Conspiracy to extort money is indictable.

§ 1379. A conspiracy to extort money by charging the prosecutor with an offence or scandal is indictable,[4] and this whether the offence is criminal or not;[5] or whether the person charged is guilty or not.[6]

So to defame.

Even when there is no extortion, and no criminal offence charged, it is indictable to conspire to degrade the character of another by charging him with disgraceful offence.[7] And wherever libelling is indictable, an attempt or conspiracy to libel is indictable.

4. *Conspiracies to obstruct Justice.*

So to obstruct public justice.

§ 1380. Any confederation whatever, tending to obstruct the course of justice, is indictable.[8] Thus, a conspiracy by certain justices of the peace to certify that a highway was in repair, when they knew it to be otherwise, was

[1] R. v. Spragg, 2 Burr. 993.

[2] R. v. Kinnersley, 1 Str. 193; Johnson v. State, 2 Dutch. 313.

[3] R. v. Best, 1 Salk. 174; 2 Ld. Raym. 1167; Com. v. Andrews, 132 Mass. 263.

On an indictment for a conspiracy to prosecute a person who was not guilty, it is inadmissible to prove that the defendants prosecuted other persons who were not guilty, no system being set up. State v. Walker, 32 Me. 195.

[4] R. v. Hollingberry, 6 D. & R. 345; 4 B. & C. 329; Com. v. Andrews, 132 Mass. 263; Com. v. Nichols, 134 Ibid. 531; Com. v. Wood, 7 Bost. Law Rep. 58; Whart. Prec. 58.

[5] R. v. Rispal, 1 W. Bl. 368; 3 Burr. 1320.

[6] R. v. Hollingberry, *supra*. In this case it was held that the means of extortion need not be stated. See, as to threats to extort money, *infra*, § 1664.

[7] Gibson, C. J., in Hood v. Palm, 8 Barr, 237; State v. Hickling, *supra*, § 1376.

[8] R. v. Hamp, 6 Cox C. C. 167; State v. Noyes, 25 Vt. 415; Com. v. M'Lean, 2 Parsons, 367; State v. Norton, 3 Zabr. 33; State v. McKinstry, 50 Ind. 465; State v. De Witt, 2 Hill (S. C.), 282. For offence under federal statute, see U. S. v. Kindred, 4 Hughes, 493.

held indictable.[1] So, where several persons conspired to procure others to rob one of them, in order, by convicting the robber, to obtain the reward then given by statute in such case, and the party who accordingly committed the robbery was afterwards convicted and actually executed, they were indicted for the conspiracy and convicted.[2] It is indictable to conspire to destroy a will, with a view to defraud the devisee.[3] And the same rule applies where the offence is the suppression or false concoction of testimony to be used in a judicial proceeding.[4]

V. GENERAL REQUISITES OF INDICTMENT.

1. *Executed Conspiracies, and herein of Overt Acts.*

§ 1381. When the conspiracy is executed it is better that the facts should be stated specially, so that not only the record may present a graduated case for the sentence of the court, but also that the case, when it goes to the jury, may not be open to the objection that the grand jury having it in their power, from the examination of the witnesses for the prosecution, to find specially the agency through which the conspirators worked, confined themselves to a general finding of an unexecuted conspiracy.[5] It is not pretended that any of the cases go so far as to prescribe this doctrine, nor is it denied that very frequently, especially in the earlier cases, the courts have sustained counts for unexecuted conspiracies (*e. g.*, conspiracies "to cheat by false pretences"), where on the trial it appeared that the supposed naked conspiracy had been fully executed, and had resolved itself into an independent misdemeanor.[6] But wherever there has been such execution of the conspiracy, it is prudent to include in the indictment at least one count setting forth specially the overt acts.[7]

Executed conspiracy should be so averred.

[1] R. *v.* Mawbey, 6 T. R. 619.

[2] R. *v.* M'Daniel, 1 Leach, 45; Fost. 130.

[3] State *v.* De Witt, 2 Hill (S. C.), 282.

[4] Ibid.; R. *v.* Mawbey, 6 T. R. 619. *Supra*, §§ 1334 *et seq.*

[5] U. S. *v.* Cruikshank, 92 U. S. 542; State *v.* Clary, 64 Me. 369; State *v.* McKinstry, 50 Ind. 465; Elkin *v.* People, 28 N. Y. 177.

[6] See Alderman *v.* People, 4 Mich. 414. This is still the law in England (R. *v.* Esdaile, 1 F. & F. 213; R. *v.* Brown, 7 Cox C. C. 442), subject to the defendant's right to call for a bill of particulars. And compare *supra*, § 1348, note. That the word "conspire" sets up a technical conspiracy, see State *v.* Bradley, 48 Conn. 535.

[7] See *supra*, § 1348.

Whether under the federal statute making conspiracies to defraud the government of the United States, or to commit any offence against it, such specification is necessary, has been already considered.[1]

§ 1382. Hence it is usual to set out the overt acts, that is, those acts which may have been done by any one or more of the conspirators, in pursuance of the conspiracy, and in order to effect the common purpose of it; but this is not requisite, if the indictment charge what is in itself an unlawful conspiracy.[2] The pleading of the offence is complete in the conspiracy; and the overt acts, though it is proper to set them forth, may be either regarded as matters of aggravation, or discharged as surplusage.[3] As has already been seen, in an indictment for conspiracy at common law to effect objects prohibited by a statute, it is enough to follow the words of the statute, without giving overt acts.[4]

Overt acts not necessary when conspiracy is *per se* unlawful.

When a distinct offence is stated as an overt act, such offence, not flowing from and distinct from the conspiracy, this is demurrable.[5]

§ 1383. How far the overt acts can be taken in to aid the charging part, is thus discussed by Tindal, C. J.:[6]—

[1] *Supra*, § 1356.

[2] R. *v.* Kinnersley, 1 Str. 193; R. *v.* Gompertz, 9 Q. B. 824; Sydserff *v.* R., 11 Ibid. 245; R. *v.* Seward, 1 Ad. & El. 706; 3 N. & M. 557; R. *v.* Heymann, L. R. 8 Q. B. 102; 12 Cox C. C. 383; R. *v.* Gill, 2 B. & Al. 204; U. S. *v.* Dustin, 2 Bond, 332; State *v.* Bartlett, 30 Me. 132; State *v.* Ripley, 31 Ibid. 386; State *v.* Noyes, 25 Vt. 415; Com. *v.* Eastman, 1 Cush. 190; Com. *v.* Shedd, 7 Ibid. 514; March *v.* People, 7 Barb. 391; Clary *v.* Com., 4 Barr, 210; Heine *v.* Com., 91 Penn. St. 145; Isaacs *v.* State, 48 Miss. 234; Alderman *v.* People, 4 Mich. 414; Landringham *v.* State, 49 Ind. 186. See *infra*, § 1400. And it is not necessary that the character of the relation between the act and the conspiracy should be detailed in the indictment. U. S. *v.* Donan, 11 Blatch. 168. See Cole *v.* People, 84 Ill. 216; State *v.* Potter, 28 Iowa, 554; State *v.* Stevens, 30 Ibid. 391, cited *infra*, § 1384.

[3] O'Connell *v.* R., 11 Cl. & Fin. 155; U. S. *v.* Ulrici, 3 Dill. 532; State *v.* Ripley, 31 Me. 386; State *v.* Bartlett, 30 Ibid. 132; State *v.* Noyes, 25 Vt. 415; State *v.* Straw, 42 N. H. 393; Com. *v.* Davis, 9 Mass. 415; Com. *v.* Tibbetts, 2 Ibid. 536; Com. *v.* Eastman, 1 Cush. 189; Collins *v.* Com., 3 S. & R. 220; State *v.* Buchanan, 5 Har. & J. 317; People *v.* Arnold, 46 Mich. 268; State *v.* Cawood, 2 Stew. 360.

[4] R. *v.* Rowlands, 2 Den. C. C. 364; 9 Eng. L. & Eq. 287; State *v.* Hewett, 31 Me. 396; State *v.* Noyes, 25 Vt. 415; Com. *v.* Fuller, 132 Mass. 563. *Supra*, §§ 1345, 1348, 1352.

[5] State *v.* Kennedy (Iowa, 1884), 18 Rep. 139.

[6] R. *v.* King, 7 Q. B. 782, 807.

Overt acts useful as explaining the conspiracy charge.

"But it was then urged by the learned counsel for the crown that supposing these objections to be well founded, this defect in the allegation of the conspiracy was cured by referring to the whole of the indictment the part stating the overt acts, as well as that stating the conspiracy; and Rex *v.* Spragg[1] was cited as authority that the whole ought to be read together. The point decided in that case appears to have been merely this, that in an indictment for a conspiracy, though the conspiracy be insufficiently charged, yet if the rest of the indictment contains a good charge of a misdemeanor, the indictment is good. Lord Mansfield distinguishes between the allegation of the unexecuted conspiracy to prefer an indictment, as to the sufficiency of which he gave no opinion, and that of the actual preferring of the indictment maliciously and without proper cause, which he calls a completed conspiracy actually carried into execution; and this he holds to be clearly sufficient; and no doubt it was so; for, rejecting the averment of the unexecuted conspiracy, the indictment undoubtedly contained a complete description of a common law misdemeanor.

"But if we examine the allegations in this indictment, there is no sufficient description of any act, done after the conspiracy, which amounts to a misdemeanor at common law. None of the overt acts are shown by proper averments to be indictable. The obtaining goods, for instance, from certain named individuals, upon credit, without any averment of the use of false tokens, is not an indictable misdemeanor; and if it is said that because it is averred to have been done in pursuance of the conspiracy above mentioned, it must be taken to be an equivalent to an averment that the conspiracy was to cheat the named individuals of their goods, the answer is, first, that it does not necessarily follow, because the goods were obtained in pursuance of the conspiracy to cheat some persons, that the conspiracy was to cheat the persons from whom the goods were obtained; they might have been obtained from A. in the execution of an ulterior purpose to cheat B. of his goods; and, secondly, another answer is, that if the averment is to be taken to be equivalent to one that the goods were obtained from the named individuals in pursuance of an illegal conspiracy to cheat and defraud those named

[1] 2 Burr. 993.

individuals of their goods, it would still be defective, as not containing a *direct and positive* averment that he did conspire to cheat and defraud these persons, which an indictment for a conspiracy, where the conspiracy itself is the crime, ought certainly to contain."[1] At the same time, overt acts may be used as indicating the object of the conspiracy.[2] And such overt acts are divisible.[3]

§ 1384. In several jurisdictions overt acts are by statute made essential to conspiracy. Yet it is not necessary that these acts should be completed. If they be in any way embodied into shape, it is enough.[4] In Illinois they need not be set forth.[5]

Overt acts may be required by statute.

2. *Unexecuted Conspiracies.*

§ 1385. Where the conspiracy is unexecuted, and nothing more is likely to appear in evidence than a mere inoperative confederacy on the part of the defendants to do an indictable act, it would seem prudent to explain the fact of the non-setting out of the features of the offence by stating that it was never consummated, and that the grand jury therefore were ignorant of its particular character. Thus, in a

Fact of their omission may be explained.

[1] See, to same effect, Com. *v.* Shedd, 7 Cush. 514; People *v.* Arnold, 46 Mich. 268.

[2] R. *v.* Esdaile, 1 F. & F. 213. This has been reaffirmed in the following case: An indictment averred that C. died possessed of East India stock, leaving a widow; that the defendants conspired, by false pretences and false swearing, to obtain the means and power of obtaining such stock; that, in pursuance of such conspiracy, they caused to be exhibited in the Prerogative Court of Canterbury a false affidavit made by one of them, in which the deponent stated that C.'s widow had died without taking out administration to C., and that deponent was one of her children; and that the defendants fraudulently obtained for deponent, as one of the children of C. a grant of administration on his estate. On motion to arrest the judgment, on the ground that a charge of conspiracy to obtain the means and power of obtaining the stock did not describe any offence, it was ruled that the statement of the overt act done in furtherance of the objects of conspiracy was so interwoven with the charge of conspiracy itself, as to show an unlawful conspiracy. Wright *v.* R. (in error) 14 Q. B. 148. But it was held, that at all events the overt acts in themselves constituted a misdemeanor on which the court could legally pronounce judgment. Ibid.

[3] See Whart. Cr. Pl. & Pr. § 133.

[4] People *v.* Mather, 4 Wend. 229; People *v.* Chase, 16 Barb. 495; State *v.* Norton, 3 Zabr. 33; State *v.* Porter, 28 Iowa, 554; State *v.* Stevens, 30 Ibid. 39. See *infra*, § 1400; *supra*, § 1356 *a*.

[5] Cole *v.* People, 84 Ill. 216.

leading case already cited,[1] Tindal, C. J., pointedly intimates that where the prosecutor is shown to have had it in his power to describe any of the objects of the conspiracy, a failure to do so is a sensible defect; and his reasoning leads to the position that, where a material gap exists, the pleader should aver specially the reasons why the description of the offence is not complete. That this course is pursued in indictments for forgery, where the grand jury are unable to describe the forged instrument from the fact of its loss or destruction, is shown,[2] and the same reasoning may be not inaptly applied to the present case. At the same time it is clear that when the conspiracy is to do an act *per se* indictable, neither means nor overt acts need be stated.[3]

Bill of particulars may be required.

§ 1386. Whenever the court deem it necessary, a bill of particulars will be ordered, to supply the defendant with the facts on which the prosecution relies to establish the general offence.[4]

3. *Joinder of Counts.*

Counts for conspiracy can be joined with counts for substantive offence.

§ 1387. The policy of our courts, as has already been seen in a kindred line of offences, has permitted a joinder of counts, which, though originally discountenanced in England, can work no injustice to the prisoner, and may save great expense and loss of time. Thus, counts for robbery and for attempts to rob; for rape and attempts to ravish; for burglary and attempts to commit burglary, are frequently joined in the same indictment.[5] When the defendant is tried on the two charges together, he has the advantage of bringing to bear on the lighter offence the full number of challenges awarded to him on the heavier; nor can he be said to be embarrassed in the preparation of his defence, as precisely the same evidence which would disprove the attempt would disprove the consummation. The only difference is, that after an acquittal of the felony, instead of being subjected to another binding over and trial on the constituent misdemeanor, the two charges are tried at the same time, when the evidence on each side is fresh and at hand, and when neither can take advantage of a prior knowledge of the antagonist's case. That this practice extends as properly to conspiracies to commit indictable offences, as to attempts or assaults with intent to commit the same, may be urged with great reason. By such a course the difficulty of merger will be avoided; for if the attempt were completed, the verdict attaches to the completed offence; if not, to the conspiracy.[1]

[1] R. *v.* King, 7 Q. B. 782, 807.

[2] *Supra*, § 1344; Whart. Cr. Pl. & Pr. § 156. See State *v.* Hewett, 31 Me. 396.

[3] *Supra*, §§ 1345, 1348, 1352, 1382; *infra*, § 1400. See, also, R. *v.* Hollingberry, 6 D. & R. 345; 4 B. & C. 329; O'Connell *v.* R., 11 C. & F. 155; R. *v.* Carlisle, Dears. C. C. 337; 6 Cox C. C. 366.

[4] R. *v.* Kenrick, per Lord Denman, C. J.; 5 Q. B. 49; R. *v.* Hamilton, 7 C. & P. 448. See R. *v.* Brown, 8 Cox C. C. 69; R. *v.* Rycroft, 6 Ibid. 76; R. *v.* Esdaile, 1 F. & F. 213; Whart. Cr. Pl. & Pr. §§ 157, 702.

[5] Harman *v.* Com., 12 S. & R. 69; Burk *v.* State, 2 Har. & J. 426; State *v.* Coleman, 5 Port. 32; State *v.* Montague, 2 McC. 257; State *v.* Gaffney, Rice, 431; State *v.* Boise, 1 McMull. 190. Whart. Cr. Pl. & Pr. §§ 290–1.

Where an indictment for conspiracy contains several counts, if only a single conspiracy is proved, the verdict may nevertheless be taken on so many of the counts as describe the conspiracy consistently with the truth.[2]

4. *Joinder of Defendants.*

Two or more persons necessary to offence.

§ 1388. A conspiracy must be by two persons at least: one cannot be convicted of it, unless he has been indicted for conspiring with named persons, or with persons to the jurors unknown.[3] So on an indictment for conspiracy against two, the acquittal of one is the acquittal of the other.[4] But where three persons were engaged in a conspiracy, and one was acquitted and another died before trial, it was held that the third could nevertheless be tried and convicted.[5]

Whether a conviction can take place when two defendants being joined, one of them was insane at the period of the alleged offence, has been rightly questioned.[6] Certainly if one defendant is incom-

[1] See *supra*, § 1344.

[2] R. *v.* Barry, 4 F. & F. 389.

[3] 1 Hawk. c. 72; R. *v.* Denton, Dears. C. C. 3; R. *v.* Thompson, 16 Q. B. 832; 5 Cox C. C. 166; Mulcahy *v.* R., L. R. 3 H. L. 306; U. S. *v.* Cole, 5 McLean, 513; Com. *v.* Irwin, 8 Phila. 380. As to joinder of defendants, see Whart. Cr. Pl. & Pr. § 305; as to verdict, Ibid. § 755, and see Whart. Crim. Ev. § 136; as to effects of allegation "unknown," see Whart. Cr. Pl. & Pr. §§ 104, 111. *Infra*, § 1393.

[4] State *v.* Tom, 2 Dev. 569.

[5] People *v.* Olcott, 2 Johns. Cas. 301. See R. *v.* Kinnersley, 1 Str. 193; R. *v.* Niccolls, 2 Ibid. 1227; R. *v.* Kenrick, 5 Q. B. 49; D. & M. 208. *Infra*, § 1391.

[6] Brackenridge's Law Miscellanies, 223.

petent to conspire, no one can be convicted of conspiracy with him alone. And this obtains in cases of acquittal or *nolle prosequi* on an indictment against a single co-conspirator.[1] When, also, the jury fail to agree as to one of two co-conspirators, there can be no conviction of the other.[2] But it is not necessary that all the conspirators should be capable of the overt act.[3]

Prosecution may elect co-conspirators to proceed against.

§ 1389. It is in the discretion of the prosecution to include only as many of the alleged co-conspirators in the indictment as it may deem expedient; and the non-joinder of any such, provided there is enough alleged on the record to constitute the offence *aliunde*, is not matter for exception, although the party omitted was a *particeps criminis*.[4] Nor is it necessary that a co-conspirator referred to, either specifically or as a person unknown, should be indicted.[5]

All contributing with knowledge of common design may be joined.

§ 1390. In a case where several conspired to procure by corrupt means an employment under government, it was held that a banker who knowingly received the money, in order to pay it over to accomplish the purpose, became a party to the conspiracy.[6] Nor is it a defence that there was a sub-plot among the co-conspirators to cheat each other.[7]

Acquittal of one defendant evidence on trial of other.

§ 1391. Where one of several defendants charged with a conspiracy has been acquitted, the record of acquittal is evidence for another defendant subsequently tried.[8]

Husband and wife without other defendant not sufficient.

§ 1392. A man and his wife, being in law but one person, cannot be convicted of the same conspiracy, unless one or more other parties are charged and proved to be concerned.[9] But it is otherwise of a conspiracy consummated before their marriage.[10]

[1] State *v.* Jackson, 7 S. C. 283.

[2] R. *v.* Manning, L. R. 12 Q. B. D. 41; 51 L. T. N. S. 121. *Infra*, § 1407.

[3] *Supra*, § 1340 *a*.

[4] R. *v.* Ahearne, 6 Cox C. C. 6; Com. *v.* Demain, Brightly, 441. *Infra*, § 1407.

[5] Heine, *v.* Com., 91 Penn St. 145.

[6] R. *v.* Pollman, 2 Camp. 229.

[7] R. *v.* Hudson, Bell C. C. 263; 8 Cox C. C. 305.

[8] R. *v.* Horne Tooke, Old Bailey, 1794; Burn's Justice, tit. "Conspiracy."

When one defendant in conspiracy dies between indictment and trial, it

[9] *Supra*, § 82. Whart. Cr. Pl. & Pr. § 305; People *v.* Mather, 4 Wend. 231. See R. *v.* Locker, 5 Esp. 107; Com. *v.* Wood, *infra;* Com. *v.* Manson, 2 Ashmead, 31.

[10] R. *v.* Robinson, 1 Leach, 37.

Unknown co-conspirators can be introduced.

§ 1393. An indictment charging the defendant with conspiracy with persons unknown is good, notwithstanding the names of some of the persons alleged unknown must necessarily have transpired to the grand jury.[1] But it might be otherwise if *all* the co-conspirators were known to the grand jury.[2]

Judgment should be several.

§ 1394. On indictments for conspiracy the judgment should be against each defendant severally, and not against them jointly.[3]

New trial for one is new trial for all.

§ 1395. Where two or more persons have been convicted of a conspiracy, a new trial of one involves a new trial of all.[4]

5. *Enumeration of Parties injured.*

§ 1396. It is essential to set forth the names of the parties to be injured if they are capable of definite ascertainment, unless a good reason be given for their non-specification.[5] Thus, Tindal, C. J.,

is no ground of *venire de novo* for a mistrial if the trial proceeds against both, no suggestion of the death being entered on the record. R. *v.* Kenrick, 5 Q. B. 49; R. *v.* Nicholls, 13 East, 412, n. *Supra*, § 1388; *infra*, § 1407.

[1] People *v.* Mather, 4 Wend. 229. See R. *v.* Steel, C. & M. 337; 2 Mood. C. C. 246. *Supra*, § 305.

[2] Whart. Cr. Pl. & Pr. §§ 104, 111; Whart. on Crim. Ev. § 97.

Where an indictment charged a man and his wife with conspiring with a person unknown to extort hush-money, etc., it was held that A., although alleged by the prosecution to be the person averred, unknown, was admissible as a witness for the defence, he not appearing to be a party on the record. Com. *v.* Wood, 7 Bost. Law Rep. 58.

In a case in 1851, before the Queen's Bench, the defendants, A., B., and C., were charged with conspiring "with divers persons unknown." The evidence applied only to A., B., and C., none being given as to the "persons unknown." The jury found that A. had conspired with either B. or C., but that they could not say which, Lord Campbell, C. J., said: "I think that under these circumstances the verdict against A. cannot be supported. It is conceded, that if there be an indictment against two persons for a conspiracy, the acquittal of one must invalidate the conviction of the other. Then, I cannot draw a distinction between the cases of two and of three persons, if one only is found guilty. If three are indicted, and two found not guilty, the third must also be acquitted. But then it is argued that B. and C. may be included in the words, 'persons to the jurors unknown;' but I cannot say that they can come under the category of persons who were not known to the jury." R. *v.* Thompson, 4 Eng. L. & Eq. 287; 16 Q. B. 832; 5 Cox C. C. 166; R. *v.* Denton, Dears. C. C. 3.

[3] March *v.* People, 7 Barb. 391. See Whart. Cr. Pl. & Pr. § 940.

[4] Com. *v.* McGowan. 2 Parsons, 341.

[5] Com. *v.* Andrews, 132 Mass. 263.

said:[1] "Mr. Pashley, for the plaintiffs in error, argued that the indictment was bad, because it contained a defective statement of the charge of conspiracy; and we agree that it is defective. The charge is, that the defendants below conspired to cheat and defraud *divers* liege subjects, being tradesmen, of their goods, etc.; and the objection is, that these persons should have been designated by their Christian and surnames, or an excuse given, such as that their names are to the jurors unknown; because this allegation imports that the intention of the conspirators was to cheat certain definite individuals, who must always be described by name, or reason given why they are not; and if the conspiracy was to cheat indefinite individuals, as, for instance, those whom they should afterwards deal with or afterwards fix upon, it ought to have been described in appropriate terms, showing that the objects of the conspiracy were, at the time of making it, unascertained, as was in fact done in the case of Rex *v.* De Berenger,[2] and The Queen *v.* Peck;[3] and it was argued that if, on the trial of this indictment, it had appeared that the intention was not to cheat certain definite individuals, but such as the conspirators should afterwards trade with or select, they would have been entitled to an acquittal: and we all agree in this view of the case, and think that the reasons assigned against the validity of this part of the indictment are correct."

Parties injured must be named if practicable.

Where, therefore, the persons injured were defined at the time of the conspiracy, and ascertainable by the pleader, their names should be specified in the indictment.[4] Where, however, the conspiracy was to defraud a class not capable of being at the time resolved into individuals, or to defraud the public generally, then the specification of names is impracticable, and hence unnecessary.[5]

An intent to cheat A. as an individual is not sustained by evidence of an intent to cheat the public generally.[6]

[1] R. *v.* King, 7 Q. B. 806, reversing S. C., 7 Q. B. 782; D. & M. 741. See *infra*, § 1400. For fuller statement of R. *v.* King, see *supra* § 1348.

[2] 3 M. & S. 67.

[3] 9 Ad. & El. 686.

[4] See People *v.* Arnold, 46 Mich. 268.

[5] Ibid.; R. *v.* De Berenger, 3 M. & S. 67; Com. *v.* Judd, 2 Mass. 329.

[6] *Infra*, § 1403.

6. *Venue.*

§ 1397. Although technically the place where the conspiracy is entered into is the place of venue,[1] yet it is generally held that the venue may be laid, as to any or all of the conspirators, in the county in which an act was done by any of them in furtherance of their common design; and consequently in this county all the co-conspirators are indictable.[2]

Venue may be in place of act.

If a conspiracy be once established, although it was concocted out of the jurisdiction of the court, an overt act committed by one of the conspirators within the jurisdiction of the court, in the pursuit of the common object of said conspiracy, is the act of each conspirator. In such case we are to view the overt act, wherever committed, as a renewal of the original conspiracy by all the conspirators.[3]

An acquittal in one State, where one overt act was performed, is no bar to a prosecution in another State, where another overt act was performed.[4]

[1] R. *v.* Best, 1 Salk. 174; 2 Ld. Raym. 1167; R. *v.* Kohn, 4 F. & F. 68.

[2] *Supra*, § 287; R. *v.* Ferguson, 2 Stark. (N. P.) 489; Com. *v.* Corlies, 3 Brews. 575; S. C., 8 Phila. 450; People *v.* Arnold, 46 Mich. 268.

"It has been said by the Court of King's Bench, that there seems to be no reason why the crime of conspiracy, amounting only to a misdemeanor, ought not to be tried wherever one distinct overt act of conspiracy was in fact committed, as well as the crime of high treason, in compassing and imagining the death of the king, or in conspiring to levy war. R. *v.* Brisac, 4 East, 171. So where the conspiracy, as against all the defendants, having been proved, by showing a community of criminal purpose, and by the joint coöperation of the defendants in forwarding the objects of it in different counties and places, the locality required for the purpose of trial was held to be satisfied by overt acts done by some of the defendants in the county where the trial was had in prosecution of the conspiracy. R. *v.* Bowes, cited in R. *v.* Brisac, *supra*." Roscoe's Cr. Ev. p. 422.

[3] *Supra*, § 280; Whart. Confl. of Laws, §§ 877, 924; Com. *v.* White, 123 Mass. 430; Com. *v.* Corlies, 3 Brews. 575; S. C., 8 Phila. 450; Bloomer *v.* State, 48 Md. 521; Johns. *v.* State, 19 Ind. 421; State *v.* Chapin, 17 Ark. 561; State *v.* Hamilton, 13 Nev. 386; and other cases cited *infra*, § 1405.

[4] Bloomer *v.* State, *ut supra*.

"Questions of great difficulty may occur with respect to jurisdiction in conspiracy. In Brisac's Case (1803) it was held, that although the agreement was made at a place out of the jurisdiction of the common law courts, it was yet triable in the ordinary criminal courts in England if an overt act in execution of it was done in Eng-

land by an innocent agent of one of the conspirators for this purpose. In Bernard's Case, 1 F. & F. 240 (see *supra*, § 287), a question occurred whether a person could be indicted in England for having counselled in England the murder of an alien in Paris. The defendant was acquitted, and the point was not determined; but in 1861 the 24 & 25 Vict. c. 100, s. 4, provided for conspiracies and other offences of this kind, not, however, by applying to the offenders the general clauses relating to accessaries, but by a special enactment making the offence a misdemeanor. See 1 Russ. by Gr. 760, 967; and see, also, *supra*, §§ 279, 287 *et seq.* In Kohn's Case, 4 F. & F. 68 (1864), a conspiracy was formed in England by the defendant and others for casting away a foreign ship in order to prejudice the underwriters. The ship was scuttled when out of the jurisdiction, by the defendant and others, who appear all to have been foreigners. Willes, J., is reported to have told the jury that 'The ship was a foreign ship, and she was sunk by foreigners far from the English coast, and so out of the jurisdiction of our courts. But the conspiracy in this country to commit the offence is criminal in our law. And this case does not raise the question which arose in R. *v.* Bernard, as to a conspiracy limited to a criminal offence to be committed abroad. For here, if the prisoner was party to the conspiracy at all, it was not so limited, for it was clearly contemplated that the ship might be destroyed off the bar at Ramsgate, which would be within the jurisdiction. The offence of conspiracy would be committed by any persons conspiring together to commit an unlawful act to the prejudice or injury of others, if the conspiracy was in this country, although the overt acts were abroad. . . . . For the principal offence . . . . the prisoner could not be indicted in this country, as he is a foreigner, and the ship was foreign, and the offence was committed on the high seas.'" Roscoe, *ut sup.* But see fully, *supra*, § 287.

The subject of jurisdiction over conspiracies to commit extra-territorial crimes is discussed by me in the Criminal Law Magazine for March, 1885.

[1] Whart. Cr. Ev. §§ 32, 698; R. *v.* Parsons, 1 W. Bla. 392; R. *v.* Whitehouse, 6 Cox C. C. 38; U. S. *v.* Babcock, 3 Dill. 581; U. S. *v.* Graff, 14 Blatch. 381; U. S. *v.* Cole, 5 McLean, 513; Kelley *v.* People, 55 N. Y. 566; Neudecker *v.* Kohlberg, 81 N. Y. 297; People *v.* Lyon, 40 Hun, 623; Tarbox *v.* State, 38 Ohio St. 581; Bloomer *v.* State, 48 Md. 521; State *v.* Arnold, 48 Iowa, 566; Jones *v.* State, 64 Ind. 562; State *v.* Sterling, 34 Iowa, 443; Hardin *v.* State, 4 Tex. Ap. 355; Loggins *v.* State, 13 Ibid. 211.

VI. EVIDENCE.

Proof of Conspiracy.

Proof of conspiracy inferential.

§ 1398. The actual fact of conspiring may be inferred, as has been said, from circumstances, and the concurring conduct of the defendants need not be directly proved.[1] Any joint action on a material point, or collocation of independent but coöperative acts, by persons closely associated with each other, is held to be sufficient to enable the jury to infer concurrence of sentiment; and one competent witness will suffice to prove the coöperation of any individual conspirator.[1] If, therefore, it appear that two or more persons, acting in concert, are apparently pursuing the same object, often by the same means, one performing part of an act, and the other completing it, for the attainment of the object, the jury may draw the conclusion that there is a conspiracy.[2]

Complicity in prior stages unnecessary.

§ 1399. All who join a conspiracy at any time after its formation become conspirators;[3] and, as will be seen, the prosecutor may go into general evidence of the conspiracy, before he gives evidence to connect the defendants with it.[4] It is not necessary, therefore, to show a com-

[1] R. *v.* Cope, 1 Stra. 144; Com. *v.* Crowninshield, 10 Pick. 497.

[2] R. *v.* Murphy, 8 C. & P. 297; Com. *v.* Warren, 6 Mass. 72.

"In prosecutions for criminal conspiracies," says Judge King, "the proof of the combination charged must almost always be extracted from the circumstances connected with the transaction which forms the subject of the accusation. In the history of criminal administration, the case is rarely found in which direct and positive evidence of criminal combination exists. To hold that nothing short of such proof is sufficient to establish a conspiracy would be to give immunity to one of the most dangerous crimes which infest society. Hence, in order, to discover conspirators, we are forced to follow them through all the devious windings in which the natural anxiety of avoiding detection teachings men so circumstanced to envelop themselves, and to trace their movements from the slight, but often unerring, marks of progress which the most adroit cunning cannot so effectively obliterate, as to render them unappreciable to the eye of the sagacious investigator. It is from the circumstances attending a criminal, or a series of criminal acts, that we are able to become satisfied that they have been the results not merely of individual, but the products of concerted and associated action, which, if considered separately, might seem to proceed exclusively from the immediate agents to them; but which may be so linked together by circumstances, in themselves slight, as to leave the mind fully satisfied that these apparently isolated acts are truly parts of a common whole; that they have sprung from a common object, and have in view a common end. The adequacy of the evidence in prosecutions for a criminal conspiracy to prove the existence of such a conspiracy, like other questions of the weight of evidence, is a question for the jury." Com. *v.* M'Clean, 2 Par. 363, 368–9. See to same effect, R. *v.* Parsons, 1 W. Bl. 392: R. *v.* Murphey, 8 C. & P. 297; R. *v.* Deasy, 15 Cox C. C. 334; U. S. *v.* Goldberg, 7 Biss. 175; Street *v.* State, 43 Miss. 2; State *v.* Sterling, 34 Iowa, 443.

[3] *Supra*, § 1341 *a*; People *v.* Mather, 4 Wend. 229; Den *v.* Johnson, 3 Har. (N. J.) 87; State *v.* Trexler, 2 Car. L. Rep. 90. See R. *v.* McMahon, 26 Up. Can. (Q. B.) 195.

[4] *Infra*, § 1401; R. *v.* Hammond, 2 Esp. 718.

plicity of the defendants in the preliminary stages of the offence. Thus, on an indictment for a conspiracy to defraud by false representation of solvency, it was held by Lord Campbell that defendants may be convicted who had no knowledge of the transactions which resulted in insolvency, provided they were aware of the result, and concurred in the representations in furtherance of the common design, even though they did so with no motive of particular benefit to themselves.[1] Nor does the entrance of new parties affect the identity of a conspiracy.[2]

No overt act necessary.

§ 1400. The offence of conspiracy, so it is said, is rendered complete by the bare engagement and association of two or more persons to break the law, without an overt act completed by the conspirators;[3] but this must be construed to mean a conspiracy evidenced in facts, since it is impossible to see how a conspiracy can be proved except by adducing facts which are more or less overt acts. A word or a sign is as much an overt act as a battle, yet no conspiracy can be proved without proving words or signs. But in any view the active consent of two or more is essential.[4]

If any overt act be proved in the county where the venue is laid, other overt acts, either of the same or others of the conspirators, may be given in evidence, although committed in other counties.[5]

If any overt act is introduced as descriptive of the offence and as limiting the conspiracy charge, a variance in the statement of the act is fatal.[6] It is otherwise when the conspiracy charge is complete in itself, in which case the overt act may be treated as surplusage.[7] In some jurisdictions, as has been seen, overt acts are essential to the offence.[8]

[1] R. *v.* Esdaile, 1 F. & F. 213; S. C., *nom.* R. *v.* Brown, 7 Cox C. C. 442.

[2] U. S. *v.* Nunnemacher, 7 Biss. 111.

[3] *Supra*, §§ 1338, 1382; O'Connell *v.* R., 11 Cl. & Fin. 155; 9 Jur. 25; State *v.* Straw, 42 N. H. 393; Resp. *v.* Ross, 2 Yeates, 1; Collins *v.* Com., 3 S. & R. 220; Com. *v.* McKisson, 8 Ibid. 420; State *v.* Young, 37 N. J. L. 184; Bloomer *v.* State, 48 Md. 521; State *v.* Buchanan, 5 Har. & John. 317; Landringham *v.* State, 49 Ind. 186; State *v.* Cawood, 2 Stew. 360; Alderman *v.* People, 4 Mich. 414; State *v.* Pulle, 12 Minn. 164; Isaacs *v.* State, 48 Miss. 234. That there must be an embodiment in acts, see *supra*, § 1338; U. S. *v.* Goldberg, 7 Biss. 175.

[4] *Supra*, § 1341 *a*, and cases there cited; Mulcahy *v.* R., L. R. 3 H. L. 306. *Supra*, § 1388.

[5] R. *v.* Bowes, cited 4 East, 171. See *supra*, §§ 287 *et seq.*, 1397.

[6] *Infra*, § 1403.

[7] *Supra*, § 1382.

[8] *Supra*, §§ 1356 *a*, 1384.

Order of evidence at discretion of court.

§ 1401. It was considered in the Queen's case, that on a prosecution for a crime to be proved by conspiracy, general evidence of an existing conspiracy may in the first instance be received, as a preliminary step to that more particular evidence by which it is to be shown that the individual defendants were guilty participators in such conspiracy; and that this is often necessary to render the particular evidence intelligible, and to show the true meaning and character of the acts of individual defendants. In such cases the general nature of the whole evidence intended to be adduced should be opened to the court; and if upon such opening it should appear manifest that subsequently no particular proof sufficient to affect the individual defendants is intended to be adduced, it would become the duty of the judge to stop the case *in limine*, and not to allow the general evidence to be received, which, even if attended with no other bad effect, such as exciting an unreasonable prejudice, would certainly be a useless waste of time.[1] But ordinarily it is only necessary to prove the acts of particular defendants, leaving the question of conspiracy to be determined by inference.[2]

[1] Queen's Case, 2 Brod. & Bing. 284. *Supra*, § 1399.

[2] R. *v.* Brittain, 3 Cox C. C. 76; R. *v.* Blake, 6 Q. B. 126; Bloomer *v.* State, 48 Md. 521.

The authorities are thus noticed by Sir J. F. Stephen, Rosc. Cr. Ev. 414:—

"It is a question of some difficulty how far it is competent for the prosecutor to show, in the first instance, the existence of a conspiracy amongst other persons than the defendants, without showing, at the same time, the knowledge or concurrence of the defendants, but leaving that part of the case to be subsequently proved. The rule laid down by Mr. East is as follows: 'The conspiracy or agreement among several to act in concert for a particular end must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner; and this must, generally speaking, be done by evidence of the party's own act, and cannot be collected from the acts of others, independent of his own, as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts.' 1 East P. C. 96. But it is observed by Mr. Starkie that in some peculiar instances in which it would be difficult to establish the defendant's privity without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of the acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity. 2 Stark. Ev. 234, 2d ed. So it seems to have been considered by Mr. Justice Buller, that evidence might be, in the first instance, given of a conspiracy, without proof of the defendant's participation in it. 'In indictments of this kind,' he says, 'there are two

§ 1402. But it needs something more than a proof of mere passive cognizance of fraudulent or illegal action of others to sustain conspiracy.[1] There must be shown some sort of active participation by the parties charged.[2] Of this we have an illustration in an English trial before Martin, B., where certain wharfingers and their servants were indicted for a conspiracy to defraud by false statements as to goods deposited with them and insured by the owners against fire. It was held, that evidence that false statements were knowingly sent in by the servants, which would be for the benefit of the masters, and that afterwards the servants took fraudulent means to conceal the falsehood of the statements, with evidence that the employers had the means of knowing the falsehood and knew of the devices used to conceal it, was not sufficient to sustain the charge of a fraudulent conspiracy between the employers and servants.[3] There must be a concurrence in the common design.[4] And we may also hold that mere sympathy with a conspiracy not exhibiting itself in overt acts does not make a person a co-conspirator.[5]

Mere cognizance of fraudulent action no conspiracy.

§ 1403. Any material variance as to the means used is fatal.[6]

things to be considered: first, whether any conspiracy exists; and next, what share the prisoner took in the conspiracy.' He afterwards proceeds, 'Before the evidence of the conspiracy can affect the prisoner materially, it is necessary to make out another point, viz., that he consented to the extent that the others did.' R. *v.* Hardy, Gurney's ed. vol. i. pp. 306, 369; 2 Stark. Ev. 234, 2d ed. . . . . .

"It has since been held, that the prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. Where, therefore, a party met, which was joined by the prisoner the next day, it was held, that directions given by one of the party on the day of their meeting, as to where they were to go, and for what purpose, were admissible, and the case was said to fall within R. *v.* Hunt, 3 B. & Ald. 566, where evidence of drilling at a different place two days before, and hissing an obnoxious person, was held receivable. R. *v.* Frost, 9 C. & P. 129; 2 Russ. by Greave, 700." See *infra*, § 1404.

[1] See *supra*, §§ 211 *d*, 227, 1341 *a*.

[2] *Supra*, § 227.

[3] R. *v.* Barry, 4 F. & F. 389.

[4] R. *v.* Boulton, 12 Cox C. C. 87.

[5] *Supra*, § 211 *d*; State *v.* Cox, 65 Mo. 29; Connoughty *v.* State, 1 Wis. 169; People *v.* Leith, 52 Cal. 251.

[6] R. *v.* Whitehouse, 6 Cox C. C. 38. See R. *v.* Barry, 4 F. & F. 389; R. *v.* Banks, 12 Cox C. C. 392; Com. *v.* Harley, 7 Met. 506; Com. *v.* Kellogg, 7 Cush. 473.

In R. *v.* Whitehouse, *supra*, the indictment alleged that I. W., C. W., and J. W., being persons in indigent circumstances, and intending to defraud tradesmen who should supply them with goods upon credit, conspired

Thus an indictment for a conspiracy, charging the object of the conspiracy to be to cheat and defraud the citizens at large, or particular individuals, out of their land entries, is not supported by evidence that the defendants conspired to make entries in the land office before it was opened, or before it was declared to be opened, or after it was opened, for the purpose of appropriating lands to their own use and excluding others.[1] Variance as to time is immaterial.[2]

Material variance as to means, fatal.

§ 1404. Whether, in an indictment for a conspiracy to commit a wrong, evidence of an attempt about the same time, by the same defendants, with the same or similar means, to commit a similar wrong, has been elsewhere generally discussed.[3] On the one hand, it is argued that such

System of conspiracy may be proved.

to cause J. W. to be reputed and believed to be a person of considerable property and in opulent circumstances, for the purpose and with the intent of cheating and defrauding divers persons, being tradesmen, who should bargain with them for the sale to J. W. of goods, the property of such last-mentioned persons, of great quantities of such goods, without paying for the same, with intent to obtain to themselves money and other profits. This, it was held, was not supported by proof that C. W. and J. W., being the wife and daughter of I. W., represented that they were in independent circumstances, their income being interest of money received monthly; at another time, when engaging lodgings, that they were not in the habit of living in lodgings, and that they obtained various goods from tradesmen on credit, under circumstances that showed an intent to defraud, but no proof being adduced that those goods were obtained by reason of any of those general statements. It was further ruled that a count charging the defendants with conspiring, by divers subtle means and false pretences, to obtain goods and chattels from a tradesman, without paying for them, with intent to defraud him thereof, is supported by proof of overt acts from which a conspiracy may be inferred, without proof of any such false pretence as is required in an indictment for obtaining goods by false pretences. Ibid.

[1] State *v.* Trammel, 2 Ired. 379. *Supra*, § 1396.

An averment, in an indictment for conspiracy, that the defendants conspired to defraud A., is not supported by proof that they conspired to defraud the public generally, or any individual whom they might be able to defraud. Com. *v.* Harley, 7 Met. 506. *Supra*, § 1396.

We have already seen that in cases of this class it is sufficient to prove overt acts from which such a conspiracy could be inferred, without proof of any technical false pretence. R. *v.* Whitehouse, 6 Cox C. C. 38. *Supra*, § 1364.

[2] U. S. *v.* Graff, 14 Blatch. 381; Whart. Cr. Ev. §§ 91 *et seq.*

[3] Whart. Cr. Ev. §§ 23 *et seq.*

The question in such cases is whether the transaction proposed to be proved

evidence is proper to show the conspiracy; on the other, that it should be excluded as showing a distinct and substantive offence. On an indictment tried before Lord Ellenborough, at *nisi prius*, charging that the defendants, being persons of evil fame, and in low and indigent circumstances, conspired together to cause themselves to be reputed persons of considerable property, and in opulent circumstances, for the purpose of defrauding one A. B., evidence being given of their having hired a house in a fashionable street, and represented themselves to one tradesman employed to furnish it as people of large fortune, a witness was called to show that at a different time they had made a similar representation to another tradesman. It was objected that the evidence formed a new offence; and that the prosecutor having elected in his indictment to press a particular charge, it was not just to enable him to spring another on the defendants without notice. The court, however, admitted the evidence, and the defendants were convicted.[1]

But in a later case, where the defendant was charged with conspiring with other persons unknown "to cheat and defraud J. D. and others," and the overt acts laid were, that the defendant did falsely pretend to J. D. that he was a merchant named G., and did, under color of pretended contract with J. D., for the purchase of certain goods of "the said J. D. and others," obtain a large quantity of the goods "of the said J. D. and others," with intent to defraud "the said J. D. and others," it was held by the judges that the words "and others," throughout this indictment, must be taken to mean the other partners of J. D., and not other persons wholly unconnected with J. D., and that, on the trial of the indictment,

was part of a system with that under trial. Tarbox *v.* State, 38 Ohio. St. 581.

In R. *v.* Hunt, 3 B. & Ald. 566, it was held that on an indictment for conspiring and unlawfully meeting for the purpose of exciting discontent and disaffection, resolutions passed at a former meeting, in another place, and at which one of the defendants presided, the professed object of which meeting was to fix the meeting mentioned in the indictment, are admissible to show the intention of such defendant in assembling and attending the meeting in question, at which he also presided.

It was further held that on proof of systematic co-operation between several bands of rioters, the riotous misconduct of the members of one band was admissible against the members of another band. See Whart. Cr. Ev. §§ 23 *et seq.*

[1] R. *v.* Roberts, 1 Camp. 399. See Resp. *v.* Hevice, 2 Yeates, 114.

evidence was not admissible to show that the defendant attempted to defraud other persons wholly unconnected with J. D.[1]

Co-conspirators are liable for each other's acts.

§ 1405. Each co-conspirator is liable for the overt acts of his confederates, committed in pursuance of the conspiracy, during its continuance;[2] and it has been shown that each is liable in the place of an overt act.[3]

Declarations of co-conspirators admissible against each other.

§ 1406. The declarations of one conspirator, in furtherance of the common design, are admissible against his co-conspirators, though such declarations cannot be received if made after the termination of the conspiracy, nor are they admissible to prove the conspiracy.[4] A party acting as a decoy cannot be regarded as a co-

[1] R. *v.* Steel, C. & M. 337. See *supra*, § 1396.

On an indictment for a conspiracy in inveigling a young girl from her mother's house, and reciting the marriage ceremony between her and one of the defendants, a subsequent carrying her off, with force and threats, after she had been relieved on a *habeas corpus*, was allowed to be given in evidence. Resp. *v.* Hevice, 2 Yeates, 114. So where the defendants were charged with a conspiracy, in several counts, alleging several conspiracies of the same kind on the same day, the prosecutor was permitted to give evidence of several conspiracies on different days. R. *v.* Levy, 2 Stark. 458; but see R. *v.* Steel, C. & M. 337.

[2] *Supra*, §§ 213–247, 397; U. S. *v.* Donan, 11 Blatch. 168; U. S. *v.* Goldberg, 7 Biss. 175; Collins *v.* Com., 3 S. & R. 220; Brown *v.* Smith, 83 Ill. 291; Smith *v.* State, 52 Ala. 407; Jackson *v.* State, 54 Ibid. 234; Peden *v.* State, 61 Miss. 268; State *v.* Jackson, 29 La. An. 354.

[3] *Supra*, §§ 287, 1397. See Whart. Cr. Ev. § 693.

[4] Whart. Cr. Ev. §§ 698 *et seq.*, where the cases are given in detail. See, also, *supra*, §§ 213–214. "It seems to make no difference as to the admissibility of this evidence, whether the other conspirators be indicted or not, or tried or not; for the making of them co-defendants would give no additional strength to their declarations as against others. The principle upon which they are admissible at all is, that the acts and declarations are those of persons united in one common design; a principle wholly unaffected by the consideration of their being jointly indicted. 2 Stark. Ev. 237, 2d ed., *supra*, p. 89. Where an indictment charged the defendant with conspiring with Jones, who had been previously convicted of treason, to raise insurrections and riots, and it was proved that the defendant had been a member of a chartist association, and that Jones was also a member, and that in the evening of the 3d of November the defendant had been at Jones's house, and was heard to direct the people there assembled to go to the race-course, where Jones had gone on before with others; it was held that a direction given by Jones, in the forenoon of the same day, to certain parties to meet on the race-course, was admissible; and it being further proved that Jones and the persons assembled on the race-course went thence to the New Inn; it was held, that what Jones said at the

conspirator, so as to make those with whom he acts responsible for what he does.[1]

VII. VERDICT.

Verdict acquitting all but one defendant is a general acquittal.

§ 1407. Two or more defendants must be joined to constitute the offence; and if only two are joined, an acquittal of one is an acquittal of the other, unless there be allegation and proof of co-defendants unknown.[2] Nor can a conviction of one of two co-conspirators be sustained when the jury do not agree as to the other.[3] A husband and wife cannot be joined as the sole conspirators.[4]

New Inn was admissible, as it was all part of the transaction. R. *v.* Shellard, 9 C. & P. 277. The letters of one of the defendants to another have been, under certain circumstances, admitted as evidence for the former, with the view of showing that he was the dupe of the latter, and not a participator in the fraud. R. *v.* Whitehead, 1 Dow. & Ry. N. P. 61." Rosc. Cr. Ev. p. 418.

[1] Williams *v.* State, 55 Ga. 391.

[2] O'Connell *v.* R., 11 Cl. & F. 155; R. *v.* Thompson, 16 Q. B. 155; R. *v.* Manning, L. R. 12 Q. B. D. 241; 51 L. T. N. S. 121.

[3] R. *v.* Manning *ut sup.* Modifying R. *v.* Cookes, 7 D. & R. 673; 5 B. & C. 538.

[4] *Supra*, §§ 1337-9, 1392-3; Whart. Cr. Pl. & Pr. 305.

Where a count in an indictment charged several defendants with conspiring together to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, such finding was held bad, as amounting to a finding that one defendant was guilty of two conspiracies, though the count charged only one. O'Connell *v.* R., 11 Cl. & F. 155.

Upon a count in an indictment against eight defendants charging one conspiracy to effect certain objects, a finding that three of the defendants are guilty generally, that five of them are guilty of conspiring to effect some, and not guilty as to the residue, of these objects, is bad in law and repugnant; inasmuch as the finding that the three were guilty was a finding that they were guilty of conspiring with the other five to effect all the objects of the conspiracy, whereas by the same finding it appears that the other five were guilty of conspiring to effect only some of the objects. Ibid.

In a case already noticed (*supra*, § 1393), A. was indicted for conspiring with Y. and Z., and other persons to the jurors unknown. The evidence was confined to A., Y., and Z., and the jury were of opinion that A. conspired with either Y. or Z., but said that they did not know with which. Y. and Z. where thereupon both acquitted. It was held that A. was entitled to be acquitted also. R. *v.* Thompson, 16 Q. B. 832; 5 Cox C. C. 166; R. *v.* Denton, Dears. C. C. 3.

As has been already seen, where one defendant in conspiracy dies between the indictment and trial, it is no ground of a *venire de novo* for a mistrial, if the trial proceeds against

both, no suggestion of the death being entered on the record. R. *v.* Kenrick, 5 Q. B. 49; D. & M. 208; 7 Jur. 848; 12 L. J. M. C. 135.

One of several prisoners indicted for conspiracy may be tried separately, and upon conviction, judgment may be passed on him, although the others, who have appeared and pleaded, have not been tried. R. *v.* Ahearne, 6 Cox C. C. 6.

It has been held that where three prisoners have been jointly indicted for a conspiracy to murder, and severally pleaded not guilty, but have severed in their challenges, and the Crown has, consequently, proceeded to try one of such prisoners; upon conviction of such prisoner, judgment must follow, although the others have not been tried; and that the possibility of the other prisoners being found not guilty (although such a verdict would be a ground for reversing the judgment) is not ground by itself for reversal. Ibid.

CHAPTER XXII.

NUISANCE.

License no defence to negligent obstruction, § 1484.
Neglect in repairing roads may be indictable, § 1485.
Indictment must aver duty, § 1486.
Court may compel repair by fine, § 1487.
Abatement, § 1488.

I. GENERAL CONDITIONS.

§ 1410. WHATEVER openly outrages decency, or is injurious to public morals or public health and comfort, is a common nuisance, and a misdemeanor at common law. It is not necessary that all members of the community should be affected by the nuisance, nor is it a defence that there were some persons by whom the nuisance was approved.[1] It is enough if the liberty of all members of the community be abridged by their being precluded from approaching without risk the thing complained of.[2] In other words, it is no defence that I might avoid being offended by a nuisance, if my liberty would be abridged by my having to avoid it.

Nuisance must be an offence deleterious to community at large.

§ 1411. The offence must not be confined to individuals, but must have within its range the community or vicinage as a class.

[1] Com. *v.* Harris, 101 Mass. 29.

[2] See Com. *v.* Webb, 6 Rand. (Va.) 726; Hackney *v.* State, 8 Ind. 494; Brooks *v.* State, 2 Yerg. 482; State *v.* Baldwin, 1 Dev. & Bat. 195; Phillips *v.* State, 7 Baxt. 151.

The definition in the English Draft Code of 1879, s. 150, is as follows:—

"A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all her majesty's subjects.

"Every one shall be guilty of an indictable offence, and shall be liable upon conviction thereof to one year's imprisonment, who commits any common nuisance which endangers the lives, safety, or health of the public, or which injures the person of any individual.

"Any one convicted upon any indictment or information for any common nuisance other than those mentioned in the preceding section shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right.

"Every one shall be guilty of an indictable offence, and shall upon conviction thereof be liable to one year's imprisonment with hard labor, who knowingly and wilfully exposes, or causes to be exposed, for sale, or has in his possession, with intent to sell for human food, articles which he knows to be unfit for human food. (See *infra*, § 1434.) Every one who is convicted of this offence, after a previous conviction for the same offence, shall be liable to two years' imprisonment with hard labor."

Hence it is not a nuisance to dig and forcibly keep up, within a neighbor's inclosure, a pit which exposes him to danger as he goes to and fro on his own soil. It is a nuisance, however, to dig a pit in front of that neighbor's house, in the public road, so as to imperil all persons passing and repassing. So for a man to make a noise on a particular occasion before a limited audience is not indictable; but it is otherwise if he make loud noises continuously and habitually to the disturbance of the citizens at large.[1] The offence must be in a populous neighborhood, or in a place sufficiently contiguous to a public highway, to affect persons passing and repassing.[2] In other words, a nuisance, to be indictable, must have within its range either the community generally, or those persons passing and repassing on a public road, or chancing to be on public resorts.[3]

Not enough if offence is special.

§ 1412. It is not necessary, in order to make an alleged nuisance indictable, that it should be detrimental to public health. It is sufficient for this purpose if it be generally offensive to the senses of smell or of hearing, so far as concerns the public at large, or if in any other way it produces general physical discomfort.[4] Following this distinction it has been held indictable to start or continue—

Not necessary that nuisance be detrimental to public health.

[1] R. *v.* Smith, 1 Stra. 704; State *v.* Haines, 30 Me. 65; Com. *v.* Harris, 101 Mass. 29; Com. *v.* Smith, 6 Cush. 80; Bankus *v.* State, 4 Ind. 114. *Infra*, §§ 1449, 1465.

[2] R. *v.* Pappineau, 2 Str. 686; R. *v.* White, 1 Burr. 333; Com. *v.* Webb, 6 Rand. (Va.) 726.

In Com. *v.* Harris, 101 Mass. 29, where the indictment was for a nuisance in making a noise on a public street, it was said by Chapman, C. J., that "the act must be of such a nature as tends to annoy good citizens, and does in fact annoy such of them as are present *and not favoring it*." On the other hand, a complaint that the defendant rang a church bell and announced that P. was dead and was to be buried the next day, which was untrue, to the annoyance of P. and his family, does aver a criminal offence. State *v.* Riggs, 22 Vt. 321.

[3] Ibid.; Com. *v.* Smith, 6 Cush. 80; Com. *v.* Oaks, 113 Mass. 8; State *v.* Wright, 6 Jones (N. C.), 25; People *v.* Jackson, 7 Mich. 432; State *v.* Schlottman, 52 Mo. 164, and *infra*, §§ 1472–3.

[4] R. *v.* Neil, 2 C. & P. 485; R. *v.* White, 1 Burr. 333; State *v.* Riggs, 22 Vt. 321; Com. *v.* Smith, 6 Cush. 80; Stoughton *v.* Baker, 4 Mass. 522; Com. *v.* Brown, 13 Met. 365; Com. *v.* Harris, 101 Mass. 29; People *v.* Cunningham, 1 Denio, 524; Lansing *v.* Smith, 8 Cow. 146; State *v.* Wetherall, 5 Harring. 487; Ashbrook *v.* Com., 1 Bush, 139; Hackney *v.* State, 8 Ind. 494; State *v.* Rankin, 3 S. C. 438.

(1) A swine-yard or even a pig-sty in a city ;[1]

(2) A tannery in a city ;[2]

(3) A petroleum manufactory in a city ;[3]

(4) Slaughter-houses in a city or in a closely settled neighborhood ;[4]

(5) Tallow chandlery in a closely populated neighborhood ;[5]

(6) Storage of gunpowder and other explosive compounds in such a way as to imperil or even terrify the community ;[6]

(7) Noises, when made in such a way as to harass the community ;[7]

[1] R. *v.* Wigg, 2 Salk. 460 ; 2 Selw. N. P. 2362 ; Banting *v.* Page, L. R. 8 Q. B. D. 97 ; 45 L. T. 759 ; Com. *v.* Vansickle, Brightly, 26 ; 4 Cr. Rec. 26. (*Infra*, § 1437) ; Lawrason *v.* Paul, 11 Up. Can. (Q. B.) 537.

In State *v.* Kaster, 35 Iowa, 221, the indictment charged that the defendant "unlawfully and injuriously did erect, continue, and use a certain inclosure or pen in which cattle and hogs were confined, fed, and watered, and the excrement, decayed food, slop, and other filth were retained," whereby were occasioned "noxious exhalations and offensive smells greatly corrupting and infecting the air ; and other annoyances dangerous to the health, comfort, and property of the good people residing in that immediate neighborhood," etc. The prosecution offered evidence that the noise made by hogs in said pens was very great and annoying at night to persons residing in that neighborhood. It was ruled by the Supreme Court that while the evidence offered was not admissible under the general charge of "other annoyances," it was admissible as constituting a part of the facts connected with the nuisance charged, and also as corroborative of the fact that hogs were kept in the pen at night. It was further held, in conformity with the law hereafter expressed (*infra*, § 1416), that in a prosecution for nuisance, the defendant will not be permitted to show that the public benefit resulting from his acts is equal to the public inconvenience.

[2] State *v.* Trenton, 36 N. J. L. (7 Vroom) 283.

[3] Com. *v.* Kidder, 107 Mass. 188. *Infra*, § 1441.

[4] R. *v.* Watts, 2 C. & P. 486 ; Com. *v.* Upton, 6 Gray, 473 ; Taylor *v.* People, 16 Park. C. R. 347 ; Phillips *v.* State, 7 Baxt. 151. But to make a slaughter-house, when not in a city, a nuisance, the offensiveness must be permanent, not merely occasional and fortuitous. Fay *v.* Whitman, 100 Mass. 76 ; Phillips *v.* State, *ut sup.*

[5] Bliss *v.* Hall, 4 Bing. N. C. 183 ; 5 Scott, 500.

[6] *Infra*, § 1441. As to gunpowder, under statute, see R. *v.* Mutters, 1 B. & A. 362. *Supra*, § 919 ; Webley *v.* Woolley, L. R. 7 Q. B. 61 ; Elliott *v.* Majendie, Ibid. 429. Holding gunpowder by a carrier in a warehouse for temporary custody until forwarded to country consignees is not having or keeping gunpowder under the statute. Biggs *v.* Mitchell, 2 B. & S. 523. See *infra*, § 1413.

[7] *Infra*, § 1432*b* ; Sturgess *v.* Bridgman, L. R. 11 Ch. D. 882 ; Inchbald *v.* Robinson, L. R. 4 Ch. 388 ; Com. *v.* Harris, 101 Mass. 29. Continuous screening coal in a public place in a

(8) Noxious vapors affecting the air of a populous neighborhood ;[1]

(9) Continuous smoke producing discomfort in the neighborhood ;[2]

(10) Offensive continuous manufacture of manures and fertilizers ;[3]

(11) Dams in such a way as to threaten danger to persons living in the immediate neighborhood ;[4]

(12) Dairies in a city when they "emit noxious and offensive exhalations and odors" to the annoyance of the neighborhood ;[5]

(13) Buildings projecting in such a way as to expose travellers to danger ;[6]

(14) Taverns, theatres, and shows which induce idlers and vagrants to collect at certain places on thoroughfares, annoying passers by and disturbing the neighborhood ; both those who promote the throng and those who wilfully join in it being indictable.[7]

(15) Dogs, which from their bad temper or mischievousness may annoy travellers or frighten horses, though they may not be actually ferocious.[8]

On the other hand, it has been held not indictable to place in a city or populous neighborhood—

(1) Stables, when not conducted with such negligence as to prejudice public health, even though the value of property in the immediate vicinity may be depreciated, and immediate neighbors may be

populous neighborhood is a nuisance. Com. *v.* Mann, 3 Gray, 213. And so of excessive noise of steam hammers in rolling mill near houses. Scott *v.* Firth, 10 L. T. 240 ; 4 F. & F. 349.

[1] Shotts Iron Co. *v.* Inglis, 7 App. Ca. 518 (H. L. Sc.) ; Crump *v.* Lambert, L. R. 3 Eq. 409.

[2] See Cooper *v.* Wooley, L. R. 2 Ex. 88 ; Rich *v.* Basterfield, 4 C. B. 783 ; 2 C. & K. 259 ; Simpson *v.* Savage, 1 C. B. N. S. 347. Smoke, even without noise or noxious vapors, may by itself be a nuisance. Crump *v.* Lambert, L. R. 3 Eq. 409.

[3] Malton Board *v.* Farmers' Manure Co., L. R. 4 Ex. D. 310.

[4] State *v.* Close, 35 Iowa, 570 ; Douglass *v.* State, 4 Wis. 387. *Infra*, §§ 1473 *et seq.*

[5] State *v.* Boll, 59 Me. 321.

[6] Grove *v.* Fort Wayne, 45 Ind. 429. See Garland *v.* Towne, 55 N. H. 55 ; Meyer *v.* Metzler, 51 Cal. 142 ; *infra*, § 1474, for other cases.

[7] *Infra*, §§ 1475 *et seq.* ; Bankus *v.* State, 4 Ind. 114. See Walker *v.* Brewster, L. R. 5 Eq. 25 ; 17 L. T. N. S. 135 ; Lippman *v.* South Bend, 84 Ind. 276. As to theatres, see more fully *infra*, § 1435. As to gaming tables, see *infra*, § 1465 *c*.

[8] Brill *v.* Flagler, 23 Wend. 354 ; King *v.* Kline, 6 Barr, 317. As to abatement in such cases, see *infra*, § 1426.

annoyed by the kicking and stamping of the horses,[1] though it is otherwise as to stables conducted with unnecessary offensiveness;[2]

(2) Brick-kilns, unless managed in such a way as to be specially offensive;[3] though burning bricks in a populous place so as to offend and annoy the neighbors is a nuisance.[4] But brick-making is not *per se* indictable as a nuisance.[5]

(3) Gas-works, when essential to a city, and when conducted with proper care.[6]

Offensive trades not necessarily indictable.

§ 1413. In discussing the question of nuisance in such cases, the degree of populousness is to be taken into consideration. Some trades are *per se* offensive; yet they are necessary to the community, and must be carried on somewhere. But where? The distincton heretofore alluded to is here to be applied. For conducting such trades in secluded and thinly populated districts no indictment lies.[7] But a gunpowder manufactory, not a nuisance *per se*, may become so when placed in a populous neighborhood.[8]

Annoyance must be reasonably such.

§ 1414. It is not enough for a thing to be annoying to the community, but it must be reasonably so. Gas, for instance, on its first introduction, was declared to be deleterious to the health of the community, and in some communities steam railways were at one time so offensive to particular local authorities, that attempts to prosecute them as nuisances were not infrequent So, in times of high political feeling, the presence,

[1] Shiras *v.* Olinger, 50 Iowa, 59; Harris *v.* Brooks, 20 Ga. 537; Laurason *v.* Paul, 11 Up. Can. (Q. B.) 537.

[2] Aldrich *v.* Howard, 8 R. I. 246; Dargan *v.* Waddell, 9 Ired. 244; Burdett *v.* Swenson, 17 Tex. 489. *Infra*, § 1437. That a nuisance in keeping a stable in such a way as to annoy and disturb an immediate neighbor may be restrained, see Ball *v.* Roy, L. R. 8 Ch. 467; Broder *v.* Saillard, L. R. 2 Ch. D. 692.

[3] Huckenstine's App., 70 Penn. St. 102.

[4] Bamford *v.* Turnley, 3 B. & S. 62; overruling Hale *v.* Barlow, 4 C. B. N. S. 334; Carey *v.* Ledbitter, 13 Ibid. 470.

[5] Wanstead Board *v.* Hill, 13 C. B. N. S. 479.

[6] *Infra*, § 1440.

[7] See R. *v.* Cross, 2 C. & P. 483; R. *v.* Carlisle, 6 Ibid. 636; R. *v.* Watts, M. & M. 281; Ellis *v.* State, 7 Blackf. 534.

[8] Anonymous, 12 Mod. 342; Wier's Appeal, 74 Penn. St. 230. See State *v.* Hart, 34 Me. 36; People *v.* Sands, 1 Johns. 78; Bradley *v.* People, 56 Barb. 72. (*Infra*, § 1441.) That storage of small quantities of gunpowder is not by itself an offence, see Heeg *v.* Licht, 16 Hun, 257. See *supra*, § 1412.

in a community almost unanimous, of a small outspoken minority is very distasteful, and such minority may readily be regarded by the majority as a nuisance, deserving of condign chastisement. The keeping of kerosene, also, by individuals in a populous neighborhood may to some persons be a cause of anxiety; and so may the retention in a family of persons prostrated by a virulent contagious disease. But in all such cases it is necessary, in order to convict, that the annoyance complained of should be substantial, and needlessly inflicted. If the grievances of the prosecutors be sentimental or speculative,[1]—if the defendant in the act complained of be simply exercising a constitutional right,—then, no matter how much he may offend the community, process of this kind cannot be used for his correction.[2]

§ 1415. No length of time legitimates a nuisance;[3] and, in fact, time, by bringing an accession of population to a particular district,

[1] See Scott *v.* Firth, 4 F. & F. 349.

[2] *Infra*, § 1428.

[3] 1 Hawk. bk. 1, c. 32, s. 8; Weld *v.* Hornby, 7 East, 199; R. *v.* Cross, 3 Camp. 227; Elliotson *v.* Feetham, 2 Bing. N. C. 134; Bliss *v.* Hall, 4 Ibid. 185; State *v.* Falls Co., 49 N. H. 240; Com. *v.* Tucker, 2 Pick. 44; Com. *v.* Upton, 6 Gray, 473; Mills *v.* Richards, 9 Wend. 315; Dygert *v.* Schenck, 23 Ibid. 446; People *v.* Cunningham, 1 Denio, 524; Taylor *v.* People, 6 Park. C. R. 347; People *v.* Mallory, 4 Thomp. & C. 567; Com. *v.* Alburger, 1 Whart. 469; Philadelphia's App., 78 Penn. St. 33; Ashbrook *v.* Com., 1 Bush, 139; Elkins *v.* State, 2 Humph. 543; Douglass *v.* State, 4 Wis. 387; State *v.* Phipps, 4 Ind. 515; State *v.* Rankin, 3 S. C. 438; R. *v.* Brewster, 8 Up. Can. (C. P.) 208. See, however, Allegheny *v.* Zimmermann, 95 Penn. St. 287, cited *infra*, § 1474; and see Wood on Nuisance, § 724.

"It is a public nuisance to place a wood-stack in the street of a town before a house, though it is the ancient usage of the town, and leaves sufficient room for passengers, for it is against law to prescribe for a nuisance. Fowler *v.* Sanders, Cro. Jac. 446. In one case, however, Lord Ellenborough ruled that length of time and acquiescence might excuse what might otherwise be a common nuisance. Upon an indictment for obstructing a highway by depositing bags of clothes there, it appeared that the place had been used as a market for the sale of clothes for above twenty years, and that the defendant put the bags there for the purpose of sale. Under these circumstances, Lord Ellenborough said, that after twenty years' acquiescence, and it appearing to all the world that there was a market or fair kept at the place, he could not hold a man to be criminal who came there under a belief that it was such a fair or market legally instituted. R. *v.* Smith, 4 Esp. 111." Roscoe's Cr. Ev. p. 796.

As to how far steam-printing works, by working the machinery so as to produce a greatly increased vibration and noise, may become a nuisance, see Heather *v.* Pardon, 37 L. T. 393.

when such district is set apart by the State as a village or city, may make a thing a nuisance ultimately which was not a nuisance in its inception,[1] though it may not so operate as to a district not so set apart, and in respect to which the movement of settlement is capricious and speculative.[2] But it is otherwise, even as to a district not set apart as a village or city, when the progress of population towards the objectionable structure is in obedience to the fixed laws of expansion of population. Hence, in the latter case, it is no defence that a nuisance was erected in a comparatively secluded place, remote from habitations, and that the complaining parties subsequently voluntarily built within the range of its noxious odors.[3] Even a charter, granted before the site became populous, may fail to protect.[4] At the same time, when a question of the dedication by the owners of a particular spot to a particular purpose arises, lapse of time may be used to sustain such dedication.[5]

Prescription no defence, nor is recentness of population.

[1] Douglass *v.* State, 4 Wis. 387. Thus, in Com. *v.* Vansickle, Brightly, 69 (4 Clark, 104), which was an indictment for maintaning a large establishment for pigs in the limits of the old city of Philadelphia, Judge Sergeant properly charged the jury that though when the establishment was first opened it was not a nuisance, it became so when population gathered largely in that neighborhood.

[2] "If a noxious trade is already established in a place remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects; or if a public road be made so near it that the carrying on of the trade become a nuisance to the persons using the road; in those cases, the party is entitled to continue his trade, because it was legal before the erecting of the houses in the one case, and the making of the road in the other. Per Abbott, C. J., R. *v.* Cross, 2 C. & P. 483." See Ellis *v.* State, 7 Blackf. 534.

"As the city extends, such nuisances (slaughter-houses) should be removed to the vacant ground beyond the immediate neighborhood of the residences of citizens. This public policy, as well as the health and comfort of the population of the city, demands." Brady *v.* Weeks, 3 Barb. 157.

[3] Crunden's Case, 2 Camp. 89; R. *v.* Watts, M. & M. 281; Bliss *v.* Hall, 4 Bing. N. C. 183; 5 Scott, 500; Com. *v.* Upton, 6 Gray, 473; Taylor *v.* People, 6 Parker C. R. 347; Com. *v.* Vansickle, Brightly, 69; 4 Clark, 104; Philadelphia's Appeal, 78 Penn. St. 33; Ashbrook *v.* Com., 1 Bush, 139; though see R. *v.* Neville, Peake (N. P.) 91.

[4] Fertilizing Co. *v.* Hyde Park, 97 U. S. 659. See Patterson *v.* Kentucky, 97 U. S. 501.

[5] R. *v.* Petrie, 4 E. & B. 737. See R. *v.* Allan, 2 Up. Can. Q. B. (O. S.) 97.

"The effect of time in legalizing a nuisance" . . . "has not in itself that effect, but the fact that a given state of things is of very long standing may be evidence that it is not, in fact, a nuisance. See cases in 1 Russ. Cr. 421, 442. The view taken by the criminal law commissioners is rather different. See 7th Rep. p. 59." Steph. Dig. C. L. art. 176.

As to the cessation of a right to use a public foot-way as a drive-way, see R. *v.* Chorley, 12 Q. B. 515; 3 Cox C. C. 367. *Cf.* Bliss *v.* Hall, 4 Bing. N. C. 183; 5 Scott, 500.

As to inference to be drawn from long acquiescence, see Gaunt *v.* Finney, L. R. 8 Ch. 8; Heather *v.* Pardon, 37 L. T. 393; Gullick *v.* Tremlett, 20 W. R. 358; and cases cited in New's Fisher's C. L. Dig. tit. "Nuisance," II.

That a prescriptive use for less than twenty years will not be a defence in a civil suit, see Elliotson *v.* Feethams, 2 Scott, 174; 2 Bing. N. C. 134; Flight *v.* Thomas, 2 P. & D. 531; 10 A. & E. 590.

§ 1416. A mere volunteer, starting an enterprise for his own benefit, cannot, if prosecuted for nuisance proved to arise from such enterprise, set up collateral benefits to the community arising from his act.[1] Eminently is this the case with stoppages of public highways or navigable streams. These are sacred to public use; and no one can justify himself in choking them by reason of general benefit to the community collateral to his act.[2] But it is otherwise with works of public improvement constituted or authorized by the State. They may work injury to particular neighborhoods: *e. g.*, a railroad may take away the business of a country town on the line, or a canal basin may breed local malaria; but these special injuries cannot be treated as public nuisances, and as such indicted.[3] When, however, the managers of such roads by negligence engender a nuisance, an indictment lies.[4] It has been also held that municipal authorities are not indictable for a nuisance in causing vapor and smoke to arise from burning infected clothing and bedding, the object being to check the spread of an epidemic disease.[5]

Collateral public advantage no defence.

§ 1417. Nor is it a defence that nuisances, equally objectionable with that under indictment, have been tolerated by the public authorities.[6]

No defence that similar nuisances coexist.

[1] R. *v.* Betts, 16 Q. B. 1022; Com. *v.* Vansickle, Brightly, 69; Caldwell's Case, 1 Dall. 150; State *v.* Kaster, 35 Iowa, 221; State *v.* Rankin, 3 S. C. 438.

[2] R. *v.* Ward, 4 Ad. & El. 384; R. *v.* Morris, 1 B. & Ad. 441; R. *v.* Tindal, 6 Ad. & El. 143; Com. *v.* Belding, 13 Met. 10. See R. *v.* Russell, 6 B. & C. 566, where the question was discussed at large, and Steph. Dig. C. L. art. 176.

[3] Com. *v.* Reed, 34 Penn. St. 275.

[4] Del. Canal Co. *v.* Com., 60 Penn. St. 367. *Infra*, § 1424.

[5] State *v.* Knoxville, 12 Lea, 146.

[6] Crossley *v.* Lightowler, L. R. 2 Ch. 478; People *v.* Mallory, 4 Thomp. & C. 567; Francis *v.* Schoellkopf, 53 N. Y. 152; Dennis *v.* State, 91 Ind. 291; Robinson *v.* Baugh, 31 Mich. 290; Douglass *v.* State, 4 Wis. 387.

No defence that thing complained of has no other place.

§ 1418. Many necessary trades—*e. g.*, gunpowder making—have particular places assigned to them by the authorities. It is, however, no defence that the nuisance complained of, though necessary, has had no such place assigned to it. It may be no nuisance if carried on in a sequestered site. It may become a nuisance when it exposes a large population to anxiety and risk.[1]

Prior conviction no defence.

§ 1419. As each period in which a nuisance is continued exhibits a distinct offence, a prior acquittal or conviction for the maintenance of a nuisance is no bar to an indictment for continuing the nuisance on a subsequent day.[2]

No defence that there was no evil intent.

§ 1420. As the object of the prosecution is to remove an injury to the public with which the intent of the defendant has nothing to do, his intent is irrelevant.[3] As illustrating this may be given the cases elsewhere cited,[4] where the principal is held responsible in this form of action for the servant's negligence.

Good intent no defence.

§ 1421. Nor is it a defence that the intent was to benefit the community.[5] If the act be a nuisance to the community, the question of intent is irrelevant, and evidence of good intent is immaterial.[6] Nor is *lucri causa* essential.[7]

All concerned are principals.

§ 1422. That all parties concerned, whether agents or organizers, are principals, follows from the familiar doctrine that in misdemeanors all are principals.[8] To nuisance this doctrine has been frequently applied in cases where an agent

[1] State *v.* Hart, 34 Me. 36. See Wier's Appeal, 74 Penn. St. 230. *Supra*, § 1413.

[2] Whart. Cr. Pl. & Pr. § 475; Beckwith *v.* Griswold, 29 Barb. 29; People *v.* Townsend, 3 Hill (N. Y.), 479.

[3] See Chute *v.* State, 19 Minn. 271. *Supra*, § 119.

[4] *Supra*, § 247; *infra*, § 1422; R. *v.* Stephens, L. R. 1 Q. B. 702; Toops *v.* State, 92 Ind. 13.

[5] See State *v.* Portland, 74 Me. 268.

[6] R. *v.* Ward, 4 Ad. & El. 384. See *supra*, §§ 119, 1416.

[7] In Jennings *v.* Com., 19 Pick. 80, it was doubted whether *lucri causa* is essential to the offence; but that it is not, is now settled in all cases of nuisance. Com. *v.* Ashley, 2 Gray, 356. *Infra*, § 1459.

[8] *Supra*, §§ 223, 246; Com. *v.* Mann, 4 Gray, 213; Com. *v.* Gannett, 1 Allen, 7; Com. *v.* Tryon, 99 Mass. 442; Com. *v.* Kimball, 105 Ibid. 465; Stevens *v.* People, 67 Ill. 587; State *v.* Potter, 30 Iowa, 587. R. *v.* Stannard, L. & C. 249, cited *infra*, §§ 1459, 1460, apparently conflicts with R. *v.* Medley, 6 C. & P. 292, and other cases noticed *supra*, §§ 135, 341, 1422; and with the general rule that all concerned in a misdemeanor are principals.

sets up as a defence that he acted only for another, who is the real principal and manager of the enterprise, controlling it, and enjoying its profits. But the agent is nevertheless held responsible[1] if he have in any sense a control over the place or thing from which the nuisance arises.[2] The converse also is true, that the principal is indictable for the acts of his agent, performed by the agent within the orbit of his delegated office.[3] And if he share the profits, he is penally responsible for his agent's acts creating a nuisance within the range of employment, though these acts were done without his knowledge and contrary to his general orders.[4] But a principal is not indictable for a collateral nuisance by a contractor;[5] and a landlord is not responsible for a tenant's nuisance that he could not have removed.[6] The occupier in such case is responsible.[7]

§ 1423. Neglects and omissions, as has heretofore been shown,[8] are virtually commissions; for he who undertakes to do a thing and neglects or omits his duty does the thing wrongfully. But to make a neglect or omission indictable for a nuisance produced by it, it is

[1] Com. *v.* Park, 1 Gray, 553; Com. *v.* Nichols, 10 Met. 259; Lowenstein *v.* People, 54 Barb. 299; Com. *v.* Gillespie, 7 S. & R. 469; State *v.* Bell, 5 Porter, 365; Thompson *v.* State, 5 Humph. 138; 2 Ibid. 399; State *v.* Matthis, 1 Hill (S. C.), 37; Com. *v.* Major, 6 Dana, 293. See *supra*, §§ 247, 341.

[2] *Supra*, § 279; R. *v.* Williams, 1 Salk. 384; 10 Mod. 63. "We do not think that the misdemeanor of unlawfully selling, committed by a servant, can be said as a matter of law to amount to maintaining a nuisance, unless he has assumed a temporary control of the premises, or in some other way emerged from his subordinate position to aid directly in maintaining it." Holmes, J., Com. *v.* Churchill, 136 Mass. 151.

[3] *Supra*, §§ 247, 248; R. *v.* Stephens, L. R. 1 Q. B. 702; 7 B. & S. 710; Tuberville *v.* Stampe, 1 Ld. Raym. 264; Com. *v.* Nichols, 10 Met. 259; State *v.* Abrahams, 6 Iowa, 117.

[4] R. *v.* Stephens, L. R. 1 Q. B. 702; R. *v.* Medley, 6 C. & P. 292. See *supra*, §§ 246–8.

[5] See Saxby *v.* R. R., L. R. 4 C. P. 198; Peachey *v.* Rowland, 13 C. B. 182; Ellis *v.* Sheffield Gas Co., 2 El. & B. 767; St. Helen's Works *v.* St. Helen's Mayor, L. R. 1 Ex. D. 196. *Supra*, §§ 247, 1420.

A landlord is responsible for whatever he caused or could prevent. James *v.* Harris, 35 L. T. 240. See Gaudy *v.* Jutter, 5 B. & S. 78; and see *infra*, § 1459; *supra*, § 1422; Nelson *v.* Brewery Co., L. R. 2 C. P. D. 311.

That the occupier, having control of a house in which there is a noxious drain, is the party responsible, see Russell *v.* Shenters, 2 Q. & D. 573; 3 Q. B. 449.

[6] See Rich *v.* Basterfield, 4 C. B. 783; Pretty *v.* Bickmore, L. R. 8 C. P. 201.

[7] Broder *v.* Saillard, L. R. 2 Ch. D. 692.

[8] *Supra*, §§ 125 *et seq.*

Person undertaking public duties indictable for neglect.

essential that the neglect or omission should have been by one undertaking specially to discharge the particular duty.[1] When such a duty is thus neglected, and a nuisance is thereby produced, an indictment lies.[2]

A license from government no excuse for unnecessary nuisance.

§ 1424. Lawful authority to do a particular thing is no defence to an indictment for doing such thing so negligently or badly as to create a nuisance.[3] But if the license be strictly followed, and a nuisance results, no prosecution can be maintained, where there is no negligence or excess alleged on part of the defendant.[4] Hence a gas company, duly chartered by an act of legislature to supply gas to a city, cannot be convicted of nuisance when the acts complained of were necessary to the exercise of its trust, and were performed carefully and judiciously.[5] The same distinction applies, *mutatis mutandis*, to railroads.[6] Specific legislative authority will protect a railroad from prosecution in occupying roads and running trains.[7]

§ 1425. A defendant is not liable for a nuisance unless it is a natural and ordinary consequence of his conduct.[8] Hence it has

[1] R. *v.* Wharton, 12 Mod. 510. *Supra*, §§ 125 *et seq.*; *infra*, § 1476.

[2] R. *v.* Medley, 6 C. & P. 292; People *v.* Corporation of Albany, 11 Wend. 539; Indianapolis *v.* Blythe, 2 Ind. 75. *Infra*, § 1485.

[3] R. *v.* Scott, 2 Gale & D. 729; Smith *v.* R. R. 37 L. T. 224; R. *v.* Morris, 1 B. & Ad. 441; Metrop. Asylum *v.* Hill, 44 L. T. (N. S.) 653; Com. *v.* Kidder, 107 Mass. 188; Com. *v.* Church, 1 Barr, 105; Del. Canal Co. *v.* Com., 60 Penn. St. 367; State *v.* Buckley, 5 Harring. (Del.) 508; State *v.* Mullikin, 8 Blackf. 260; Stoughton *v.* State, 5 Wis. 291. *Cf.* Palmer *v.* State, 39 Ohio St. 236. See Whart. Cr. Pl. & Pr. § 125. *Infra*, § 1476.

[4] Com. *v.* Kidder, 107 Mass. 188; Easton *v.* R. R., 24 N. J. Eq. 49; Com. *v.* Reed, 34 Penn. St. 275; Danville R. R. *v.* Com., 73 Ibid. 29; Butler *v.* State, 6 Ind. 165; Neaderhouser *v.* State, 28 Ibid. 257; Stoughton *v.* State, 5 Wis. 291; State *v.* London, 3 Head, 263. *Supra*, § 1416; *infra*, §§ 1476, 1484.

[5] People *v.* N. Y. Gas Light Co., 64 Barb. 55. See R. *v.* Pease, 4 B. & Ad. 30.

[6] Whart. on Neg. § 271. *Infra*, § 1476.

[7] Com. *v.* Erie R. R., 27 Penn. St. 339; Dan. R. R. *v.* Com., 73 Ibid. 29. But it will not protect acts transcending authority. Ibid.

In Managers of Met. Asylum Dist. *v.* Hill, L. R. 6 Ap. Ca. 193; 44 L. T. (N. S.) 653, it was held that a government license was no defence to those concerned in the erection of a small-pox hospital in such a place as to expose a populous neighborhood to infection. See Wolcott *v.* Mellick, 3 Stockt. 309.

[8] *Supra*, §§ 125 *et seq.*, 152 *et seq.* *Infra*, § 1474. See Whart on Neg. §§ 73 *et seq.*

It has been held that no indictment lies for injuries produced by fire works,

Nuisance must be in causal relation with defendant's act.

been correctly held that a party is not guilty of a public nuisance, unless the injurious consequences complained of are the natural, direct, and proximate result of his conduct. If such consequences are caused by the culpable acts of others so operating on his acts as to produce the injurious consequences, then he is not liable.[1]

II. ABATEMENT FOR.

Nuisance may be stopped by abatement.

§ 1426. Independently of judgment of fine and imprisonment,[2] there may be, when the offence is continuous and there is a *continuando* in the indictment, a judgment by the court that the nuisance abate.[3] But for this purpose the *continuando* is essential.[4] The usual course is to order the abatement; and if the defendant neglect or refuse to obey, to direct an abatement by the sheriff.[5] A private nuisance is a nuisance which distinctively affects a private person, and which he is excused for removing when he can do so without public disturbance or invasion of another's rights.[6] A public nuisance is one which, as we have seen, annoys the public as such; and a public nuisance may be

unles there be causal relationship proved. R. *v.* Barnett, Bell C. C. 1; cited *supra*, §§ 135, 154, 159, 166, 247.

[1] State *v.* Rankin, 3 S. C. 438; and see R. *v.* Medley, 6 C. & P. 292; Moses *v.* State, 58 Ind. 185. *Supra*, § 1416; *infra*, §§ 1441, 1484. And see U. S. *v.* Elder, 4 Cranch C. C. 507. *Infra*, § 1498.

[2] State *v.* Noyes, 10 Foster, 279. *Infra*, § 1487.

[3] Munson *v.* People, 5 Park. C. R. 16; Smith *v.* State, 22 Ohio St. 539; McMaughlin *v.* State, 45 Ind. 338. See Meigs *v.* Lister, 25 N. J. Eq. 489; Campbell *v.* State, 16 Ala. 144; and see 19 Cent. L. J. 42.

[4] R. *v.* Stead, 8 T. R. 142; R. *v.* Pappineau, 2 Strange, 686; State *v.* Haines, 30 Me. 65; State *v.* Noyes, 10 Foster, 279; Munson *v.* People, 5 Park. C. R. 16; Taylor *v.* People, 6 Ibid. 347; Del. Canal Co. *v.* Com., 60 Penn. St. 367; Wroe *v.* People, 8 Md. 416; Smith *v.* State, 22 Ohio St. 539.

[5] Taggart *v.* Com., 21 Penn. St. 527; Barclay *v.* Com., 25 Ibid. 503; McLaughlin *v.* State, 45 Ind. 338; Campbell *v.* State, 16 Ala. 144; Crippen *v.* People, 8 Mich. 117.

That a private person can only abate a nuisance that is a special injury to himself, see Colchester *v.* Brooke, 7 Q. B. 339; Dimes *v.* Petley, 15 Ibid. 276; Jones *v.* Withams, 11 M. & W. 176.

But he can only interfere with another's property to the extent necessary to abate the nuisance. Roberts *v.* Rose, 4 H. & C. 103.

[6] *Supra*, §§ 97, 97 *a*; 3 Bl. Com. 220; Cooley on Torts, 46; 1 Hilliard on Torts, 605, and cases there cited. Manhattan Co. *v.* Van Keuren, 18 C. E. Green, 251; Babcock *v.* Buffalo, 56 N Y. 268; Ruff *v.* Phillips, 50 Ga. 130. See Brown *v.* Perkins, 12 Gray, 10; and summary in 27 Alb. L. J. 24.

abated by private sufferers injured when there is not time or opportunity to secure the intervention of the public authorities, and when without such intervention serious damage will ensue;[1] but even in such case the party causing the nuisance should, when this can be done without injurious delay, be called upon to remove it.[2] And when the nuisance becomes the object of public prosecution, legal proceedings being instituted to test the right, then the right of private citizens to abate ceases.[3] The abatement may be enforced even to the destruction, if necessary, of the property from which the nuisance springs.[4] But this is not permissible when the nuisance can be abated without such destruction.[5] Thus the destruction of a tippling

[1] Low *v.* Knowlton, 26 Me. 128; Hopkins *v.* Crombie, 4 N. H. 520; Arundel *v.* McCulloch, 10 Mass. 70; State *v.* Paul, 5 R. I. 185; State *v.* Keenan, Ibid. 497; Renwick *v.* Morris, 7 Hill (N. Y.), 575; Wetmore *v.* Tracey, 14 Wend. 250; Meeker *v.* Van Rensselear, 15 Ibid. 397; Rung *v.* Shoneberger, 2 Watts, 23; Barclay *v.* Com., 25 Penn. St. 503; Moffett *v.* Brewer, 1 Greene, Iowa, 348; Manhat. Man. Co. *v.* Van Keuren, 23 N. J. Eq. 251; State *v.* Dibble, 4 Jones (N. C.), 107; King *v.* Saunders, 2 Brev. 111. As to right of self-defence in this relation, see *supra*, § 97, 97 *a*. That an impediment in the highway may be removed by individual action, see Wood on Nuisance, § 520; Turner *v.* Holtzman, 54 Md. 148. This is applied to removal of boughs overhanging a road. Lonsdale *v.* Nelson, 2 B. & C. 302, 311. As to limitations of right to abate, see Wood on Nuisance, § 726; 19 Cent. L. J. 42.

[2] Jones *v.* Williams, 11 M. & W. 176, and cases above cited.

[3] Com. *v.* Erie & N. E. R. R., 27 Penn. St. 339. The more prudent course in cases of disputed right is to leave the question of abatement to the courts. See Taggart *v.* Com., 21 Penn. St. 527. It has been said that when a breach of the peace would ensue the right cannot be exercised. Day *v.* Day, 4 Md. 262. But as the right is absolute, this qualification is not good. It might as well be said that the right of self-defence ceases when its exercise involves a breach of the peace. See *supra*, §§ 97-102. The distinction is that the right cannot be sustained when its exercise involves a breach of the peace more disturbing to the community than the continuance of the evil until the result of legal procedure.

That the mayor of a city may interfere to abate a public nuisance, see Fields *v.* Stokley, 99 Penn. St. 306. See criticism in 28 Alb. L. J. 244.

[4] Penruddock's Case, 5 Co., 100; Penns. *v.* Wheeling Bridge Co., 13 How. 518; Lancaster *v.* Rogers, 2 Barr, 114.

In State *v.* Parrott, 71 N. C 311, it was held that individual citizens were justified in tearing down a railroad bridge over Neuse River, when by so doing they removed obstructions to the free navigation of the river. See to same effect, State *v.* Dibble, 4 Jones, 107, citing Wilson *v.* Forbes, 2 Dev. 30; Collins *v.* Benbury, 3 Ired. 277; S. C., 5 Ibid. 118; Fagan *v.* Armstead, 11 Ibid. 433; Wilson *v.* Black Bird Creek Marsh Company, 2 Peters, 248.

[5] Roberts *v.* Rose, 3 H. & C. 162.

house[1] and house of ill-fame cannot be defended on this ground.[2] This right, at the same time, is a part of the right of self-defence; and it may be exercised in behalf, not only of self, but of others whom the party is called upon to protect,[3] as well as of the community of which the party interfering is a member, if he be among the injured parties.[4] But the right cannot be exercised wantonly or by a mere volunteer.[5]

In cases of indictments against municipal corporations for neglect in repairing roads, the order of abatement goes virtually to the reparation of the road, which may be compelled by fine.[6]

Dogs, when habitually ranging the highways or marauding in fields so as to imperil life or property, or when disturbing a neighborhood by incessant and distressing noise, may be killed by any one thus annoyed or injured.[7]

[1] Brown *v.* Perkins, 12 Gray, 89.

[2] Ely *v.* Niagara Co., 36 N. Y. 297. "A house kept as a house of ill-fame, and as a resort for thieves and other disreputable persons," said the court, "is a public and common nuisance, but the destruction of the building and its furniture is not necessary to its abatement and is unlawful." S. P. Barclay *v.* Com., 29 Penn. St. 503; Welch *v.* Stowell, 2 Doug. (Mich.) 332. *Infra*, § 1530.

[3] See *supra*, § 97; Aldrich *v.* Wright, 53 N. H. 398; State *v.* Keenaw, 5 R. I. 497; State *v.* Dibble, 4 Jones N. C. 107. See *infra*, §§ 1540 *et seq.*

[4] See Yates *v.* Milwaukee, 10 Wal. 497; Brown *v.* Perkins, 12 Gray, 89; Babcock *v.* Buffalo, 56 N. Y. 268; State *v.* Parrott, 71 N. C. 311.

[5] Dimes *v.* Petty, 15 Q. B. 276; Brown *v.* Perkins, 12 Gray, 89; Bowden *v.* Lewis, 13 R. I. 189; Fort Plain Bridge *v.* Smith, 30 N. Y. 44. And as to the indictability of cruelty in such cases, see *supra*, § 1082 *d*.

[6] R. *v.* West Riding, 7 T. R. 467; R. *v.* Incledon, 13 East, 164; R. *v.* Claxby, 3 C. L. R. 986; 1 Jur. (N. S.) 710. *Infra*, § 1487.

[7] *Dangerous and troublesome dogs.*— That a dog which attacks persons or property (*e. g.*, sheep) may be killed by those who are assailed, see Whart. on Neg. § 912; Janson *v.* Brown, 1 Camp. 41; Reed *v.* Edwards, 17 C. B. N. S. 245; Sarch *v.* Blackburn, 4 C. & P. 300; Brown *v.* Hoburger, 52 Barb. 15; though it is said that this is only justifiable in immediate repulsion of an attack. Wells *v.* Head, 4 C. & P. 508; see Morris *v.* Nugent, 7 Ibid. 572. But it is otherwise when a dog becomes a common nuisance, ranging the roads, and alarming or disturbing the neighbors and those passing and repassing; in which case he may be killed by any one who is exposed to the annoyance. King *v.* Kline, 6 Barr, 317, by Coulter, J.; Brown *v.* Carpenter, 26 Vt. 639; and see *supra*, § 1412. But this does not apply to dogs kept on the owner's premises; see Brock *v.* Copeland, 1 Esp. 202; Perry *v.* Phipps, 10 Ired. 259; and so far as concerns the question of nuisance, habitual troublesomeness must be made out.

III. INDICTMENT.

Indictment must conclude to common nuisance.

§ 1427. The technical term "common nuisance" is essential as a term of art, when the indictment is at common law.[1] But this is not by itself enough. The term "common nuisance" must be so directed as to be pointed, not at particular individuals, but at the community at large; *e. g.*, the offence must be declared to be to the "common nuisance" "of all the citizens of the said State residing in" the neighborhood; or "of all the citizens of said State there passing and repassing."[2]

Must show a public offence.

§ 1428. The indictment, also, must show an offence not private but public,[3] and the defect is not cured by the averment of a public nuisance.[4] Thus, frequenting houses of ill-fame, if done secretly, is not indictable; the indictment, to make the offence a nuisance, must aver it to be done openly, notoriously, and scandalously.[5] So, when those concerned in the control of an alleged noxious object are indicted for a nuisance, it must be alleged to be so situated as to make it a nuisance to the public, or, at least to all persons passing or repassing the offensive object;[6] and when a dam is claimed to produce stagnant water and to corrupt the air, this must be alleged to be in such a way as to affect a populous neighborhood, or persons passing on a public highway.[7]

See cases cited in Whart. on Neg. § 912. Single cases of annoyance are not enough on the ground given by Lord Cockburn that "every dog is entitled to at least one worry." Campbell on Neg. § 27. And see *supra*, §§ 97, 97 *a*.

[1] R. *v.* Holmes, 20 Eng. Law & Eq. 597; 3 C. & K. 360; State *v.* Stevens, 40 Me. 559. When the offence is statutory, the term is unnecessary unless prescribed by statute. Ibid.

[2] Com. *v.* Faris, 5 Rand. (Va.) 691; Graffins *v.* Com., 3 Penn. R. 502; State *v.* Baker, 74 Mo. 394. That surplusage does not affect, see Com. *v.* Ballou, 124 Mass. 26.

[3] See Wertz *v.* State, 42 Ind. 161; State *v.* Kaster, 35 Iowa, 221; State *v.* Close, 35 Iowa, 570; Chute *v.* State, 19 Minn. 271. Thus an indictment for polluting a stream must show that the stream was one in which the public had rights. Messersmidt *v.* People, 46 Mich. 437.

[4] State *v.* Houck, 73 Ind. 37.

[5] Brooks *v.* State, 2 Yerg. 482. See Parkinson *v.* State, 2 W. Va. 589. *Infra*, § 1446.

[6] Horner *v.* State, 49 Md. 277; State *v.* Purse, 4 McCord, 472. That the averment "to the nuisance of all persons then and there passing and repassing along said public highway" is enough, see Com. *v.* Sweeny, 131 Mass. 579.

[7] Com. *v.* Webb, 6 Rand. (Va.) 726; Cornell *v.* State, 7 Baxt. 520. *Infra*, § 1480.

It has also been held that the indictment must show that the alleged "nuisance" is not merely offensive to the community, but that it is reasonably so. In other words, it must appear that the act complained of is such as the law would pronounce to be a nuisance. For the pleader to limit himself to the mere conclusion of law, "to the common nuisance," is clearly insufficient.[1] But as to common scolds, and descriptive designations of this class, the generic description is enough.[2]

Bill of particulars may be required.

§ 1429. The generality of the indictment in nuisance, as in conspiracy, in many cases entitles the defendant to a bill of particulars, the practice as to which is elsewhere stated at large.[3]

IV. PROOF.

Nuisance to be proved inferentially.

§ 1430. Whether the acts complained of are nuisances to the community is to be determined inferentially from the facts in the case, as well as from testimony of experts as to the probable operation of the constituents of which the nuisance is composed on the health or comfort of the community. But only the nuisance specifically charged in the indictment can be proved.[4] "General reputation," of course, cannot be admitted to prove or disprove nuisance.[5] But, as will be seen, the bad character of persons haunting a house of ill-fame may be put in evidence.[6]

V. OFFENCES TO RELIGION.

§ 1431. Any public act that grossly and wantonly shocks the religious sense of the community as a body is a nuisance.

Hence it is a nuisance to disturb public rest on Sunday by any

[1] *Supra*, § 1419; Whart. Cr. Pl. & Pr. § 154; Com. *v.* Boynton, 12 Cush. 499; People *v.* Cunningham, 1 Denio, 524; Com. *v.* Webb, 6 Rand. (Va.) 726; State *v.* Baldwin, 1 Dev. & Bat. 195; State *v.* Purse, 4 McCord, 472. See, as to indictment for noxious trade, State *v.* Hart, 34 Me. 36.

[2] See *infra*, § 1442.

[3] See *supra*, § 1386; Whart. Cr. Pl. & Pr. §§ 157, 702; and see R. *v.* Curwood, 5 Nev. & M. 369.

[4] Com. *v.* Brown, 13 Met. 365.

[5] State *v.* Foley, 45 N. H. 466; Com. *v.* Stewart, 1 S. & R. 342; Com. *v.* Hopkins, 2 Dana, 418; Overstreet *v.* State, 3 How. (Miss.) 328. *Infra*, §§ 1451–4; Whart. Cr. Ev. § 255.

[6] Clementine *v.* State, 14 Mo. 112. *Infra*, § 1451.

unnecessary conspicuous and noisy conduct.[1] Hence, also, public, gross, and scandalous profanity is a nuisance;[2] though it is essential that such profanity should be alleged and proved to be *in the hearing* of divers persons,[3] and that it should be continuous, since a single profane oath cannot ordinarily be a public nuisance.[4]

Whatever shocks common religious sense is a nuisance.

[1] *Infra*, § 1449; Com. *v.* Jeandelle, 2 Grant, 506; 3 Phila. 509; Com. *v.* Dupuy, Bright. 44; Lindenmüller *v.* People, 33 Barb. 548. As to disturbing congregation, see *infra*, § 1556.

[2] 1 Hawk. P. C. 358; State *v.* Chandler, 2 Harring. 553; State *v.* Powell, 70 N. C. 67; State *v.* Brewington, 84 N. C. 783; State *v.* Crisp, 85 Ibid. 528; Young *v.* State, 10 Lea, 165; State *v.* Graham, 3 Sneed, 134. *Infra*, § 1605. *Cf.*, Holcomb *v.* Cornish, 8 Conn. 375; Com. *v.* Hardy, 1 Ashm. 410, and cases cited *infra*, § 1603. As to indictment, see Com. *v.* Spratt, 14 Phila. 365.

[3] State *v.* Pepper, 68 N. C. 259; Goree *v.* State, 71 Ala. 7. See *infra*, § 1442. As to blasphemous libels, see *infra*, § 1605; Gaines *v.* State, 7 Lea, 410.

In State *v.* Pepper, 68 N. C. 259, Rodman, J. said: "The only question which it is necessary to consider arises on the face of the indictment. Does it charge any criminal offence?

"It charges that the defendant, 'in the public streets of the town of Lumberton, with force and arms, and to the great displeasure of Almighty God and the common nuisance of all the good citizens of the State then and there being assembled, did, for a long time, to wit: for the space of twelve seconds, profanely curse and swear, and take the name of Almighty God in vain, to the common nuisance as aforesaid,' etc.

"We think no indictable offence is charged, and that the indictment is defective in several respects.

"In the learned and instructive opinion of the court, in State *v.* Jones (9 Ired. 38), delivered by Nash, J., it is said that a single act of profane swearing is not indictable. The acts must be so repeated in public as to have become an annoyance and inconvenience to the public. The fact must be so, and it must be so charged. That is not charged in the bill before us. The question is too clear, both upon reason and authority, to require more to be said.

"To make profane swearing a nuisance, the profanity must be uttered in the hearing of divers persons, and it must be charged in the bill to have been so uttered. This principle is fully established by State *v.* Jones, and the cases there cited, especially State *v.* Waller (3 Mur. 229), which was an indictment for drunkenness.

"In this case, the averment that the profanity was 'to the common nuisance of all the good citizens of the State then and there being assembled,' is equivocal. Taken literally, it would mean that all the citizens of the State were assembled in Lumberton on this occasion, which would be absurd. If it be understood as alleging that the profanity was to the nuisance of all such citizens of the State as were then and there assembled, it is not a direct and positive averment that any citizens were so assembled. The averment might be true, although there were no persons assembled. It is not the same as saying, 'in the presence of divers persons being then and there assembled, for that contains a direct averment of the presence of divers persons.

"We were referred to State *v.* Roper (1 Dev. & Bat. 208), as an authority that it was not necessary to charge the act to have been done in the presence of any person, it being charged to have been done in a public place.

"In that case the indictment charged the defendant with an indecent exposure of his person on a public highway, but omitted to allege that it was in the presence of divers persons or of any person.

"Gaston, J., delivering the opinion of the court, says, that such an allegation was unnecessary; it was sufficient if it was probable from the circumstances that the exposure could have been seen by the public, and the indictment was sustained. The authority upon which that decision professes to be founded is R. *v.* Crunen, 2 Camp. 89. But we conceive that case does not sustain the form of indictment adopted in State *v.* Roper.

"The form of the indictment in R. *v.* Crunden is given in 2 Chit. Cr. Law, 41, from which it appears that it was charged in both counts that the defendant exposed himself naked in a public place, and 'in the presence of divers of the king's subjects.' The evidence was that the defendant bathed in the sea at Brighton, near to and in front of a row of inhabited houses. Although there was no direct evidence that any occupant of the houses or others had seen him, yet clearly there was evidence from which the jury might have inferred that they did. The most that can be gathered from that case is, that if one person (the witness) saw the indecent exposure, and others were actually present and might have seen it, though there is no proof that they did, 'yet the law recognizes the probable risk of their seeing it as sufficiently proximate to be dealt with as a reality.' Note 7 to R. *v.* Webb. 1 Den. C. C. 338.

"In the last case cited, the indictment charged that the defendant exposed his person 'in a public place, in a certain victualling ale-house, in the presence of one M. A., the wife of R. C., and of divers others,' etc. The evidence was that the defendant exposed his person to the view of M. A., she alone being present. The court doubted about the sufficiency of the indictment, upon grounds not pertinent to the present point, and held, that if the words, 'of divers others,' had been omitted, it would have been bad, and as this allegation was not proved, there was no evidence to support this conviction. See also R. *v.* Watson, 2 Cox. C. C. 376."

From these cases it was inferred that when the nuisance is one whose offensiveness is to the hearing, it must be charged to have been heard by divers persons. This was affirmed in State *v.* Powell, 70 N. C. 67.' See further, *infra*, § 1432.

[4] State *v.* Powell, 70 N. C. 67; State *v.* Baldwin, 1 Dev. & Bat. 195; Gaines *v.* State, 7 Lea, 510.

§ 1431 *a*. As embodying the principle just stated, statutes prohibiting secular labor on Sunday have been held constitutional;[1] and

[1] State *v.* Gurney, 37 Me. 149; State *v.* Barker, 18 Vt. 195; Com. *v.* Harrison, 11 Gray, 308; Specht *v.* Com., 8 Barr, 312; Com. *v.* Jeandelle, 2 Grant, 506; S. C., 3 Phila. 509; State *v.* Ches.

the same view has been taken as to a statute forbidding theatrical exhibitions on Sunday.[1] Even as to Jews and persons conscientiously keeping the seventh day as the Sabbath, such statutes are to be enforced;[2] and when the overt act is proved, intent is irrelevant.[3] A principal, also, is liable under the statute for his agent's acts in violation of the statute.[4]

Unnecessary labor on Sunday a statutory offence.

& Ohio R. R. 24 W. Va. 783; Schlict *v.* State, 31 Ind. 246; Foltz *v.* State, 33 Ibid. 215; Frollichstein *v.* Mobile, 40 Ala. 725; Ambs *v.* State, 20 Mo. 214; Com. *v.* Louisville R. R., 80 Ky. 143; Shover *v.* State, 5 Eng. (Ark.) 259; State *v.* Anderson, 30 Ark. 131; Bridges *v.* State, 37 Ibid. 224. Bird, *ex parte*, 19 Cal. 130; Burk, *ex parte*, 59 Ibid. 6; Koser, *ex parte*, 60 Ibid. 177; People *v.* Griffin, 1 Idaho, N. S. 476; Usener *v.* State, 8 Tex. Ap. 177; Bohl *v.* State, Ibid. 683. See Com. *v.* Crowther, 117 Mass. 116; Com. *v.* Has, 122 Ibid. 40; in note to Com. *v.* Louisville R. R. in 3 Crim. Law Mag. 638; Com. *v.* Stodler, 15 Phila. 418. That the exception in favor of those who observe Saturday is not unconstitutional, see Johns *v.* State, 78 Ind. 332.

[1] Lindenmüller *v.* People, 33 Barb. 548. As to ninepin alleys, see Com. *v.* Colton, 8 Gray, 488. *Infra*, § 1465 *a*.

[2] Com. *v.* Hyneman, 101 Mass. 30; Com. *v.* Has, 122 Ibid. 40; Anon., 12 Abb. (N. Y.) Ca. 455; Com. *v.* Wolf, 3 S. & R. 48; Specht *v.* Com., 8 Barr, 312. But see *contra*, Cincinnati *v.* Rice, 15 Ohio, 225. As to statute excepting such cases, see Com. *v.* Trickey, 13 Allen, 559; Johns *v.* State, 78 Ind. 332.

[3] *Supra*, §§ 23 *a*, 88; Brittin *v.* State, 5 Eng. (Ark.) 299.

"Shooting at a dog" is a violation of the Alabama statute against Sabbath breaking. Smith *v.* State, 50 Ala. 159. See, as to hunting, State *v.* Carpenter, 62 Mo. 594.

Hunting and fishing on Sunday may be indictable as a nuisance, notwithstanding the fact that they are punishable by summary proceedings before justices. Gunter *v.* State, 1 Lea (Tenn.), 129.

[4] Seaman *v.* Com., 11 Weekly Notes, 245.

"Store" in the prohibitive statute is regarded as including "shop." Sparrenberger *v.* State, 53 Ala. 484. See Snider *v.* State, 59 Ala. 64.

Sunday evening, after sunset, is part of the day. Com. *v.* Newton, 8 Pick. 234.

The sale of medicines is usually excepted by statute; and if not, may be excused on ground of necessity. R. *v.* Howarth, 33 Up. Can. Q. B. 537.

Leaving a door unlatched, so that passers by can enter, is equivalent to keeping open. Com. *v.* Lynch, 8 Gray, 384; Com. *v.* Harrison, 11 Ibid. 308.

An open park is not included in a prohibition of keeping open of "saloon or other building." State *v.* Barr, 39 Conn. 40; Maguire *v.* State, 47 Md. 485.

The mere sale of liquors on Sunday at a hotel, when not specifically indictable, is not indictable as a profanation of that day. See Com. *v.* Naylor, 34 Penn. St. 86; Hall *v.* State, 4 Harring. 132; Wetzler *v.* State, 13 Ind. 35. See *infra*, §§ 1512 *a et seq*.

§ 1431 *b*. The statutes in most jurisdictions designate the particular kind of labor that is prohibited; and when this is the case, the offence, unless it becomes a nuisance, is confined within the limitations of the statute. But the terms are construed by the courts in harmony with the object in view, which is the preservation of Sunday as a day of rest. Thus, in Pennsylvania driving an omnibus is held to be a "worldly employment," a term handed down from a Quaker ordinance;[1] while in other States "common labor" is construed to include all kinds of secular business by which the rest of the day may be disturbed.[2] "Work," or "servile labor," has received a similar meaning.[3] When the term "usual avocation" or "ordinary calling" is employed, it covers the particular business, if secular, in which the party in question is concerned.[4] But under prohibitions of this order do not fall business transacted, for the furtherance of their distinctive purposes, by religious and philanthropic associations.[5]

Limitations as to kind of labor to be followed

§ 1431 *c*. In some of the statutes the exception of necessity is expressed. In others it is implied, subject to the general distinctions as to necessity which have been already stated.[6] By the courts the following occupations have been held to be necessary either as statutory or common law exceptions:[7] Driving to religious worship;[8] rectifying a switch on a railroad;[9] opening locks on canals which are public highways;[10] protecting any industry or property from immediate destruction;[11] carrying the mail under federal statute, though this has been held not to protect unnecessary travelling in the mail

Necessary occupations excepted.

[1] Johnston *v.* Com., 22 Penn. St. 102.

[2] Cincinnati *v.* Rice, 15 Ohio, 225.

[3] Smith *v.* Wilcox, 25 Barb. 341.

[4] See R. *v.* Whitnash, 7 B. & C. 596; George *v.* George, 47 N. H. 27; Voglesong *v.* State, 9 Ind. 966; Whart. on Cont. § 385.

[5] People *v.* Young Men's Society, etc., 65 Barb. 357; see, as a curious illustration of the expansion of this exception, Feital *v.* R. R., 109 Mass. 398.

[6] *Supra*, § 95.

[7] See this question discussed in its civil relations in Whart. on Cont. § 388.

[8] Com. *v.* Nesbit, 34 Penn. St. 398. As to meaning of religious worship, see Feital *v.* R. R., 109 Mass. 398.

[9] Yonoski *v.* State, 79 Ind. 393.

[10] Murray *v.* Com., 24 Penn. St. 270.

[11] Com. *v.* Conway, 2 Leg. Chron. (Pa.) 399; 3 Leg. Chron. (Pa.) 27, (coaling locomotives); Edgerton *v.* State, 67 Ind. 588, (gathering and carrying food to hogs); Turner *v.* State, Ibid. 595, (harvesting "dead ripe" corn).

coach ;[1] boiling down sap from maple sugar trees which would otherwise be lost ;[2] turning in a kiln barley which would otherwise decay ;[3] hauling watermelons which are "dead ripe," and which would otherwise have greatly depreciated ;[4] shaving (by a barber) persons requiring this attention ;[5] travelling to obtain medical aid in sickness.[6] The following occupations have been held to be not necessary: Piloting a canal boat on Sunday ;[7] rescuing goods from slow waste ;[8] gathering from the shore seaweed which might otherwise be swept away by the waves ;[9] running an omnibus,[10] or horse cars for passengers ;[11] hauling goods to a steamboat making its regular trips ;[12] clearing obstructions in a mill employing many hands so as to enable it to resume work on Monday morning ;[13] selling liquor, even by a licensed innkeeper, and to those requiring the stimulus ;[14] selling cigars by a cigar vendor, even to habitual smokers, who need the indulgence ;[15] though it has been held to be otherwise when the cigars are not sold as part of a business,[16] or where they are sold by hotel keepers to their guests.[17]

[1] Com. v. Knox, 6 Mass. 76; see State v. Ches. & Oh. R. R., 24 W. Va. 809.

[2] See Whitcomb v. Gilman, 35 Vt. 297; Morris v. State, 31 Ind. 189.

[3] Crocket v. State, 33 Ind. 416.

[4] Wilkinson v. State, 59 Ind. 416.

[5] Phillips v. Innis, 4 Cl. & F. 234; Com. v. Jacobus, 1 Leg. Gaz. 49; 17 Pitts. L. J. 154; but see State v. Lorry, 7 Baxt. 95, to the effect that "barbering" on Sunday is not a nuisance.

[6] Gorman v. Lowell, 111 Mass. 65.

[7] Scully v. Com., 35 Penn. St. 511; S. C., 3 Phila. 347; see Murray v. Com., 24 Penn. St. 270, *supra*, the distinction being that opening a lock for a boat running on a canal is a necessity, but that it is not a necessity for the boat to run.

[8] State v. Goff, 20 Ark. 289.

[9] Com. v. Sampson, 97 Mass. 407; see Johnson v. Irasburg, 47 Vt. 28; McGrath v. Merwin, 112 Mass. 467.

[10] Johnston v. Com., 22 Penn. St. 102.

[11] Com. v. Jeandelle, 2 Grant, 566; S. C., 3 Phila. 503; afterwards corrected by statute. *Contra*, Augusta R. R. v. Renz, 35 Ga. 126; Com. v. Louisville R. R., 80 Ky. 143.

That a party who non-negligently lets a carriage on Sunday under the belief that it is for necessary travel is not indictable, see Myers v. State, 1 Conn. 507.

[12] Pate v. Wright, 30 Ind. 476.

[13] McGrath v. Merwin, 112 Mass. 407.

[14] *Infra*, § 1454. Omit v. Com., 21 Penn. St. 426; Vogelsong v. State, 9 Md. 112; see State v. Ambs, 20 Mo. 218; Archer v. State, 10 Tex. Ap. 482; *contra*, Hall v. State, 4 Harring. 132. *Cf.* Eitel v. State, 33 Ind. 201; State v. Eskridge, 1 Swan, 413; State v. Anderson, 30 Ark. 131.

[15] Anon., 12 Ab. N. C. 458 (Arnoux, J.); Foltz v. State, 33 Md. 215; Mueller v. State, 76 Ibid. 310.

[16] Wetzler v. State, 18 Ind. 35.

[17] Carver v. State, 69 Ind. 61. Though such hotel keepers cannot "keep cigar-stands." Mueller v. State, *ut supra*.

Baking by a baker, for Sunday use, bread which could have lasted over for a day, has been held to contravene the statute, though it is otherwise with baking meat necessary for immediate use.[1]

VI. OFFENCES TO PUBLIC DECENCY.

So of whatever shocks public decency.

§ 1432. Any public exhibition of gross and wanton indecency is in like manner a nuisance.[2] Hence it is indictable to indulge in habitual, open, and notorious lewdness ;[3] to permit dependents (in old times, slaves) to roam the streets in a state of nakedness ;[4] to openly and notoriously haunt houses of ill-fame ;[5] to use habitually indecent or profane language in the presence of passers by and the public generally ;[6] to parade stud horses through a city, letting them out to mares on the public streets ;[7] and to be addicted to public and notorious drunkenness.[8] The exhibitor of an unnatural and monstrous birth is thus indictable ;[9] and so is a herbalist who publicly exposes and exhibits in his shop, on a highway, a picture of a man naked to the waist, and covered with eruptive sores, thus constituting an exhibition offensive and disgusting, although there is nothing immoral or indecent in the picture, and his motive is innocent.[10] The same

[1] 1 Hawk. P. C. 360; R. v. Cox, 2 Bur. 785; R. v. Younger, 5 T. R. 450.

[2] As to indecent exposure of person, see *infra*, § 1468. As to indecent exhibitions, see *infra*, § 1606. As to Indiana statute, see McJunkins v. State, 10 Ind. 140.

[3] Delany v. People, 10 Mich. 241; Peak v. State, 10 Humph. 99; State v. Moore, 1 Swan, 136; Crouse v. State, 16 Ark. 566; *infra*, §§ 1446, 1747; *supra*, § 1428. As to statutes, see *infra*, § 1446.

[4] Britain v. State, 3 Humph. 203. *Infra*, § 1606.

[5] See Brooks v. State, 2 Yerg. 482; State v. Cagle, 2 Humph. 414; State v. Brunson, 2 Bailey, 149.

[6] Barker v. Com., 19 Penn. St. 412; State v. Kirby, 1 Murph. 254; State v. Ellar, 1 Dev. 267; State v. Brewington, 84 N. C. 783; State v. Appling, 25 Mo. 315; Bell v. State, 1 Swan, 42. *Supra*, § 1431; *infra*, § 1603. See, under Alabama statute, Smith v. State, 63 Ala. 55; Henderson v. State, Ibid. 193.

As has been seen, the offence must be "in the presence and hearing of divers persons then and there assembled," and the acts must have been so repeated in public as to have become an annoyance and inconvenience to the public. The words also must be given in the indictment. State v. Barham, 79 N. C. 646; aff. State v. Pepper, 68 Ibid. 259; State v. Powell, 70 Ibid. 67. See, under Georgia statute, Brady v. State, 48 Ga. 311.

[7] Nolen v. Mayor, 4 Yerg. 163.

[8] *Infra*, § 1433. See Smith v. State, 1 Humph. 396; State v. Waller, 3 Murph. 229; State v. Sowers, 52 Ind. 311.

[9] Harring v. Watson, 1 Russ. on Cr. 5th ed. 436.

[10] R. v. Grey, 4 F. & F. 73. See R. v. Bradford, Comb. 304.

has been ruled as to any scandalous exhibition.[1] But in all these cases the indictment must aver, and the proof must show, exposure and offence to the community generally; as mere private lewdness or indecency is not indictable as a nuisance at common law.[2]

Indecent treatment of the dead indictable.

§ 1432 *a*. Indecency in treatment of a dead human body is an offence at common law, as an insult to public decency. Hence, it is indictable to expose such a body without proper burial,[3] to wantonly or illegally disturb it,[4] to sell it, for mere purposes of private gain, for dissection,[5] or to disinter it, unless so directed by the deceased in his life or by his relatives after his death, with consent of the public authorities and of the owners of the ground, where this is requisite.[6] Want of

[1] R. *v.* Saunders, L. R. 1 Q. B. D. 15; 13 Cox C. C. 116; People *v.* Jackson, 3 Denio, 101; Knowles *v.* State, 3 Day, 103. See R. *v.* Grey, 1 F. & F. 73; Jocko *v.* State, 22 Ala. 73. In Com. *v.* Hazleton, New Bedford, Mass., 1873, the defendant was indicted for the exposure in a shopwindow of a nude statuette of Antinous. The charge left the question of indecency to the jury, who did not agree. See pamphlet report in Harvard Library. As to nude pictures, see Com. *v.* Dejardin, 126 Mass. 46. *Infra*, §§ 1606 *et seq.* As to exposure of person, see *infra*, § 1468. As to demoralizing exhibitions, see further, Thurber *v.* Sharp, 13 Barb. 627; Willis *v.* Warren, 1 Hilt. N. Y. 590; Jocko *v.* State, 22 Ala. 73; Pike *v.* Com., 2 Duval. 89.

[2] State *v.* Waller, *ut supra*. A urinal placed in such a way on private grounds as to be generally accessible, and to be conspicuous in a populous neighborhood, may be a nuisance. Chibnell *v.* Paul, 29 W. R. 539; see Vernon *v.* Vestry, L. R. 16 Ch. D. 449; and see *infra*, § 1470.

[3] Kanavan's Case, 1 Greenl. 226.

[4] 2 East P. C. 652; R. *v.* Giles, R. & R. 367; R. *v.* Sharpe, 7 Cox C. C. 214; 40 Eng. L. & E. 584; State *v.* Little, 1 Vt. 331; Com. *v.* Loring, 8 Pick. 370. See Com. *v.* Cooley, 10 Pick. 37; McNamee *v.* People, 31 Mich. 473. All concerned in the outrage are principals. Tate *v.* State, 6 Blackf. 110.

[5] R. *v.* Cundick, D. & R. (N. P.) 13; R. *v.* Feist, D. & B. 590; 8 Cox C. C. 18; R. *v.* Lynn, 2 T. R. 733; Com. *v.* Cooley, 10 Pick. 37; State *v.* McClure, 4 Blackf. 328.

[6] R. *v.* Sharpe, 7 Cox C. C. 214; Com. *v.* Loring, 8 Pick. 370; Com. *v.* Marshall, 11 Pick. 350; Tate *v.* State, 6 Blackf. 110. See Whart Prec. §§ 821 *et seq.*

"An indictment charged (*inter alia*) that the prisoner, a certain dead body of a person unknown, lately before deceased, wilfully, unlawfully, and indecently did take and carry away, with intent to sell and dispose of the same for gain and profit. It being evident that the prisoner had taken the body from some burial-ground, though from what particular place was uncertain, he was found guilty upon this count; and it was considered that this was so clearly an indictable offence that no case was reserved. R. *v.* Gilles, 1 Russ. by Grea. 464; Russ. & Ry. 366 (*n*). So to take up a dead body, even for the purpose of dissection, is

means to bury a relative is a defence to an indictment for non-burial;[1] though this defence will not be good if the party on whom the duty primarily lay neglected to call in the proper authorities.[2] A person, also, is indictable who buries or otherwise disposes of any dead body on which an inquest ought to be taken, without giving notice to a coroner, or who, being under a legal duty to do so, fails to give notice to a coroner that a body on which an inquest ought to be held is lying unburied, before such body has putrefied.[3] But "cremating" a dead body instead of burying it, is not an indictable offence at common law, unless the proceedings are conducted in such a way as to be a nuisance.[4]

in indictable offence. Where, upon an indictment for that offence, it was moved in arrest of judgment that the act was only one of ecclesiastical cognizance, and that the silence of the older writers on crown law showed that there was no such offence cognizable in the criminal courts, the court said that common decency required that the practice should be put a stop to; that the offence was cognizable in a criminal court as being highly indecent, and *contra bonos mores;* that the purpose of taking up the body for dissection did not make it less an indictable offence; and that as it had been the regular practice at the Old Bailey in modern times to try charges of this nature, the circumstances of no writ of error having been brought to reverse any of those judgments was a proof of the universal opinion of the profession upon this subject. R. *v.* Lynn, 2 T. R. 733; 1 Leach, 497. See, also, R. *v.* Cundick, Dowl. & Ry. N. P. C. 13. And it makes no difference what are the motives of the person who removes the body; the offence being the removal of the body without lawful authority. R. *v.* Sharpe, Dears. & B. 160; 26 L. J. M. C. 45, where the defendant, from motives of filial affection, had removed the corpse of his mother from its burying place. The defendant had in this case committed a trespass against the owner of the soil of the burying place; but, *quære*, whether if no such trespass was committed the offence might not be still complete." Roscoe Cr. Ev. p. 429.

[1] R. *v.* Vann, 2 Den. C. C. 325; 5 Cox C. C. 379.

[2] See *infra*, § 1565; Bettison, *in re*, L. R. 4 Ecc. 294; 12 Eng. R. 655 with Mr. Moak's note. The offence in the text is regulated in most States by statute. Philanthropic or scientific intentions are in such cases no defence. Com. *v.* Cooley, 10 Pick. 37; 1 Russ. 464. See *supra*, § 119; and compare articles in 18 Alb. L. J. 486–7 *et seq.*; 1 Am. L. Rev. N. S. 57. As to statutes, see Com. *v.* Loring, 8 Pick. 370; Com. *v.* Slack, 19 Pick. 307. In R. *v.* Stewart, 12 A. & E. 773, 779, it was held that the person under whose roof another person dies is under a legal duty to carry the corpse, decently covered, to the place of burial, if there is no one else who is bound to bury it.

[3] Steph. Dig. C. L. art. 175. That this is the case when a body is buried in such a way as to obstruct the coroner in his duties, see R. *v.* Stephenson, 13 Q. B. D. 331.

[4] R. *v.* Price, L. R. 12 Q. B. D. 247,

It is also an offence at common law to wantonly deface tombs, monuments, and graves;[1] and to be concerned in a disturbance in a graveyard.[2] The passage of time does not withdraw from graveyards this protection, though they have been long disused.[3] But acts of the legislature, or of competent municipal authorities, for the transfer of dead bodies from one burying place to another are not unconstitutional.[4]

Noisy and indecent conduct in public streets.

1432 *b*. Loud and unnecessary noises in the public streets made habitually, so as to disturb the neighborhood, are a nuisance.[5] Hence, keeping an inclosed lot for rifle shooting, so as to draw together numbers of disorderly persons, many of them armed and noisy, is a common law nuisance;[6] and so where noisy crowds are drawn together, to the annoyance of the neighborhood, night after night, by fireworks.[7] *Theatres*, when conducted in such a way as to draw together disorderly people, and, by immoral plays and spectacles, to degrade those who frequent them, are nuisances at common law.[8] The same doctrine was held as to a circus, carried on for eight weeks near dwelling-houses, and making continuous uproar.[9]

[*As to exposure of person, see infra*, § 1468.]

VII. OFFENCES TO HEALTH.

So of whatever is likely to generate disease.

§ 1433. Any acts or omissions which, in the regular course of events are likely to generate disease or communicate infection, expose the person so acting or omitting to act to an indictment for nuisance. It is not necessary

qualifying the law laid down in 2 Black. Com. 508; Steph. Com. book ii. part ii. cap. vii. 8th ed. 199.

[1] Com. *v.* Viall, 2 Allen, 512; Phillips *v.* State, 29 Tex. 226.

[2] 1 Hawk. P. C. ch. 23, § 23; *supra*, § 1431.

[3] Com. *v.* Wellington, 7 Allen, 299.

[4] Com. *v.* Goodrich, 13 Allen, 546.

[5] Com. *v.* Oaks, 113 Mass. 8. "It is sufficient," said Colt, J., "if the acts proved are of such a nature as tend to annoy all good citizens, and do in fact annoy any one present and not favoring them." Ibid. See State *v.* Graham, 3 Sneed, 134. *Supra*, §§ 1411, 1412, and as to cases of noise on highways, *infra*, § 1474.

[6] R. *v.* Moore, 3 B. & Ad. 184. See Bostock *v.* R. R., 5 De G. & S. 584.

[7] Walker *v.* Brewster, L. R. 5 Eq. 25. And see Inchbald *v.* Robinson, L. R. 4 Ch. Ap. 388.

[8] *Supra*, § 1412; Hawkins, L. 362, § 7; Wood on Nuisances, § 52, citing People *v.* Baldwin, 1 Crim. Rec. (N. Y.) 286. As to crowds so collected see *infra*, § 1474.

[9] Inchbald *v.* Robinson, L. R. 4 Ch. 388. See *supra*, § 1412.

that the result should *certainly* flow from the cause. In view of the great stakes involved, and of the anxiety which the defendant's misconduct is likely to produce, a high probability of disease is sufficient.[1]

1. *Unwholesome Food or Drink.*

As in case of exposure of putrid or infectious food or drink.

§ 1434. Whoever knowingly and wilfully exposes for sale, or has in his possession with intent to sell for human food, articles which he knows to be unfit for human food, is indictable for a nuisance;[2] but, to sustain the indictment, it is necessary that the food must be something that it does not purport to be, *e. g.*, that it must be putrid or infected with some disease or other injurious quality, making it prejudicial to health.[3] Guilty knowledge is necessary to constitute

[1] State *v.* Portland, 74 Me. 268; State *v.* Buckman, 8 N. H. 203; Meeker *v.* Van Rensselaer, 15 Wend. 397; People *v.* Townsend, 3 Hill (N. Y.), 479; State *v.* Close, 35 Iowa, 570; Watson *v.* Toronto Gas Co., 4 Up. Can. (Q. B.) 158; State *v.* Rankin, 3 S. C. 438. See *supra*, §§ 152 *et seq.* As to permitting land to generate disease, see Com. *v.* Colby, 128 Mass. 91.

Allowing noxious waters or other filth to pass from the defendant's land to the land of neighbors, may be a nuisance. Hurdman *v.* R. R., L. R. 3 C. P. D. 168. See Fletcher *v.* Rylands, L. R. 1 Ex. 265; L. R. 3 H. L. Ca. 330; Humphries *v.* Cousins, L. R. 2 C. P. D. 239. And so as to noxious vapors. Shott's Iron Co., 7 App. Ca. 518; Crump *v.* Lambert, L. R. 3 Eq. 409; *supra*, § 1412.

That over-crowding houses with poor people in time of infection, so as to endanger the health of the community, is a nuisance, see Rolle's Abr. 139, pl. 3; Wood on Nuisances, § 71; Meeker *v.* Van Rensselaer, 15 Wend. 397. State *v.* Purse, 4 McC. 472. *Infra*, § 1436. Blackburn's Case, cited *infra*, § 1836.

[2] R. *v.* Haynes, 4 M. & S. 214; R. *v.* Stevenson, 3 F. & F. 106; State *v.* Smith, 3 Hawks, 378; Hunter *v.* State, 1 Head, 160. In England, victuallers, brewers, and other common dealers in victuals, who in the course of their trade sell provisions unfit for the food of man, are criminally responsible under 51 Hen. III. "Pillor et Tumbrel, etc.," and of Edw. I. "De Pistoribus et Hasiatoribus et aliis Vitellariis," and are liable civilly to the vendee, without any fraud on their part or warranty of the soundness of the thing sold; but a private person, not following any of these trades who sells an unwholesome article for food, is not so liable. Burnby *v.* Bollett, 16 M. & W. 644. Report of English Commissioners, 1879. *Supra*, § 1410. It is no defence that the noxious article was sold under a patent from the United States. Palmer *v.* State, 39 Ohio St. 236.

[3] R. *v.* Stevenson, 3 F. & F. 106; People *v.* Parker, 38 N. Y. 85; Goodrich *v.* People, 19 Ibid. 574; State *v.* Norton, 2 Ired. 40; State *v.* Smith, 3 Hawks, 378; Daly *v.* Webb, 4 Irish R. C. L. 309. See Stein *v.* State, 37 Ala. 123. *Supra*, § 1118.

the offence.[1] The carrier who knowingly brings such food to the market is equally responsible with the vendor;[2] but if the meat is to be used for other than human food, the indictment does not lie.[3] The same rule applies to the furnishing others with unwholesome water,[4] and to the furnishing others (children at a military asylum) with unwholesome bread,[5] and to the pollution of water,[6] and to the drawing together of water in pools in such a way as to stagnate and poison the air.[7] But preparing a single portion of deleterious food for a single person, though it may be an attempt or assault, is not a nuisance.[8]

The pollution of a spring or stream of water,[9] and the supplying a market with food likely to engender disease,[10] are, independent of the question of nuisance, misdemeanors at common law. Whether supplying deleterious food or drink is an assault is elsewhere considered.[11]

Mere unwholesomeness is not sufficient.

§ 1435. It should be remembered that much food is unwholesome which it is not indictable to sell as human food; *e. g.*, rich and highly seasoned dishes. Hence it is not enough in the indictment to aver the selling of "unwholesome food;" but the kind of food (*e. g.*, beef) must be mentioned, and it must be averred to be diseased, or so spoilt or infected as to make it unwholesome.[12] But the offence is completed by the sale of food the seller knows to be diseased and poisonous, without proof of sickness caused thereby, or averment or proof that the food was sold to the vendees to be eaten by them, if

[1] Ibid. See *supra*, § 87; Whart. Crim. Ev. § 39.

[2] R. *v.* Jarvis, 3 F. & F. 108.

[3] R. *v.* Crawley, 3 F. & F. 109. See *supra*, § 1118.

[4] State *v.* Buckman, 8 N. H. 203.

[5] R. *v.* Dixon, 3 M. & S. 11.

[6] *Infra*, § 1477.

[7] State *v.* Close, 35 Iowa, 679; Com. *v.* Webb, 6 Rand. 726; Douglass *v.* State, 4 Wis. 387.

[8] R. *v.* Hanson, 2 C. & K. 912; Com. *v.* Stratton, 114 Mass. 303.

[9] State *v.* Buckman, *ut supra*.

[10] State *v.* Smith, 3 Hawks, 378, and cases cited in prior notes.

[11] *Supra*, § 610.

[12] Goodrich *v.* People, 3 Parker C. R. 622; 19 N. Y. 574.

Sir J. F. Stephen (Dig. C. L. art. 187) thus states the law:—

"Publicly and wilfully exposing or causing to be exposed for sale articles of food unfit for consumption, and knowingly permitting servants to mix unwholesome ingredients in articles of food, are acts endangering the health or life of the public within the meaning of this article." This is defective in not averring "for human use."

the sale were for human use.[1] The names of the vendees, not being material to the offence, need not be averred.[2]

As we have already seen, latent adulterations of food meant for public use may be proceeded against as cheats.[3]

2. *Contagious Diseases.*

And so as to communication of infection.

§ 1436. For the same reasons, it is indictable to expose to the public a human being or brute animal having a contagious disease; nor is it necessary in such case that the indictment should aver a nuisance.[4] And so, as has been seen, doing anything, or maintaining any building or institution, likely to generate infection, is indictable.[5]

VIII. OFFENSIVE INDUSTRIES.

§ 1437. Can an industry which is essential to the public welfare, be convicted and abated as a nuisance, because it is offensive to the vicinity? This is a question that has been already discussed, and will be noticed in some of its relations hereafter. It has been seen that no prescription can be pleaded for a nuisance,[6] and that neither its collateral benefit to the community,[7] nor the good intent of the projector,[8] is a defence. It has been seen that it is enough in such case to sustain a conviction that the comfort of the community was impaired.[9] It has also been seen that when population moves up to a nuisance, which previously was in a solitude, then, as a

[1] Goodrich *v.* People, *ut supra*.

[2] Ibid.

[3] *Supra*, § 1120.

[4] R. *v.* Vantandillo, 4 M. & S. 73; R. *v.* Burnett, 4 Ibid. 272; R. *v.* Henson, Dears. C. C. 24. See Smith *v.* Baker, U. S. Cir. Ct. N. Y. 1884; 30 Alb. L. J. 163; 1 Am. L. Journ. 363; where it was held that to take a child with whooping-cough to a boarding-house whereby boarders were induced to leave, and the plaintiff's (the landlady's) child caught the disease, gives the plaintiff a right to damages.

[5] *Supra*, § 1433. Metrop. Asylum *v.* Hill, 44 L. T. (N. S.) 653; Meeker *v.* Van Rensselaer, 15 Wend. 397. In 1865, in the prosecution of Blackburn for sending infected clothing to New York in order to generate disease, the British crown officers concurred in the opinion that the offence was indictable at common law. The defendant was acquitted from want of evidence. Dip. Cor. U. S. 1865–6; I. 168, 187. See article on Extra-territorial Crime in Crim. Law Mag. for March, 1885. And see Fairlee *v.* People, 11 Ill. 1, cited *supra*, § 525.

[6] *Supra*, § 1415.

[7] *Supra*, § 1416.

[8] *Supra*, § 1421.

[9] *Supra*, § 1410 *et seq.*

general rule, the nuisance must recede.[1] As, however, this is a rule subject to some exceptions, it is better to view it as it bears on three distinct conditions of fact.

Offensive industry cannot be planted in populous community.

§ 1438. First, when the industry is originally planted in a populous community. Here there can be no question. The industry, if a nuisance, must be abated.

Offensive industry indictable if placed within city limits.

§ 1439. Secondly, when the industry is originally planted within the limits of an incorporated city or village, but where there are no dwelling-places in the vicinity at the time of its origination. The law, in this case, is clear. Whoever builds in a district set apart especially by the law for urban purposes, does so with notice that anything inconsistent with such purposes must be abandoned when the comfort of the population requires the surrender.[2]

Whether such industry must recede, in other cases, when population approaches, is a question of expediency.

§ 1440. Thirdly, when the industry is originally planted in an uninhabited district, not part of an incorporated city or village, and is subsequently approached by population to whom it is a nuisance. Here the law also is, that in such case the industry must retire, to take up its seat in a district to which population has not yet reached. Yet it is impossible to study the cases without seeing that the question is treated as one of expediency, as the issue (that of comfort) indeed invites. Whose expulsion would produce the most general inconvenience—the "nuisance" or the population? If the "nuisance" be essential to the community at large,—if it cannot be pushed into remoter and more desolate regions without great inconvenience,—if the population affected by it can with comparatively little inconvenience retire,—then the latter cannot claim that the former be expelled.[3] Of such cases as these we have illustrations in various public works instituted by government, and in chartered corporations for travel.[4]

[1] *Supra*, § 1415.

[2] See Ball *v.* Roy, L. R. 8 Ch. 459; Broder *v.* Saillard, L. R. 2 Ch. D. 692.

[3] See Ellis *v.* State, 7 Blackf. 534.

[4] See *supra*, § 1424. Thus, on the ground that a gas manufactory is essential to the comfort and safety of cities, it has been ruled, in a case already cited, that when such a manufactory is chartered for the purpose by the legislature, no indictment lies when the processes adopted for the purpose are the best that can be applied, and when due care and diligence has been shown. People *v.* N. Y. Gas light Co., 64 Bard. 55. See Com. *v.* Reed, 34 Penn. St. 275. *Supra*, § 1424. As to a petroleum refinery, see Jones *v.* Cook, L. R. 6 Q. B. 505; Com. *v.* Kidder, 107 Mass. 188. As to a tannery, see State *v.* Trenton, 36 N. J. L. (7 Vroom) 283. As to brick-making, see Huckenstine's App., 70 Penn. St. 102. As to a swine-yard, Com. *v.* Van Sickle, Brightly, 69; and see *supra*, § 1412.

On the other hand, when the "nuisance" can be readily sequestered to a more secluded spot, while the population has taken root, and cannot readily be moved, then the former must give way to the latter.[1] It should be remembered, however, that no mere sentimental or nervous sensibility will be ground for a conviction. The "nuisance" must be *reasonably* offensive.[2]

IX. EXPLOSIVE AND INFLAMMABLE COMPOUNDS.

Explosive compounds must be carefully kept.

§ 1441. It is a nuisance at common law to keep or manufacture explosive or inflammable compounds in such a way as to be productive of terror or peril to the community.[3] Licenses for such keeping or manufacture are to be strictly construed, and their restrictions conformed to closely. Nor will they be stretched to authorize any offence they do not expressly cover.[4] Thus a license from government to manufacture or keep on hand petroleum, under such conditions as will prevent explosion, is no defence to an indictment against the manufacturer of such petroleum in such a way as to diffuse unwholesome and offensive vapors.[5] The same distinctions apply to gunpowder.[6] Spring guns, also, may be proceeded against as nuisances.[7]

[1] *Supra*, § 1415. See Com. *v.* Upton, 6 Gray, 473; Ashbrook *v.* Com., 1 Bush, 139.

[2] *Supra*, § 1414.

[3] R. *v.* Lister, Dears. & B. 209; Hepburn *v.* Lordan, 2 H. & M. 345; Williams *v.* East India Co., 3 East, 192, 201; State *v.* Hart, 34 Me. 36; Trueman *v.* Casks, Thach. C. C. 14; Com. *v.* Kidder, 107 Mass. 188; People *v.* Sands, 1 Johns. 78; Bradley *v.* People, 56 Barb. 72; Myers *v.* Malcolm, 6 Hill, (N. Y.) 292; Wier's App., 74 Penn. St. 230; Cheatham *v.* Shearon, 1 Swan (Tenn.), 213.

[4] See *supra*, § 1424.

[5] Com. *v.* Kidder, 107 Mass. 188. See Wier's Appeal, 74 Penn. St. 230. *Supra*, § 1424.

[6] People *v.* Sands, *ut sup.*; Bradley *v.* People, *ut sup.* As to gunpowder under English statute, see R. *v.* Mutters, 1 B. & A. 362; Webley *v.* Woolley, L. R. 7 Q. B. 61; Elliott *v.* Majendie, Ibid. 429; Briggs *v.* Mitchell, 2 B. & S. 523. *Supra*, § 1412. As to fireworks under statute, see Bliss *v.* Lilley, 3 B. & S. 128; King *v.* Ford, 1 Stark. 421; Ibbotson *v.* Peat, 3 H. & C. 644.

[7] *Supra*, § 464.

X. NUISANCES OF PERSONAL DEPORTMENT.

Common scolds indictable at common law.

§ 1442. When a woman is habitually addicted to scolding at and before persons in general, on the highway, or in a populous neighborhood, so as to disturb passers-by, she may be indicted as a common scold;[1] and it is enough if the indictment simply avers her to be such.[2] Anger or malice is not a necessary constituent of the offence.[3] Ducking, however, which was the old common law punishment, is now obsolete.[4]

And so of common brawlers.

§ 1443. A *common brawler* is a person addicted to constant noisy public brawling and quarrelling. The offence is in some States indictable by statute; in others at common law.[5] It is not necessary to constitute this offence, or that of a common scold, that the brawling and scolding should be in the public streets. If it takes place within a house, and yet is so vehement and vituperative as to disturb the public peace outside, it is indictable.[6] A common profane swearer, or user of indecent language, has been said to be in like manner and with like limitations, indictable at common law.[7]

And so of common barrators. Common thieves.

§ 1444. *A common barrator*,[8] *e. g.*, a person who habitually[9] foments vexatious and groundless litigation among citizens, irrespective of any private relations he may sustain to them, is indictable as a nuisance at common law.[10] The gratuitous or venal fostering of litigation, under the name of champerty and maintenance, is hereafter considered.[1] *Common thieves* are indictable in some States by statute, but in such case habitual thieving must be proved.[2]

And so of eavesdroppers.

§ 1445. *Eavesdropping* may, in like manner, be indictable as a nuisance.[3] It should, however, to be indictable at common law, be habitual, and combine the lurking about dwelling-houses, and other places where persons meet for private intercourse, secretly listening to what is said, and then tattling it abroad.[4] It is a good defence that the act was authorized by the husband of the prosecutrix.[5] The offence, it is said, may be committed by stealthily lurking around a grand jury, and repeating their secret proceedings.[6]

And so of persons habitually and openly lewd.

§ 1446. *Open and gross lewdness* is in some jurisdictions indictable by statute,[7] and is so at common law, with the qualifications above stated.[8] Lewdness, however, is not a designation of character, but a conclusion of law, of which it is necessary to state the premises of fact.[9] And to sustain a charge of haunting houses of ill-fame, there must be a *scienter*.[10] The evidence by which such an indictment may be sustained is necessarily circumstantial.[11]

Night-walkers, *i. e.*, persons who stroll the streets at night for immoral purposes, are indictable at common law.[12]

[1] R. v. Foxby, 6 Mod. 14; U. S. v. Royall, 3 Cranch C. C. 618; Com. v. Pray, 13 Pick. 359; Com. v. Foley, 99 Mass. 497; Com. v. Davis, 11 Pick. 432; Com. v. Mohn, 52 Penn. St. 243; James v. Com., 12 S. & R. 220. *Contra*, Com. v. Hutchinson, 5 Clark (Pa.), 321; S. C., 3 Am. Law Reg. 113.

The offence must be to the public, not to an individual alone. State v. Schlottman, 52 Mo. 164.

[2] Ibid. See J'Anson v. Stuart, 1 T. R. 748; State v. O'Mally, 48 Iowa, 501, cited Whart. Cr. Pl. & Pr. § 203.

[3] U. S. v. Royall, *ut supra*.

[4] James v. Com., 12 S. & R. 220.

[5] See Com. v. Foley, 99 Mass. 497, as to Massachusetts statute; and see, also, Com. v. Harris, cited *supra*, § 1412.

[6] Com. v. Foley, 99 Mass. 497. See R. v. Taylor, 2 Ld. Ray. 679.

[7] Barker v. Com., 19 Penn. St. 412; Bell v. State, 1 Swan, 42. See *supra*, § 1432.

[8] Dickinson Q. S. 217. As to champerty, see *infra*, § 1853.

[9] There must be at least three cases. R. v. Hardwick, 1 Sid. 282.

[10] 4 Bl. Com. 134; 1 Hawk. P. C. 475; Com. v. Pray, 13 Pick. 359; Com. v. Mohn, 52 Penn. St. 243; State v. Chitty, 1 Bailey, 379. A person who maliciously splits suits so as to accumulate costs is indictable at common law. Com. v. McCulloch, 15 Mass. 227. See Com. v. Davis, 11 Pick. 432. See *infra*, § 1853. By §§ 132-5 of the New York Penal Code of 1882, barratry is made a misdemeanor, and is defined to be the practice of exciting groundless judicial proceedings. Particular acts need not be specified in the indictment. J'Anson v. Stuart, 1 T. R. 754.

[1] *Infra*, §§ 1853, 1854.

[2] World v. State, 50 Md. 49.

[3] U. S. v. Royall, *ut supra*.

[4] 4 Bl. Com. 168. See Com. v. Lovett, 4 Clark (Pa.), 5; 8 Haz. Pa. Reg. 305; Com. v. Mergelt, cited Ibid.; State v. Williams, 2 Tenn. 108. *Supra*, § 19.

The offence is made indictable by § 436 of the N. Y. Penal Code of 1882.

[5] Com. v. Lovett, *supra*.

[6] State v. Pennington, 3 Head, 299.

[7] So in Massachusetts, where it was held that indecent exposure of person was "gross lewdness" under the statute. Com. v. Wardell, 128 Mass. 52; State v. Millard, 18 Vt. 574. See *infra*, § 1469; Grisham v. State, 2 Yerger, 589; where it was held that to an indictment against two for lewdness, it is no defence that the parties were married by rites not recognized by the State as legal. And see Com. v. Munson, 127 Mass. 460; *infra*, §§ 1726, 1747, 1748; Peak v. State, 10 Humph. 99. *Supra*, § 1432. See, however, *contra*, State v. Brunson, 2 Bailey, 149. For illicit cohabitation, see *infra*, § 1747.

[8] *Supra*, § 1432.

[9] Dameron v. State, 8 Mo. 494.

[10] Brooks v. State, 2 Yerger, 482.

[11] Peak v. State, 10 Humph. 99; Mynatt v. State, 8 Lea, 47.

[12] State v. Dovers, 45 N. H. 543. See *supra*, § 441.

§ 1447. *Common drunkenness* may be treated as a nuisance when it is such as habitually to shock, molest, and disturb the community at large.[1] "Common" does not in this sense mean constant. It is enough if the drunkenness be frequent.[2] By statute private drunkenness is in some jurisdictions made indictable.[3]

And so of common drunkards.

§ 1448. *Publishers of false alarms, or of intelligence calculated to disturb the peace of a community*, on the same principles on which common scolds and common barrators are indictable, are subject, if the offence be continuous and directed at the community generally, to penal discipline.[4] Under this head may be classed a case in which it was held that it is an indictable offence to tamper with telegraph wires, so as to give a false alarm of fire.[5]

And so of false newsmongers.

XI. DISORDERLY, BAWDY, AND TIPPLING-HOUSES.

§ 1449. A bawdy-house (or a house of ill-fame as it is sometimes called) is a house kept for the reception of persons who choose to resort to it for the purpose of illicit sexual intercourse, and is indictable at common law.[6] But the

Bawdy-house and disorderly house indictable at common law.

[1] See Com. *v.* Boon, 2 Gray, 74; State *v.* Sowers, 52 Ind. 311; Smith *v.* State, 1 Humph, 396; State *v.* Waller, 3 Murph. 229. For indictment, see State *v.* Moriarty, 74 Ind. 103.

[2] State *v.* Pratt, 34 Vt. 323; Com. *v.* McNamee, 112 Mass. 285.

[3] Com. *v.* Miller, 8 Gray, 484; Com. *v.* Conley, 1 Allen, 6.

[4] R. *v.* Harris, 7 How. St. Tr. 925; 2 Inst. 226-7; 4 Bl. Com. 149. *Supra*, § 1374. "This indictment charges the unlawful circulation of a false report by hand-bills posted on the corners of the public streets, and other public places in the city, calling on the citizens to look out for a child-stealer, describing her as a woman about twenty-four years of age, etc. The hope is suggested that she may be discovered and brought before the public, where she may be observed by both heads of families and their children, etc. That this publication, given to the public in the manner above stated, constitutes, in whatever light it may be viewed, a common nuisance, cannot, we think, be well questioned; that it is injurious to both the comfort and health of a large number of persons in the community in which the report has been put in circulation is self-evident, because its tendency is to fill the mind with anxiety, fear, and alarm, to the absolute destruction of the comfort and happiness of many, and by this means is, to a greater or less extent, injurious to the health of persons brought under such influences." Com. *v.* Cassidy, 6 Phila. 82; Allison, J., 1865. See *supra*, § 1121.

That to falsely and maliciously announce a man's death and toll the bell for it, is not indictable, see State *v.* Briggs, 22 Vt. 321, cited *supra*, § 1411.

[5] Koppersmith *v.* State, 51 Ala. 6.

[6] 4 Bl. Com. 168; R. *v.* Williams, 10 Mod. 63; R. *v.* Rice, L. R. 1 C. C. 21;

house must be resorted to in common by other women than its keeper when a woman.[1] It is immaterial "whether indecent or disorderly conduct is perceptible from the outside."[2]

A disorderly house is a house kept in such a way as to disturb, annoy, or scandalize the public generally, or the inhabitants of a particular vicinity, or the passers in a particular highway, and is indictable at common law;[3] and an inn, or building, to which the public have access generally may be "disorderly" when the disorder is only inside, and is not heard outside, if it disturb those who have right of access to the house.[4] So, though a mere tippling-house is not *per se* a nuisance at common law,[5] yet it is otherwise with a house kept for promiscuous and noisy tippling, promoting drunkenness in a community,[6] or when unlawful sales are made to all parties applying.[7] But to make a house, as a disorderly house, a nuisance at

U. S. *v.* Stevens, 4 Cranch C. C. 341; Jennings *v.* Com., 17 Pick. 80; Com. *v.* Lewis, 1 Met. 151; Com. *v.* Kimball, 7 Gray, 328; Cadwell *v.* State, 17 Conn. 467; Jacobowsky *v.* People, 6 Hun, 524; Barnesciotta *v.* People, 10 Ibid. 137; King *v.* People, 83 N. Y. 587; State *v.* Williams (30 N. J. L.), 1 Vroom, 102; State *v.* Evans, 5 Ired. 603; Smith *v.* Com., 6 B. Monr. 21; State *v.* Bentz, 14 Mo. 27; Birchfield, *ex parte*, 52 Ala. 377.

[1] State *v.* Garity, 46 N. H. 61; Com. *v.* Lambert, 12 Allen, 177; Cadwell *v.* State, 17 Conn. 467; State *v.* Main, 31 Ibid. 572. *Infra*, § 1455.

[2] Steph. Dig. C. L. art. 180; citing 1 Russ. Cr. 443; R. *v.* Rice, L. R. 1 C. C. 21. See King *v.* People, 83 N. Y. 587.

[3] *Infra*, § 1456; State *v.* Bailey, 1 Foster, 343; State *v.* Stevens, 40 Me. 559; Com. *v.* Cobb, 120 Mass. 356; Hunter *v.* Com., 2 S. & R. 298; Clementine *v.* State, 14 Mo. 112; Hackney *v.* State, 8 Ind. 494. See McElhaney *v.* State, 12 Tex. Ap. 231.

[4] State *v.* Mathews, 2 Dev. & Bat. 424. The converse is true, that when the conduct of the house causes outside disorder, this makes a disorderly house. State *v.* Webb, 25 Iowa, 235.

[5] Com. *v.* McDonough, 13 Allen 581.

[6] *Infra*, § 1454; R. *v.* Rice, L. R. 1 C. C. 21; U. S. *v.* Lindsay, 1 Cranch C. C. 245; U. S. *v.* Elder, 4 Ibid. 507; U. S. *v.* Columbus, 5 Ibid. 304; Meyer *v.* State, 42 N. J. L. 145; Wilson *v.* Com., 12 B. Monr. 2; State *v.* Bertheol, 6 Blackf. 474; State *v.* Mullikin, 8 Ibid. 260; State *v.* Robertson, 86 N. C. 628. A license to sell liquor does not protect such a house. *Infra*, § 1454. See Del. Canal Co. *v.* Com., 60 Penn. St. 367; State *v.* Thornton, Busbee, 252. And to permit immoral acts in a house open to the public makes it a disorderly house. State *v.* Williams, 1 Vroom (30 N. J. L.), 102. *Supra*, § 1424.

It is no defence when the character of the house is such as to promote disorder, that its keeper interfered to quell brawls. Com. *v.* Cobb, 120 Mass. 356.

[7] Meyer *v.* State, 41 N. J. L. 6. See Smith *v.* Com., 6 B. Mon. 21; Mains *v.* State, 42 Ind. 327.

common law, it must offend a class larger than its own private inmates.[1] The disorder must be in a place to which the public at large have access.[2] What is disorder, however, is conditioned by circumstances; and what is not disorderly on a secular day may be disorderly on Sunday.[3]

Disorderly, tippling, and bawdy-houses are plainly distinguishable. As, however, they may be joined in separate counts in the same indictment,[4] or may be blended in one count; and, as the decisions bearing on them speak generally of the offence thus made up, they will here be considered under one general head. It is to be remembered, however, that to constitute a bawdy-house it is not necessary that there should be any disorder visible or audible from outside;[5] and to constitute a disorderly house it is not necessary that there should be any public prostitution.[6]

Offences of this class need not be committed *lucri causa*.[7]

§ 1450. The indictment, when the offence is statutory, must contain the statutory terms.[8] When at common law, if it contain averments that the house was unlawful, and disorderly, and a common nuisance, specifying in what respect it was disorderly, this is usually enough.[9]

Enough if facts constituting nuisance be averred.

That it is sufficient simply to charge the defendant with keeping a "common disorderly house" has been sometimes argued.[10] But this is a loose mode of pleading, for the question of disorder is a wide one, and there are many kinds of disorder which are not indictable, and of which it would be intolerable tyranny for the law to attempt to take cognizance. The proper course is to specify what

[1] See Cheek *v.* Com., 79 Ky. 359.

[2] *Infra*, § 1456; Mains *v.* State, 42 Ind. 327.

[3] See *supra*, § 1431; U. S. *v.* Columbus, *ut sup.*; Hall *v.* State, 4 Harring. 132.

[4] Com. *v.* Ismahl, 134 Mass. 201.

[5] R. *v.* Rice, L. R. 1 C. C. 21. King *v.* People, 83 N. Y. 587; Hunter *v.* Com., 2 S. & R. 298; State *v.* Mathews, 2 Dev. & B. 424.

[6] Brooks *v.* State, 4 Tex. Ap. 567.

[7] *Infra*, § 1457.

[8] As to Massachusetts, see Com. *v.* Lavonsair, 132 Mass. 1.

[9] U. S. *v.* Columbus, 5 Cranch C. C. 304; State *v.* Homer, 40 Me. 438; State *v.* Collins, 48 Ibid. 217; State *v.* Bailey, 1 Foster, 343; State *v.* Nixon, 18 Vt. 70; Com. *v.* Ashley, 2 Gray, 356; Wells *v.* Com., 12 Ibid. 326; Com. *v.* Wood, 97 Mass. 225; Com. *v.* Stewart, 1 S. & R. 342; Joseph *v.* State, 42 Ind. 370; Vanderworker *v.* State, 8 Eng. (Ark.) 700. See Jordan *v.* State, 60 Ga. 656.

[10] See R. *v.* Rogier, 1 B. & C. 272; Com. *v.* Pray, 13 Pick. 359; Clifton *v.* State, 53 Ga. 241. Under Iowa statute, see State *v.* Alderman, 40 Iowa, 375.

the disorder is; *e. g.*, assemblages of persons of both sexes of lewd character, tippling, noise, tumult,[1] etc. But several specifications do not constitute duplicity.[2]

It is not necessary to name the persons frequenting the house.[3]

§ 1451. Particular acts or conditions of disorder, inside or outside, may be put in evidence to prove a house to be disorderly, although they were not specified in the indictment;[4] though common reputation, or complaint among the neighbors, is not for this purpose admissible.[5] But that the house was frequented by noisy and disreputable persons, without identifying them, may be put in evidence,[6] and general annoyance will sustain an indictment, though only one person may have been actually disturbed.[7] It need not be alleged that the house was kept for lucre.[8] The use of the house, also, as a place where infractions of the law (*e. g.*, illegal sales of liquor, or gambling, or illegal betting) are habitually carried on, constitutes a disorderly house.[9]

Character of house to be proved inductively.

§ 1452. As has just been seen,[10] *bawdy-houses* admit of a wider range of proof. Whether it be because the term "house of ill-fame" is sometimes, by statute, made convertible with bawdy-house;[11] or whether it be because at com-

Bad reputation of visitors admissible.

[1] See Whart. Prec. *in loco;* Com. *v.* Wise, 110 Mass. 181; People *v.* Jackson, 3 Denio, 101; Frederich *v.* Com., 4 B. Monr. 7; Davis *v.* State, 52 Ind. 488; Hickey *v.* State, 53 Ala. 514. See Whart. Cr. Pl. & Pr. §§ 154, 231.

[2] Com. *v.* Ballou, 124 Mass. 26; Whart. Cr. Pl. & Pr. § 251.

[3] State *v.* Patterson, 7 Ired. 70.

[4] Com. *v.* Davenport, 2 Allen, 299; Com. *v.* O'Brien, 8 Gray, 487; Com. *v.* Cardoze, 119 Mass. 210; Com. *v.* Stewart, 1 S. & R. 342; State *v.* Webb, 25 Iowa, 235; Garrison *v.* State, 14 Ind. 287; State *v.* Patterson, 7 Ired. 70; Mahalovitch *v.* State, 54 Ga. 217.

[5] U. S. *v.* Nailor, 4 Cranch. C. C. 372; U. S. *v.* Jourdane, Ibid. 338; State *v.* Foley, 45 N. H. 466; Com. *v.* Stewart, 1 S. & R. 342; Henson *v.* State, 62 Md. 231; Com. *v.* Hopkins, 2 Dana, 418; Smith *v.* Com., 6 B. Monr. 21; Sparks *v.* State, 59 Ala. 82; Toney *v.* State, 60 Ibid. 97. See State *v.* Boardman, 64 Me. 523.

[6] Com. *v.* Kimball, 7 Gray, 328; State *v.* Patterson, 7 Ired. 70; Wooster *v.* State, 55 Ala. 217.

[7] Com. *v.* Hopkins, 133 Mass. 381.

[8] *Infra*, § 1457; *supra*, § 1449; State *v.* Smith, 29 Minn. 193; State *v.* Porter, 38 Ark. 637.

[9] State *v.* Williams, 30 N. J. L. 102, 111; Meyer *v.* State, 41 Ibid. 6; 42 N. J. State, 145; Smith *v.* Com., 6 B. Mon. 21; Wilson *v.* Com., 12 Ibid. 2.

[10] *Supra*, § 1449.

[11] Cadwell *v.* State, 17 Conn. 467; and see State *v.* Morgan, 40 Ibid. 44; aff. State *v.* Blakesley, 38 Ibid. 523; Sylvester *v.* State, 42 Tex. 496. See Com. *v.* Davis, 11 Gray, 48, and *contra*

mon law a "house of ill-fame," as a scandal to the community, is *per se* indictable; or whether because no other proof can often be had; it has been ruled, though on questionable authority, that the "ill-fame" or "bad reputation"[1] of the house may be proved.[2] But however this may be, it is settled that the bad reputation of the persons visiting the house may be put in evidence.[3] It is, in any view, error to charge the jury that they are to convict if the house has a bad reputation. They must only convict if they believe the house to be one of ill-fame, or a bawdy-house, as the case may be;[4] and the fact that a house kept *bonâ fide* for public convenience is sometimes resorted to by persons of ill-fame does not necessarily make it a house of ill-fame.[5] All concerned in "keeping" such house, if they take part in its government, are "keepers," no matter what may be its extent;[6] though the fact that a prostitute

under Maine statute, State *v.* Boardman, 64 Me. 523. That the "character" of a "liquor nuisance" may be shown by the prosecutor, see State *v.* Haley, 52 Vt. 476; Whart. on Cr. Ev. § 57. As to statute, see *infra*, § 1498 *b*. Prostitution in the house need not be proved if the house was used as a dance-house to get up assignations. Com. *v.* Cardoze, 119 Mass. 210. That indictment following statute is sufficient, see Com. *v.* Lavonsair, 132 Mass. 1; State *v.* Nichols, 83 Ind. 228.

[1] Cadwell *v.* State, 17 Conn. 467; State *v.* Blakesly, 38 Ibid. 523.

[2] Whart. Cr. Ev. § 255; U. S. *v.* Gray, 2 Cranch C. C. 675; U. S. *v.* Stevens, 4 Ibid. 341; State *v.* Lyon, 39 Iowa, 379; State *v.* McDowell, Dudley (S. C.), 346; Adams *v.* State, 25 Ohio St. 584; O'Brien *v.* People, 28 Mich. 213; State *v.* Brunell, 29 Wis. 435; State *v.* Smith, 29 Minn. 193; Morris *v.* State, 38 Tex. 603; see Drake *v.* State, 14 Neb. 535. See *contra*, U. S. *v.* Jourdine, 4 Cranch. C. C. 338; State *v.* Boardman, 64 Me. 523; State *v.* Foley, 45 N. H. 466; People *v.* Mauch, 24 How. Pr. 276; Com. *v.* Stewart, 1 S. & R. 342; Henson *v.* State, 62 Md. 231; Toney *v.* State, 60 Ala. 97.

That single illicit acts will not constitute a bawdy house, see State *v.* Garing, 74 Me. 122; State *v.* Evans, 5 Ired. 603; Smalley *v.* State, 11 Tex. Ap. 147.

[3] See Whart. on Cr. Ev. 9th ed. §§ 58 *et seq.*; State *v.* McGregor, 41 N. H. 407; Com. *v.* Gannett, 1 Allen, 7; Com. *v.* Lambert, 12 Ibid. 177; Com. *v.* Kimball, 7 Gray, 328; Harwood *v.* People, 26 N. Y. 190; Com. *v.* Noonan, 15 Phila. 372; Wooster *v.* State, 55 Ala. 217; Clementine *v.* State, 14 Mo. 112; Sparks *v.* State, 59 Ala. 82; State *v.* Hand, 7 Iowa, 411; State *v.* Lyon, 39 Ibid. 379; O'Brien *v.* People, 28 Mich. 213; King *v.* State, 17 Fla. 183; Morris *v.* State, 38 Tex. 603; Sylvester *v.* State, 42 Ibid. 496; Terr. *v.* Chartrand, 1 Dak. T. 379.

[4] State *v.* Brunell, 29 Wis. 435.

[5] McElhaney *v.* State, 12 Tex. Ap. 231.

[6] Com. *v.* Gannett, 1 Allen, 7; Harlow *v.* Com., 11 Bush. 610; People *v.* Buchanan, 1 Idaho, N. S. 681. *Infra*, § 1460.

is an inmate of such a house does not by itself make her a keeper.[1]

§ 1453. *Ownership* may be proved by admission, or by acts of authority, or by record.[2] It cannot be shown by reputation,[3] but is to be inferred from the circumstances in proof.[4] It is not proved by occupation of a particular room in the house.[5]

Ownership proved inferentially.

§ 1454. *Tippling-houses*, when conducted noisily and in such a way as to breed disorder and crime, are, as has been seen, indictable at common law;[6] nor will a license to sell liquor shield the defendant when tried specifically for the nuisance.[7] Nor, in prosecutions for a nuisance, can a tavern-keeper, or the keeper of any building open to the public, defend himself on the ground that the disorder is exclusively inside the house, and is not heard outside.[8] Wherever the public has access, there disorder is a public nuisance. But in a private house, to which the public has not access, the disorder must be such as to annoy passers-by or neighbors.[9] And of a tippling house, as such, it is an essential condition that there should be habitual selling, directly or indirectly, of spirituous liquor by retail.[10]

Tippling houses indictable at common law.

§ 1455. A married woman may be indicted for keeping a house of ill-fame, either with or without her husband,[11] and a *husband* living in the house, and there exercising acts of control, cannot defend himself on the ground that the house was owned by his wife, under the married woman's

Married woman indictable for keeping house.

[1] Toney *v.* State, 60 Ala. 87.

[2] State *v.* Worth, R. M. Charl. 5.

[3] State *v.* Hand, 7 Iowa, 411; Allen *v.* State, 15 Tex. Ap. 320.

[4] State *v.* Wells, 46 Iowa, 662; Couch *v.* State, 24 Tex. 557.

[5] Toney *v.* State, 60 Ala. 97.

[6] *Supra*, § 1449, where the cases are given; and see more fully *infra*, § 1498.

[7] *Supra*, § 1424; State *v.* Buckley, 5 Harring. 508; State *v.* Mullikin, 8 Blackf. 260. See U. S. *v.* Elder, 4 Cranch C. C. 507; State *v.* Ambs, 20 Mo. 214; Archer *v.* State, 10 Tex. Ap. 482.

[8] *Supra*, § 1449.

[9] *Supra*, § 1411, 1431 *c*; State *v.* Buckley, 5 Harring. 508. But see under Iowa Statute, Shepard *v.* People, 40 Mich. 487. As to special disorder on Sunday, see *supra*, § 1431: Wilson *v.* Com., 12 B. Mon. 2.

[10] U. S. *v.* Columbus, 5 Cranch C. C. 304; Com. *v.* McDonough, 13 Allen, 581; State *v.* Burchinal, 4 Harring. 572; Bloomhuff *v.* State, 8 Blackf. 205; State *v.* Thornton, Busbee, 252.

[11] R. *v.* Williams, 1 Salk. 184; 10 Mod. 64; Com. *v.* Lewis, 1 Met. 151; Com. *v.* Cheney, 114 Mass. 281; State *v.* Bentz, 11 Mo. 27. *Supra* §§ 78, 81, 1449.

acts, who lived there, carried on the premises, and received all the profits.[1]

Proof of general nuisance is enough.

§ 1456. So far as concerns disorderly houses, nuisance to *all* the neighborhood need not be proved,[2] nor, if the house be shown to be disorderly, is proof of outside riot or disorder in the vicinity necessary.[3] On the other hand, a single riot does not create a disorderly house,[4] nor does a single act of lewdness, nor even continuous acts of lewdness by one person, make a bawdy-house.[5] But the offence must be to the public in general.[6] Thus, upon a charge of keeping a disorderly house, where it appeared that the defendant lived in the country, remote from any public road, and that loud noises and uproar were often kept up by his five sons, when drunk, whom he did not encourage (save by getting drunk himself), but would sometimes endeavor to quiet, by which disorder only two families, in a thinly settled neighborhood, were disturbed, this was held not to amount to a common nuisance.[7]

The question of admissibility of reputation is elsewhere discussed.[8]

A house of assignation, where parties meet for the purposes of debauchery, is indictable as a bawdy or disorderly house, though no prostitutes live there.[9]

Offence need not be *lucri causa*.

§ 1457. That the offence need not be *lucri causa*, has been mainly determined as a matter of pleading.[10] But on principle the expectation of pay is not essential to the offence.[11]

[1] Com. *v.* Wood, 97 Mass. 225. See Scarborough *v.* State, 46 Ga. 26.

[2] Com. *v.* Davenport, 2 Allen, 299.

[3] R. *v.* Rice, L. R. 1 C. C. 21; U. S. *v.* Columbus, 5 Cranch C. C. 304; State *v.* Webb, 25 Iowa, 235. See Sylvester *v.* State, 42 Tex. 496.

[4] Hunter *v.* Com., 2 S. & R. 298. *Supra*, § 1449; Mains *v.* State, 42 Ind. 327; Dunnaway *v.* State, 9 Yerg. 350.

[5] State *v.* Evans, 5 Ired. 603, and cases cited *supra*, § 1422. See R. *v.* Pierson, 1 Salk. 382.

[6] Hunter *v.* Com., 2 S. & R. 298; Mains *v.* State, 42 Ind. 327.

[7] State *v.* Wright, 6 Jones (N. C.), 25. See State *v.* Mathews, 2 Dev. & B. 424.

[8] *Supra*, § 1452; Whart. Cr. Ev. 9th ed. §§ 58 *et seq.*

[9] R. *v.* Pierson, 1 Salk. 382; People *v.* Rowland, 1 Wheeler C. C. 286.

[10] See *supra*, §§ 1449-51; State *v.* Porter, 38 Ark. 637.

[11] State *v.* Nixon, 18 Vt. 70; Com. *v.* Wood, 97 Mass. 225; State *v.* Williams, 1 Vroom, 102; State *v.* Webb, 25 Iowa, 235. See State *v.* Bailey, 1 Fost. 185.

A room or a tent may be a "house."

§ 1458. Proof of the use of a single room for purposes of general prostitution will support an indictment for keeping a "house" for such purposes.[1] And a canvas tent may be a "house" in the same sense;[2] and so may a boat on a river, when used as a habitation.[3]

Letting house of ill-fame indictable at common law.

§ 1459. At common law it is an indictable offence not only to keep a house of ill-fame, or to be in any way concerned in the same,[4] but to let a house, knowing it is to be used for the purposes of prostitution;[5] though in New York the last point was once ruled differently, and it was laid down that to rent a house to a woman of ill-fame, with the intent that it should be kept for purposes of public prostitution, is not in itself an offence punishable by indictment.[6] Subsequently, however, the doctrine held in the latter case was qualified, and it was declared that when it appeared that the owner of lands had either created a nuisance, or continued, or in any way sanctioned its creation or continuance, he is indictable.[7] At present the law, even in New York, is, that such letting or hiring, with a guilty knowledge, makes the landlord indictable as a principal in keeping the house, supposing the house to be so kept.[8] If, however, the

[1] Com. *v.* Howe, 13 Gray, 26; Com. *v.* Hill, 14 Ibid. 24; Com. *v.* Butman, 118 Mass. 456; State *v.* Garity, 46 N. H. 61; State *v.* Main, 31 Conn. 572; and see Clifton *v.* State, 53 Ga. 241. In People *v.* Bixby, 67 Barb. 221; 4 Hun, 636, an immoral exhibition of women in a room which was not open to the public generally, but only to such as were permitted to enter and paid therefor, was held to be in a "public place" within the statute against indecent exposure. But see State *v.* Barr, 39 Conn. 40. As sustaining text see State *v.* Main, 31 Conn. 572; State *v.* Mullen, 35 Iowa, 199.

[2] Killman *v.* State, 2 Tex. Ap. 222; though see Callahan *v.* State, 41 Tex. 43.

[3] State *v.* Mullen, 35 Iowa, 199.

[4] *Supra*, § 1449; Harlow *v.* Com., 11 Bush, 610.

[5] U. S. *v.* Gray, 2 Cranch C. C. 675; Com. *v.* Harrington, 3 Pick 26; Smith *v.* State, 6 Gill, 425; People *v.* Saunders, 29 Mich. 269; State *v.* Potter, 30 Iowa, 587.

That a landlord is responsible for whatever he causes or is able to prevent or correct, see James *v.* Harris, 35 L. T. 240; Gandy *v.* Jutter, 5 B. & S. 78; Nelson *v.* Brewery Co., L. R. 2 C. P. D. 311.

That the lessor may be charged as keeper of the house, see State *v.* Lewis, 4 Tex. Ap. 567; Stevens *v.* People, 67 Ill. 587.

[6] People *v.* Brockway, 2 Hill (N.Y.), 558.

[7] People *v.* Townsend, 3 Hill, 479. See, also, to same effect, Ross *v.* Com., 2 B. Monr. 417.

[8] Com. *v.* Harrington, *ut sup.*; People *v.* Erwin, 4 Denio, 129; Smith *v.*

landlord has absolutely no control, and when leasing was ignorant of the intended use, he is not responsible for letting the house with the unlawful purpose in view.[1] And in any view the indictment should be special, charging him not with keeping, but with knowingly letting, the house.[2]

Cognizance of object sufficient to impute indictability.

§ 1460. To make a party liable for knowingly permitting his house to be used for the purposes of prostitution, it is said in Iowa to be necessary that he be shown to have done some act, or made some declaration, sufficient to show his assent to such use after he had knowledge of it.[3] Mere inactivity, it is said in the same case, or failure to take steps to prosecute, does not make him liable. But, however this may be under the Iowa statute, acquiescence involves a party in the common law offence, where the lease is renewed (as in cases of leases week by week, or month by month) after knowledge by the lessor of the use made by the lessee. Here the lessor supplies the machinery for the maintenance of the nuisance, and continues week after week to renew the supply, and knowingly to give each week fresh impulse to the nuisance. In such case, according to the views hereinbefore unfolded, he becomes (the offence being a misdemeanor) a principal in the nuisance.[4] The same rule applies to all persons mixing in the management, supposing the offence is charged as a nuisance.[5] Thus, it is no defence to an indictment of this class that the defendant, who is proved to have control of the

State, 6 Gill, 425; but see *contra*, R. *v.* Barrett, L. & C. 263—a case, I think, erroneously decided. See *supra*, § 1422. In Ohio the offence is indictable by statute. Act of April 11, 1856.

[1] State *v.* Williams, 1 Vroom (30 N. J. L.), 102; S. P., R. *v.* Barrett, *ut sup.* See Ross *v.* Com., 2 B. Monr. 417.

[2] R. *v.* Stannard, L. & C. 349, commented on in succeeding note. And see, also, State *v.* Pearsall, 43 Iowa, 630.

[3] State *v.* Abrahams, 6 Iowa, 117. See Com. *v.* Adams, 109 Mass. 344.

[4] See *supra*, § 1442; R. *v.* Stannard, L. & C. 349, so far as it conflicts with the principles just stated, cannot be accepted as law. See *supra*, § 1422. So far as it lays down the rule that a landlord's failure to give notice to quit does not involve the landlord in liability as a "keeper" of the house, the rule is consistent with what has been stated as to "omissions." But on the only question put in R. *v.* Stannard, the ruling is not inconsistent with the text. The indictment charged that the defendant kept the house. "But he was not the keeper of the house," said Pollock, C. B., "and the conviction must be quashed." See *supra*, §§ 125 *et seq.*

[5] Harlow *v.* Com., 11 Bush, 610, and cases *supra*, § 1452.

building, is not the owner, but merely collects the rents as agent for the owner;[1] nor is it a defence that the defendant's husband, she being a married woman, resided in the house, and was the lessee.[2] But it is otherwise when the offence, as will presently be seen, is charged as the special offence in letting the house.

Indictment must be special.

1460 *a*. The indictment, when the offence is that of knowingly keeping the house, though it need not describe the premises with greater accuracy than in burglary,[3] ought, when it rests on a lease, accurately to specify the date and terms of the lease, and the name of the lessee, or to give an excuse for non-specification.[4] An omission of the *scienter* is fatal.[5] And if the leasing be the *gravamen* of the offence, and there be no proof of coöperation in keeping the nuisance, the indictment must be special.[6]

XII. GAMES.

Scandalous or disorderly games indictable.

§ 1461. Here we touch a point that has heretofore[7] been incidentally discussed. Are public games to be discouraged and depressed? Much depends on this point on the policy of the community in respect to the physical and martial culture of young men; but much also, when the question of nuisance presents itself, depends on the moral bias of the community. Where public sentiment is scandalized by the public exhibition of a particular game, then the public exhibition of such game may be a nuisance. But the sentiment thus to be protected must be that of a community, and not that of a few persons, no matter what their prominence and excellence.[8] Applying this criterion, we can understand why decisions as to what public games are nuisances should vary in different communities.

§ 1462. Bowling-alleys, when attended by noise, and drawing to them crowds of idlers, may be nuisances in thickly inhabited and

[1] Lowenstein *v.* People, 54 Barb. 299.

[2] Com. *v.* Cheney, 114 Mass. 281. See *supra*, § 1455.

[3] People *v.* Saunders, 29 Mich. 269. See Hipes *v.* State, 73 Ind. 39.

[4] Com. *v.* Moore, 11 Cush. 600. Otherwise when no lease is set forth. Smith *v.* State, 6 Gill, 425.

[5] State *v.* Leach, 50 Mo. 535.

[6] R. *v.* Stannard, L. & C. 349; Com. *v.* Johnson, 4 Clark (Pa.), 398 (4 Penn. L. J. Rep.); State *v.* Pearsall, 43 Iowa, 630.

[7] *Supra*, § 371.

[8] See *supra*, §§ 1411, 1414.

So of bowling-alleys when disorderly.

quiet communities;[1] though when charged as a common law nuisance proof of great habitual disorder should be given.[2] Nor can the game be properly regarded as a game of chance or as a nuisance, unless conducted in a disorderly way.[3]

So of billiard rooms.

§ 1463. Unless conducted in such a way as to attract offensive crowds, billiard rooms are not common law nuisances;[4] and though it has been held that when the loser has to pay for the table the play may become gambling;[5] the better opinion is that the game is not necessarily a game of chance.[6] But when disorderly they may become indictable as nuisances.

§ 1464. Public spectacles are to be governed by the considerations just named, with this addition, that whatever tends to need-

[1] State *v.* Currier, 23 Me. 43; State *v.* Hay, 29 Ibid. 457; Haines *v.* State, 30 Ibid. 65; Tanner *v.* Trustees, 5 Hill (N. Y.), 121. See State *v.* Records, 4 Harring. 554; Needham *v.* State, 1 Tex. 139.

In Tanner *v.* Trustees, the ruling of the court is based in part on a statement of Lord Hale in Hall's Case, 1 Mod. 76; 2 Keb. 846, that "in the eighth year of Charles the First, Noy came into court and prayed a writ to prohibit a bowling alley erected near St. Dunstan's church, and had it." But this case may be explained on the account of the "nearness" to St. Dunstan's church, which nearness is made a prominent feature in the report. It would not apply, therefore, to bowling alleys so situate as not to produce a similar disturbance. Nor in the report of Hall's Case, in Vent. 169, is there any notice of the "bowling-alley" precedent. That bowling-alleys are not nuisances unless made so by their locality (*e. g.*, as where placed in such a way as to disturb public business or public worship), see State *v.* Haines, 30 Me. 65; Updike *v.* Campbell, 4 E. D. Smith, 570; State *v.* Hall, 32 N. J. L. 158.

[2] State *v.* Hall, 32 N. J. L. (3 Vroom) 158.

In Massachusetts, bowling has been held to be an "unlawful game" under Rev. Sts. c. 50, § 17. Com. *v.* Goding, 3 Met. 130; Com. *v.* Stowell, 9 Ibid. 572; Com. *v.* Drew, 3 Cush. 279. *Infra*, § 1465. As to "bowls," see *infra*, § 1465 *a*.

In North Carolina, bowling is held to be a game more of skill than chance. State *v.* Gupton, 8 Ired. 27.

[3] State *v.* Gupton, 8 Ired. 371. See Bass *v.* State, 37 Ala. 469, where it was held that betting on nine pins was an offence.

[4] Com. *v.* Sylvester, 13 Allen, 247; Com. *v.* McDonough, Ibid. 581; Com. *v.* Emmons, 98 Mass. 6; People *v.* Sergeant, 8 Cow. 139; Ward *v.* State, 17 Ohio St. 32; Harbaugh *v.* People, 40 Ill. 294; Smith *v.* State, 22 Ala. 54; Hanrahan *v.* State, 57 Ind. 527; Longworth *v.* State, 41 Tex. 508; though see State *v.* Layman, 5 Harring. 510.

[5] Ward *v.* State, 17 Ohio St. 32; State *v.* Book, 41 Iowa, 550.

[6] Harbaugh *v.* State, 40 Ill. 494; Blewett *v.* State, 34 Miss. 606; Wortham *v.* State, 59 Ibid. 179. See Sikes *v.* State, 67 Ala. 771.

So of public spectacles.

lessly collect a crowd of idlers, and block up streets, becomes a nuisance.[1] That the exhibition of obscene pictures may be a nuisance at common law is elsewhere seen.[2]

Gaming, when public, may be indictable.

§ 1465. It is at common law not indictable for persons to engage in gaming in private,[3] or to conduct a single game of chance in a public place. But when gaming is there publicly known to be carried on, however secluded the place may be, and when unwary and inexperienced persons are there enticed and fleeced, then the parties concerned are indictable for nuisance, irrespective of any particular statutes.[4] And a public faro table when so operating is, *per se*, a nuisance.[5] Nor is it necessary that a house, to be a public place, should be one exposed to all passers-by. It is enough if persons ordinarily applying are to be received.[6] All concerned in keeping the house are principals.[7]

[1] See R. *v.* Carlile, 6 C. & P. 636; Walker *v.* Brewster, 5 L. R. Eq. 25; R. *v* Grey, 4 F. & F. 73.

[2] *Infra*, §§ 1606–8; *supra*, § 1432.

[3] 1 Hawk. P. C. 721; U. S. *v.* Milburn, 4 Cranch C. C. 719; Estes *v.* State, 2 Humph. 496; Hirst *v.* Molesbury, L. R. 6 Q. B. 130. See further, Ismenard's Case, 1 Cranch C. C. 100; State *v.* Currier, 23 Me. 43; State *v.* Hay, 29 Ibid. 457, under statute; Needham *v.* State, 1 Tex. 139, for keeping without license; Com. *v.* Emmons, 98 Mass. 6; Smith *v.* State, 22 Ala. 54; Hanrahan *v.* State, 57 Ind. 527, under statute; Longworth *v.* State, 41 Tex. 162.

In Armstrong *v.* State, 4 Blackf. 247, it was said that the inference from a single act of gaming is for the jury.

[4] R. *v.* Medlor, 2 Show, 36; U. S. *v.* Dixon, 4 Cranch C. C. 107; State *v.* Haines, 30 Me. 65; Lord *v.* State, 16 N. H. 325; Com. *v.* Tilton, 8 Met. 232; Com. *v.* Stahl, 7 Allen, 304; People *v.* Jackson, 3 Denio, 101; People *v.* Sergeant, 8 Cow. 130; State *v.* Layman, 5 Harring. 510; Bloomhuff *v.* State, 8 Blackf. 205; State *v.* Crummey, 17 Minn. 72; Barada *v.* State, 13 Mo. 94; Vanderworker *v.* State, 8 Eng. (Ark.) 700. See Wheeler *v.* State, 42 Md. 563.

As to gambling under Virginia statute, see Nuckolls *v.* Com., 32 Grat. 884. As to Alabama statute, see Toney *v.* State, 61 Cal. 1.

[5] State *v.* Doon, R. M. Charl. 1.

[6] Rice *v.* State, 10 Tex. 545.

That, under the English statute, a railway carriage is a public place, see Langrish *v.* Archer, L. R. 10 Q. B. D. 44. As to what is a public place, see State *v.* Book, 41 Iowa, 550; Smith *v.* State, 52 Ala. 384; Dickey *v.* State, 68 Ibid. 508; Lowrie *v.* State, 43 Tex. 602; Sheppard *v.* State, 1 Tex. App. 304; Askey *v.* State, 15 Ibid. 558.

As to the game of "tan," see People *v.* Ah Oon, 56 Cal. 188. *Infra*, § 1465 *a*.

That under statute declaring that persons playing faro and other games

[7] *Supra*, § 1422; State *v.* Haines, 30 Me. 65; State *v.* Crummey, 17 Minn. 72; People *v.* Raynes, 3 Cal. 366.

§ 1465 *a*. Fair and honest contests of skill and strength have been always regarded as sustained by the common law, notwithstanding the fact that a prize is attached to success. This has been so from the days of tournaments, where prizes were given for valor to the victors in fair encounters in the arena, to the days of county fairs, where prizes are given to those who bring in the fleetest horses, the fattest pigs, the rarest fruit, and the finest needlework. The mere fact, therefore, that a prize is offered to the conqueror in a contest of skill or strength does not make it illegal; nor, to advance a step further, is mere private gaming for money, when the game is fair, and when there is no offence to the public, indictable at common law.[1] On the other hand, not only in the United States, but in England, statutes have been repeatedly passed to prohibit "gaming" as an illegal act, to be distinguished from the playing of games. Keeping this distinction in view, the meaning of "gaming," as a criminal offence, is plain. To play chess for a prize is not "gaming," nor is it "gaming" to play foot-ball or cricket, or to engage in contests of strength in a country fair, though a prize is to be awarded to the winner. On the other hand, it is "gaming" for parties to stake money on chance.[2] The chance must be the controlling factor in the game. It is not enough to say that wherever chance enters in any appreciable degree into a contest, then there is gaming. There is no contest—forensic, literary, artistic—in which chance does not so enter. A lawyer may accidentally lose his brief before beginning his speech; or an author may be misled by a wrong reference on which he casually strikes; or an artist may find that colors he took due care

Gaming is staking on chance.

for money shall be deemed common gamblers, single acts may constitute the offence, see State *v.* Melville, 11 R. I. 417; Cameron *v.* State, 15 Ala. 383; Torney *v.* State, 13 Mo. 455; Patterson *v.* State, 12 Tex. Ap. 222; Scribner *v.* State, Ibid. 173; *infra*, § 1476.

[1] See Hirst *v.* Molesbury, L. R. 6 Q. B. 130; State *v.* Currier, 23 Me. 43; Com. *v.* Emmons, 98 Mass. 6; Hanrahan *v.* State, 57 Ind. 527; State *v.* Hayden, 31 Mo. 35; Needham *v.* State, 1 Tex. 139; Longworth *v.* State, 41 Ibid. 102.

[2] This is adopted in *In re* Lee Tong, 5 Crim. Law Mag. 67; see State *v.* Gitt Lee, 6 Oreg. 426; 1 West Coast Rep. 37; 18 Fed. Rep. 256.

In People *v.* Weithoff, 51 Mich. 214, Cooley, J., said: "Let a stake be laid upon the chances of a game, and we have gaming."

A learned note on "games of chance" will be found in 5 Crim. Law Mag. 529.

in selecting turn out from some casualty not to stand. This, however, does not make a contest, in which lawyer, author, or artist may be concerned, "gaming." All competitive examinations are affected in some degree by chance, yet no competitive examination is "gaming." So as to games of skill. In such games chance may have very little part. If so, playing these games, even for reward, is not gaming. It is otherwise when the game depends more largely on chance than on skill. Hence gaming as a penal offence, under the statutes making it such, may be defined as a staking by agreement on chance.[1]

Dog-racing dependent upon training, is not a game of chance,[2] nor is horse-racing, when also dependent on training, and for the improvement of stock;[3] though if chance be made the preponderating element, it is otherwise.[4]

"*Cock-fighting*," being cruel and wanton,[5] and mainly dependent on chance, is gaming.[6]

Ninepins.—Whether the game of ninepins is a game of chance depends upon whether it is a game in which chance or skill predominates. When fairly conducted, it is to be regarded as an athletic sport, not indictable at common law.[7]

The following games have been held lawful even when played for a stake:—

[1] See Whitney *v.* State, 10 Tex. Ap. 377.

[2] Hirst *v.* Molesburg, L. R. 6 Q. B. 130.

[3] Oliphant on Horses, 412; Coombs *v.* Dibble, L. R. 1 Exch. 248; Hirst *v.* Molesbury, L. R. 6 Q. B. 130; Daintree *v.* Hutchinson, 16 M. & W. 87; Bentwick *v.* Connop, 5 Q. B. 693; Challand *v.* Bray, 1 Dowl. Pr. (N. S.) 783; Evans *v.* Pratt, 4 Scott, N. R. 376; Holmes *v.* Sixsmith, 7 Exch. 802. See Stephen on Search of a Horse, 2d ed. 1836; Harless *v.* U. S., 1 Morris, 169; State *v.* Hayden, 31 Mo. 35; but see State *v.* Ness, 2 Ind. 499.

[4] Tollet *v.* Thomas, L. R. 6 Q. B. 515. See Beeston *v.* Beeston, L. R. 1 Ex. D. 13; Higginson *v.* Simpson, L. R. 2 C. P. D. 76; Dyer *v.* Benson, 69 Ga. 609. Compare Morgan *v.* Beaumont, 121 Mass. 7, and cases in subsequent notes.

[5] See *supra*, §§ 1067, 1082 *d*.

[6] Com. *v.* Tilton, 3 Met. 232; Baxter *v.* State, 1 Humph. 486. See Coolidge *v.* Choate, 11 Met. 79. But see Martin *v.* Hewson, 10 Exch. 737. *Infra*, § 1082 *b*. See § 665 of N. Y. Penal Code of 1882.

The game is condemned by Lord Ellenborough in Squires *v.* Whisken, 3 Camp. 140, and held unlawful in R. *v.* Howel, 3 Keb. 510, where it is said that "the defendant being convicted of keeping a common cock-pit, the court conceived it an unlawful game . . . at common law." And see *supra*, § 372.

[7] See *supra*, § 1462.

Foot-ball;[1] wrestling matches, provided they do not take the shape of public prize-fights,[2] rowing matches;[3] coursing matches;[4] quoits;[5] cricket;[6] bowls;[7] foot-racing;[8] billiards;[9] backgammon;[10] dominoes;[11] shuffleboard.[12]

Verdicts of juries finding that the following games are games of chance have been sustained:—

"Rondo:"[13]

"Draw Poker:"[14]

"Pool," "French Pool" or "Paris Mutual:"[15]

[1] Manby *v.* Scott, 1 Mod. 136.

[2] *Supra*, §§ 212, 372, 373, 636; Manby *v.* Scott, *ut supra*; Kennedy *v.* Gad, 3 C. & P. 376; State *v.* Shaw, 33 Me. 554; Doan *v.* State, 26 Ind. 495. As to New York, see Penal Code of 1882, § 455.

That consent cannot validate a prize fight when it is a breach of the peace, see *supra*, § 639. That consent cannot validate a boxing match, see State *v.* Burnham, 55 Vt. 445. And it is no defence that such performances are sustained by usage. Ibid.

[3] Bostock *v.* R. R., 3 M. Dig. 274.

[4] Daintree *v.* Hutchinson, 16 M. & W. 87.

[5] Manby *v.* Scott, *ut supra*.

[6] Jeffreys *v.* Walter, 1 Wils. 220; Walpole *v.* Sanders, 7 D. & R. 130; Hodson *v.* Terrill, 1 C. & M. 797.

[7] Sigel *v.* Jebb, 3 Stark. 2. As to bowling alleys, see *supra*, § 1462; and see State *v.* Records, 4 Harring. 554.

[8] Batty *v.* Marriott, 5 C. B. 818; Emery *v.* Richards, 14 M. & W. 728; Coombs *v.* Dibble, L. R. 1 Exch. 246.

[9] Parsons *v.* Alexander, 1 Jur. N. S. 660. See *supra*, § 1463. A "billiard table" need not have pockets. Sikes *v.* State, 67 Ala. 77. As holding that billiard playing when the loser pays for the game is gambling, see Ward *v.* State, 17 Ohio St. 32; State *v.* Book, 41 Iowa, 550; see, however, Harbaugh *v.* People, 40 Ill. 294; Blewett *v.* State, 34 Miss. 606.

But that billiards is not by itself a game of chance, see Wortham *v.* State, 59 Miss. 179.

[10] Wetmore *v.* State, 55 Ala. 198.

[11] R. *v.* Ashton, 1 E. & B. 286. See note to § 1465.

[12] State *v.* Bishop, 8 Ind. 266.

[13] Glascock *v.* State, 10 Mo. 508.

[14] See State *v.* Lewis, 12 Wis. 434; Stith *v.* State, 13 Ark. 680; Wren *v.* State, 70 Ala. 1. But in Nuchols *v.* Com., 32 Grat. 884, it was ruled that "poker" is not of the same class as faro, keno, and the like.

[15] Com. *v.* Simonds, 79 Ky. 648.

In Rice *v.* State, the Court of Appeals of Maryland, on March 12, 1885, decided that the selling of cards and tickets at a "mutual pool" on horse races is not keeping a gambling table under the Maryland Statute; four judges assenting, three dissenting. From the opinion of the majority the following is extracted:—

"We are now prepared to examine the evidence which was admitted in the Criminal Court. If the persons who purchased the tickets in the various pools were playing at a game of chance, then the appellants were keeping a gaming table and a place for gambling. The object of purchasing these tickets was to wager money on certain horse races. No ordinary interpretation of language would describe their conduct as the playing of a game. When a man hazards his money on the rise or fall of prices of

"Tan:"[1]

"Faro," of which the distinctive feature is that the chances are unequal:"[2]

stocks, cotton, grain, or other commodities it cannot, in the proper use of language, be said that he is playing at a game of chance, nor can the place where such ventures are made or registered be designated as a gaming table.

"Bets are made and money hazarded on many of the uncertainties and contingencies of life, but in the common use of language, these transactions are not called games of chance. The contingency on which these appellants wagered their money was the result of a race. In one event they would win, in another they would lose. It may be said that many elements of uncertainty were involved in the wager by reason of the various combinations which might be made in the pools. But, nevertheless, the thing which was to determine gain or loss was the success of the horses chosen. If by any singular subtlety of discourse a horse race could be shown to be a game of chance, by the same reason we must hold it was played on the race-course, and that the horses were the players. Such disquisitions are very far removed from the ordinary method of thought prevailing among men. It is not consistent with the just and benign spirit of our law to give to a criminal statute an interpretation which can be maintained only by a keen and scholastic ingenuity. The meaning of the law which consigns a man to prison or deprives him of his property should be plain and obvious. Betting money is not an offence by the common law, and is punishable only in the particular cases which are made criminal by statute. Horse races have been in some measure favored by our legislation. By the 18th section of article 56 of the code, the clerks of the Circuit Courts are authorized to issue licenses for the sale of spirituous and fermented liquors at horse races, and the Maryland Jockey Club was incorporated by the act of 1872, chapter 55. Persons may attend the races and hazard their money as freely as they choose by betting on the horses, and they will not thereby become amenable to any legal penalties. The jockey club holds its meetings for these races under the authority given by the Legislature in its charter of incorporation. If betting money on the horses were regarded by the law as playing at a game of chance the race-course would be 'a place of gambling' within the meaning of the statute, and the jockey club would be indictable for maintaining it. But we have seen that they have the express authority of the Legislature for these races. It may be urged that, wagering money on a horse-race is as immoral and as evil in its consequences as playing at a gaming table, and that these pool-rooms present to the idle and dissipated all the temptations which belong to any form of gambling. But such arguments do not justify us in extending the statute beyond the bounds of a just and reasonable construction of its language. It is for the legislature to make such changes in the law as it may consider the public good to require. Our functions are limited to interpreting and enforcing the legislative will when it has been declared, and it would be very unwarrantable in us to permit any private sentiments of our own to affect the construction which we give to these statutes."

[1] People *v.* Ah Oon, 56 Cal. 188.

[2] Wyatt's Case, 6 Rand. 694; Mon-

"Baccarat:"[1]

"Keno."[2]

But neither whist nor écarté is in common usage considered a game of chance.[3]

Under "gaming tables" have been held to be included the games of "thimble and balls;"[4] roulette, and games of the same class;[5] and "pool selling" on base ball.[6] The same has been held as to pool selling in general.[7]

As a "substitute," in the statutory sense, for cards and dice has been considered the game of "ramps."[8]

In keeping a gambling table, *lucri causa* is not an essential ingredient.[9]

§ 1465 *b*. We have already had occasion to notice that the playing at games, so far from being in itself illegal, has been encouraged by a just public sentiment in all cases in which such games tend to the nurturing among young men of personal strength and martial spirit.[10] The same may be said, though with less emphasis, of games by which recreation of mind or body is obtained by those who need such recreation. In its popular sense, we are told,[11] the word "game," in this relation, is used in three senses: (1) Sport, as where Shakespeare speaks of "pastime and pleasing game." (2) A contrivance to furnish sport or recreation, as "games of chance," "games of skill."

Gambling a statutory offence.

cure, J., in Com. *v.* Nuchols, 32 Grat. 895; State *v.* Andrews, 43 Mo. 470; Com. *v.* Monarch, 6 Bush. 301.

[1] Jenks *v.* Turpin, 13 Q. B. D. 505; 50 L. T (N. S.) 808; Park Club Case, as reported in Stutfield on Betting; Saturday Review, Oct. 4, 1884, p. 458. *Aliter* by the French courts, as reported in Fortnightly Review for July, 1884.

A series of illegal games may be averred cumulatively. Leath *v.* Com., 32 Grat. 873.

[2] U. S. *v.* Hornibrook, 2 Dillon, 229; Brown *v.* State, 40 Ga. 689, where keno is said to be a raffle; Miller *v.* State, 48 Ala. 122; Schuster *v.* State, Ibid 199; St. Louis *v.* Sullivan, 8 Mo. Ap. 455; Trimble *v.* State, 22 Ark. 355; Portis *v.* State, 27 Ibid. 360. *Infra*, § 1557. Wyatt's Case, 6 Rand. 694. See Hazen *v.* State, 18 Fla. 184.

[3] Fortnightly Rev. July, 1884.

[4] State *v.* Red, 7 Rich. 8.

[5] Ritte *v.* Com., 18 B. Mon. 38.

[6] People *v.* Weithoff, 51 Mich. 203.

[7] Tollett *v.* Thomas, L. R. 6 Q. B. D. 514; Scollans *v.* Flynn, 120 Mass. 271; People *v.* Reilly, 50 Mich. 384. See Rice *v.* State, *supra*.

[8] Bryan *v.* State, 26 Ala. 65.

[9] State *v.* Holland, 22. Ark. 242; *supra*, § 1457.

[10] *Supra*, § 1461.

[11] See Webst. Dict., tit. "Game;" Ency. Brit., tit. "Gaming."

(3) The method of procedure. "Gaming," however, implies, when used as describing a condition, an element of illegality; and when people are said to be "gaming," this generally supposes that the "games" have been games in which money comes to the victor or his backers.[1] When the terms "game" or "gaming" are used in statutes it is almost always in connection with words giving them the latter sense, and in such case it is only by averring and proving the *differentia* that the prosecution can be sustained.[2] But when "gaming" is spoken of in a statute as indictable, it is to be regarded as convertible with gambling; *i. e.*, staking money on a game involving more or less chance.[3]

Under the statutes the following points have been adjudicated.

(1) Statutes of this class, so far as they make that indictable which was not previously indictable, are to be strictly construed.[4] But whenever the offence they are aimed at is proved, then the

[1] In this sense "gamester" is used by Dryden: "The losing gamester shakes the box in vain."

[2] Com. *v.* Adams, 109 Mass. 344; Wheeler *v.* State, 42 Md. 563, citing State *v.* Elborn, 27 Ibid. 483; Neal *v.* Com., 22 Grat. 917 (a game of "bagatelle"); Carper *v.* State, 27 Ohio St. 572 (aff. Buck *v.* State, 1 Ibid. 61); Roberts *v.* State, 32 Ibid. 171; Biemer *v.* People, 76 Ill. 265 (under statute making fraudulent use of cards indictable); Hamilton *v.* State, 75 Ind. 586 (holding that the staking of anything of value on a game is gaming); State *v.* Miller, 53 Iowa, 154; State *v.* Bryant, 74 N. C. 207 (cited *infra*, § 1491); Kneeland *v.* State, 62 Ga. 395; Clark *v.* State, 49 Ala. 37 (making receipt of stake the test); Wetmore *v.* State, 55 Ibid. 198 (holding that cotemporaneous construction and usage determine the meaning of words, and that "backgammon" is not "a game played with dice"); People *v.* Ah Yem, 53 Cal. 246 (holding betting is not accessaryship). See, as to construction of English statutes, R. *v.* Ashton, 1 E. & B. 286; Redgate *v.* Haynes, L. R. 1 Q. B. D. 89 (Blackburn, J.); Bew *v.* Harston, L. R. 3 Q. B. D. 454.

[3] Com. *v.* Taylor, 14 Gray, 26; Carper *v.* State, 27 Ohio St. 572 (a case of "draw-poker"); Carr *v.* State, 50 Ind. 178; Williams *v.* Warsaw, 60 Ibid. 457 (defining gaming as meaning "a game upon the result of which something of value is staked"); State *v.* Maurer, 7 Iowa, 406; State *v.* Miller, 53 Ibid. 154; State *v.* Bryant, 74 N. C. 207; Innis *v.* State, 51 Ala. 23; State *v.* Nelson, 19 Mo. 393; Harrison *v.* State, 4 Coldw. 105 (that betting on horse races is not necessarily gaming); Tuttle *v.* State, 1 Tex. Ap. 364; aff. Bachelor *v.* State, 10 Tex. 262.

In State *v.* Bryant, 74 N. C. 207, it was said by Settle, J., that, "all gaming is not immoral, and it may be that all immoral games are not prohibited by statute."

[4] See Gibbons *v.* People, 33 Ill. 442; Cain *v.* State, 12 Sm. & M. 456.

courts will not regard variances in mode or details as material.[1] Hence a contest for a wager, in a matter more or less of chance, is gambling;[2] and so of staking money directly on any game of chance or skill;[3] and agreeing that it should be determined by a throw of cards who should pay for a drink or for the expenses of a table.[4] Giving a prohibited game a new name does not take it out of the statute;[5] and under any general term descriptive of gaming used as a *nomen generalissimum*, specific types of gaming are to be regarded as included.[6] Those concerned in managing a social club are indictable for gaming permitted by them.[7] And so of those concerned in a proprietary club managed by a committee who elected members.[8]

(2) Under the statutes the playing a single prohibited game may constitute the offence.[9] It has been said that when a series of prohibited games are played at one sitting this constitutes but one offence;[10] and this may be true when these games form one transaction. But when they do not they can no more be consolidated in one offence than can a series of illegal drinks taken successively in a drinking saloon.[11]

(3) All concerned are principals,[12] even if not participating, if they take part in the management of the game or table.[13] But in some statutes the permitting persons to play on the defendant's premises is made a substantive offence.[14]

[1] Blemer *v.* People, 76 Ill. 265; State *v.* Gitt Lee, 6 Oreg. 426.

[2] State *v.* Smith, 1 Meigs, 99.

[3] Com. *v.* Taylor, 14 Gray, 26; Com. *v.* Gourdier, Ibid. 390.

[4] State *v.* Leighton, 3 Fost. (N. H.) 167; McDaniel *v.* Com., 6 Bush, 326. *Aliter* in New York, People *v.* Sergeant, 8 Cow. 139.

[5] State *v.* Maurer, 7 Iowa, 63, Dean *v.* State, Mart. & Y. 127, cited *infra*, § 1466.

[6] Com. *v.* Simonds, 79 Ky. 648; Blemer *v.* People, 76 Ill. 265; Porter *v.* State, 51 Ga. 300; State *v.* Gitt Lee, 6 Oreg. 426. As to "gift enterprises" and lotteries, see *infra*, § 1491. "Gift enterprises" have been held in Tennessee to be common gaming. Bell *v.* State, 5 Sneed, 507.

[7] Jacobi *v.* State, 59 Ala. 71.

[8] Jenks *v.* Turpin, 50 L. T. (N. S.) 808; Saturday Review, Oct. 4, 1884, p. 437. See *infra*, § 1519 *a*.

[9] State *v.* Melville, 11 R. I. 417; Swallow *v.* State, 20 Ala. 30; Torney *v.* State, 13 Mo. 455.

[10] Wingard *v.* State, 13 Ga. 396.

[11] See Whart. Cr. Pl. & Pr. § 474.

[12] *Supra*, § 1422; State *v.* Haines, 30 Me. 65; State *v.* Crummey, 17 Minn. 72; Poteete *v.* State, 72 Ala. 558.

[13] Hipes *v.* State, 73 Ind. 39.

[14] Com. *v.* Stowell, 9 Metc. 572. As to joinder of defendants, see Whart. Cr. Pl. & Pr. §§ 301 *et seq.* That the parties with whom the defendant played need not be averred, see Orr *v.* State, 18 Ark. 540; Goodman *v.* State, 41 Ibid. 228. See *infra*, § 1510.

§ 1465 *c*. Hence, from what has been already stated,[1] whatever is likely to excite a disturbance (*e. g.*, dispensing intoxicating drinks) may give to gaming that incident of disorder and discomfort to the community which may make it a nuisance.[2]

Gaming made unlawful by whatever excites disturbance.

§ 1465 *d*. It has been already stated that, while gaming by itself is not a nuisance at common law, it becomes so when accompanied with incidents which make it contribute to the discomfort and disorder of the community. This is the case when minors are drawn together at gaming tables in such a way as to engender dissipated habits on their part, to take them from their home and business duties, and to draw together idlers so as to create a disturbance. In many States to permit minors to attend gaming tables is made indictable by statute, even though the gaming itself be of a character which is not specifically indictable.[3]

Receiving minors at gaming tables.

§ 1466. As to the framing of indictments for gambling and for gaming-houses the following points are to be noticed:—

Statutory requisites must be followed in pleading.

Statutory terms.—These must be used, though it is not enough when they charge conclusions of law.[4]

[1] *Supra*, §§ 1461 *et seq.*

[2] Com. *v.* Tilton, 8 Met. 232; Com. *v.* Price, 8 Leigh, 757; State *v.* Black, 9 Ired. 378 (Ruffin, C. J.); State *v.* Terry, 4 Dev. & B. 185 (under statute); Ray *v.* State, 50 Ala. 172 (under statute); Campbell *v.* State, 55 Ibid. 89 (under statute); Cole *v.* State, 9 Tex. 42 (under statute); O'Brien *v.* State, 10 Tex. Ap. 544. And so as to gaming on the Lord's Day. State *v.* Fearson, 2 Md. 310, cited *supra*, § 28; and citing Whart. Prec. 444, 445; holding this is indictable at common law. State *v.* Anderson, 30 Ark. 131 (under statute); *supra*, § 1431 *c*; but see State *v.* Conger, 14 Ind. 396. See *supra*, § 1412, as to analogous cases of public spectacles producing disorder.

[3] Com. *v.* Emmons, 98 Mass. 6 (cited *supra*, § 1463); Hitchings *v.* People, 39 N. Y. 454 (holding that it is not necessary the offence should be habitual); State *v.* Hall, 32 N. J. (3 Vroom) 158; *supra*, § 1462; Fugate *v.* State, 2 Humph. 397; Green *v.* Com., 5 Bush, 327 (case of permitting minors to play); Ready *v.* State, 62 Ind. 1 (citing State *v.* Ward, 57 Ibid. 537). See Stern *v.* State, 53 Ga. 229 (cited *supra*, §§ 87, 88), where it is held that when the statute requires it *scienter* is essential.

[4] Whart. Cr. Pl. & Pr. §§ 154, 221, 231; Com. *v.* Parker, 117 Mass. 112; Wheeler *v.* State, 42 Md. 563; Carper *v.* State, 27 Ohio St. 572; Zook *v.* State, 47 Ind. 463; Carr *v.* State, 50 Ibid. 292; Donniger *v.* State, 52 Ibid. 326; Pemberton *v.* State, 85 Ibid. 507; Blemer *v.* People, 76 Ill. 265; State *v.* Kauffman, 59 Iowa, 273; Conyers *v.* State, 50 Ga. 103; Napier, *v.* State, 50 Ala. 168; State *v.* Crowder, 39 Tex. 47; State *v.* Bristow, 41 Ibid. 146; State *v.* Bultion, 42 Ibid. 77; Wallace *v.* State, 13 Tex. Ap. 160; Parker *v.* State, Ibid. 213. Under the English statute it is necessary to aver that the

Matters unknown.—As to such, specifications can be excused by stating that they were unknown to the grand jury.[1]

Joinder of defendants.—All parties in joint gambling may be indicted jointly;[2] but not unless they were engaged at the same time in the same game.[3]

Exceptions.—When the exceptions to the statute are contained in the enacting clause of the statute and limit the offence, they should be negatived in the indictment. It is otherwise when they are in provisos or subsequent exceptions, and are matters of defence.[4]

Names of parties.—The names of parties playing need not be specified in the indictment when the offence is charged as of the nature of a nuisance, or, as is the case with keeping gaming tables, is not dependent on the character of the parties engaged.[5] It is otherwise when the offence is qualified by the character of the parties engaged, in which case the names should be given, or they should be averred to be unknown; and, it is otherwise, also, when certain persons are required to be present in order to constitute the offence.[6]

defendant won by fraud or unlawful device or ill practice. R. *v.* Rogier, 1 B. & C. 272. That "gambling," in an indictment, may be substituted for "gaming" in a statute, see State *v.* Nelson, 19 Mo. 393 (see State *v.* Mitchell, 6 Mo. 147). When a statute prohibits games of a "like kind" with faro, etc., games falling under "like kind" must be specifically described. Huff *v.* Com., 14 Grat. 648. "Gambling-table, commonly called faro," "is good under a statute prohibiting any faro bank." Brown *v.* State, 5 Eng. (Ark.) 607.

[1] Whart. Cr. Pl. & Pr. § 156; Com. *v.* Ashton, 125 Mass. 384.

[2] Whart. Cr. Pl. & Pr. § 302; Com. *v.* McGuire, 1 Va. Ca. 119; Com. *v.* McChord, 2 Dana, 242; Covy *v.* State, 4 Port. 187; State *v.* Homan, 41 Tex. 155.

[3] Lindsay *v.* State, 48 Ala. 169; Galbreath *v.* State, 36 Tex. 200; State *v.* Homan, *ut supra*.

[4] Whart. Cr. Pl. & Pr. § 238. See Alexander *v.* State, 48 Ind. 394; Reynolds *v.* State, 2 N. & McC. 365; Bell *v.* State, 5 Sneed, 507.

[5] See *supra*, §§ 1453, 1460; Whart. Cr. Pl. & Pr. § 155; Roberts *v.* State, 32 Ohio St. 171; Huffman's Case, 6 Rand. 685; State *v.* Ames, 1 Mo. 372; Green *v.* People, 21 Ill. 125 (citing Canniday *v.* People, 17 Ibid. 158); State *v.* Thomas, 50 Ind. 292 (citing Carpenter *v.* State, 14 Ibid. 109); Hinton *v.* State, 68 Ga. 322; Coggens *v.* People, 7 Port. 263; Flake *v.* State, 19 Ala. 552; Johnston *v.* State, 7 S. & M. 58; Johnson *v.* State, 36 Tex. 198; Groner *v.* State, 6 Fla. 39 (citing Coggins *v.* State, 3 Port. 264).

[6] Davis *v.* State, 7 Ohio, 204; Buck *v.* State, 1 Ohio St. 61 (explained on statutory grounds in Roberts *v.* State,

Nature of stake.—When the statute requires that the game should be played for money or for a stake, then the playing for money or for a stake should be alleged; though when a specific amount of money is specified, it is no variance if the amount be not exactly proved.[1] When, however, the stake is specified as a "valuable thing," then the "valuable thing" should be individuated.[2]

Place of gaming.—The distinctive feature of some prosecutions is, that the offence should have been committed in a particular kind of place; *e. g.*, a "public place," or a "public house." If so, the statutory qualification must be included in the indictment.[3] The name of the owner of the place, however, is irrelevant.[4] A gaming-house need not be more closely described than that it was in the county.[5]

Nature of game.—When the statute makes playing a specific game or device indictable (*e. g.*, faro), it is necessary that the game should be specified in the indictment as falling under the statute.[6]

32 Ibid. 173); Butler *v.* State, 5 Blackf. 280, 343; Alexander *v.* State, 48 Ind. 394; Jester *v.* State, 14 Ark. 552 (that a variance is fatal). In R. *v.* Moss, 1 Dears. & B. 205, it was held to be unnecessary to aver from whom the defendant won.

[1] Com. *v.* Tiernan, 4 Grat. 545; Com. *v.* Gartland, 5 Met. (Ky.) 478; Parsons *v.* State, 2 Cart. (Ind.) 499 (Blackford, J.); Medlock *v.* State, 18 Ark. 303; State *v.* Ward, 9 Tex. 370. But it is a variance if currency be charged and negotiable paper be proved. Tate *v.* State, 5 Blackf. 174.

[2] See Anthony *v.* State, 4 Humph. 83, where it was held that "valuable things" was too vague. That a wager is not necessary under the statute when minors are permitted to play, see Bond *v.* State, 52 Ind. 457. Under the Georgia statute the thing played for need not be averred. Hinton *v.* State, 68 Ga. 322.

[3] Wortham *v.* Com., 6 Rand. 675; Linkous *v.* Com., 9 Leigh, 608; Flake *v.* State, 19 Ala. 551; Rice *v.* State, 10 Tex. 545; State *v.* Norton, 19 Ibid. 102; Wallace *v.* State, 12 Tex. Ap. 479. As to what is a "public place," see Russell *v.* State, 72 Ala. 222. In Elsberry *v.* State, 41 Tex. 158, an indictment averring the offence to be "in a public place in view of the highway" was held sufficient. In State *v.* Fuller, 31 Ibid. 588, "public place" was held too indefinite. "Public place" has been held sufficient in indictments for exposure of person. *Infra*, § 1469.

[4] State *v.* Atkins, 1 Ala. 180. See Wilson *v.* State, 5 Tex. 21, where it was held that when unnecessary the variance was not fatal.

[5] App *v.* State, 90 Ind. 73; Keith *v.* State, Ibid. 89; Dohme *v.* State, 68 Ga. 639; Whart. Cr. Pl. & Pr. § 144.

[6] R. Ashton, 1 E. & B. 286; Com. *v.* Monarch, 6 Bush, 301 (holding that it is enough to specify the game in the statutory words); State *v.* Kauffman, 59 Iowa, 273; State *v.* Lewis, 12 Wis. 434; Ben (Negro) *v.* State, 9 Tex. Ap. 107; Parker *v.* State, 13 Ibid. 213; State *v.* Jeffrey, 33 Ark. 136. In

Where, however, the statute prohibits playing all games of chance for money, or keeping a gaming-table of any class, or any general gambling device, then it is not necessary to specify the game or device.[1] But when a gaming-house is charged as a nuisance, then the incidents making it a nuisance must be averred.[2] When the statute requires designation of the class of house, then a variance in the designation is fatal;[3] but not a variance in the details of the games.[4]

Evidence is inferential.

§ 1467. The proof is necessarily, to a greater or less degree, inferential, such as possession and use of implements for gambling,[5] or the testimony of participants in games of whose character the jury is to judge. The *scienter*, when individuals are prosecuted as gamblers, may be inferred from the illicit use of such implements elsewhere.[6] How the defendant's control is to be proved is elsewhere shown.[7] Betting at a game does not necessarily involve participation.[8]

Windsor's Case, 4 Leigh. 680, it was held that if the game were averred it should be proved. That the State need not elect between several games, see Hinton *v.* State, 68 Ga. 322.

[1] See Gibboney *v.* Com., 14 Grat. 582; State *v.* Dole, 3 Blackf. 394; Webster *v.* State, 8 Ibid. 400 (but holding that some descriptions of the game should be given); Moore *v.* State, 65 Ind. 213, 382; Pemberton *v.* State, 85 Ibid. 507; State *v.* Ritchie, 2 Dev. & B. 29; Bryan *v.* State, 26 Ala. 65; Harris *v.* State, 33 Ibid. 73; Johnston *v.* State, 7 Sm. & M. 58; Montee *v.* Com., 3 J. J. Mars. 135; Campbell *v.* State, 2 Tex. Ap. 187. In Johnston *v.* State, 7 Sm. & M. 163, the reason is given, quoting from Judge Peck in Dean *v.* State, Mart. & Y. 127, that "adepts at gaming play for money without any game, where their invention for names has been exhausted." *Infra*, § 1513.

[2] Whart. Cr. Pl. & Pr. §§ 221, 230, 231; U. S. *v.* Ringgold, 5 Cranch C. C. 378. See Com. *v.* Pray, 13 Pick. 359; People *v.* Jackson, 3 Denio, 101; Frederick *v.* Com., 4 B. Mon. 7; State *v.* Ames, 1 Mo. 372; O'Brien *v.* State, 10 Tex. Ap. 554.

[3] Watson *v.* State, 13 Tex. Ap. 160.

[4] State *v.* Pancake, 74 Ind. 15.

[5] Robbins *v.* People, 95 Ill. 175; State *v.* Andrews, 43 Mo. 470; St. Louis *v.* Sullivan, 8 Mo. Ap. 455; Yepperson *v.* State, 39 Tex. 48. See Mallory *v.* State, 62 Ga. 164.

[6] Com. *v.* Hopkins, 2 Dana, 418.

[7] See *supra*, §§ 246, 247, 1453. Leasing a house weekly, with a billiard table in it for gambling, makes the lessor liable, if notice is brought home to him. Com. *v.* Adams, 109 Mass. 344. But unless knowledge can be imputed to the defendant, he cannot be convicted. Padgett *v.* State, 68 Ind. 46.

Whether gambling in stocks is penal, see Kirkpatrick *v.* Bonsall, 72 Penn St. 155.

[8] Ah Yem, *ex parte*, 53 Cal. 246.

A variance as to the place laid by way of local description may be fatal. (Com. *v.* Butts, 2 Va. Ca. 18.) And so where there is a variance as to the

Betting a statutory offence.

§ 1467 *a*. We have already noticed cases in which betting is indictable as an incident of gambling,[1] and betting on elections will be hereafter distinctively discussed.[2] We may now observe that in some jurisdictions betting is made distinctively indictable by statute. Betting in this sense is an agreement by two or more parties that one will pay another a specific sum on the occurring of a future contingency. When betting in this sense is illegal, all parties concerned are indictable.[3] The indictment must adopt the technical terms of the statute.[4] When the offence is in the nature of a nuisance, or when the form is one prescribed by statute, then the amount of the bet need not be described.[5] But it is otherwise, at common law, when a specific bet is charged.[6] When averred the facts in detail must be proved.[7] To indictments for betting, ignorance is no defence.[8] Betting on elections is hereafter considered.[9]

A conspiracy to cheat by betting is indictable at common law.[10] Betting on horse racing is, in some States, made specifically indictable by statute.[11]

parties alleged as concerned in the prohibited game. Wilcox *v.* State, 7 Blackf 456; Iseley *v.* State, 8 Ibid. 403 (Perkins, J.); Haney *v.* State, 4 Eng. 193 (Scott, J.).

[1] *Supra*, § 1465 *a*.

[2] *Infra*, § 1848 *b*.

[3] See Whart. on Cont. §§ 451 *et seq.* Vicaro *v.* Com., 5 Dana, 505; Howlett *v.* State, 5 Yerg. 145; State *v.* Welch, 7 Port. 463; Stone *v.* State, 3 Tex. Ap. 675.

[4] State *v.* Holland, 22 Ark. 242; Anderson *v.* State, 9 Tex. Ap. 177. In Warren *v.* State, 18 Ark. 95, "gambling device, commonly called a faro bank," was held good under "statute prohibiting any gaming table or gambling device, . . or any faro bank," etc.

[5] Jacobson *v.* State, 55 Ala. 151; Mitchell *v.* State, Ibid. 160; Ramey *v.* State, 14 Tex. 409 (case of rondo); Harrison *v.* State, 15 Ibid. 239; Blair *v.* State, 32 Ibid. 474 (case of faro). See Bone *v.* State, 63 Ala. 185; Napier *v.* State, 50 Ibid. 168.

[6] Wagner *v.* State, 63 Ind. 250; State *v.* Kilgore, 6 Humph. 44 (where the indictment, which was held bad, only averred a bet of goods, wares, and merchandise).

[7] Bone *v.* State, 63 Ala. 185.

[8] *Supra*, § 88.

[9] *Infra*, § 1848 *b*.

[10] *Supra*, § 1371.

[11] See State *v.* Lovell, 39 N. J. 458, 463.

Whether horse racing is gambling, under the statutes, depends upon the character of the race. If the object is by fixed exhibitions to encourage the development and advance of the breed of horses, then such races cannot be so classed. Holmes *v.* Sixsmith, 7 Ex. 802; Bentick *v.* Connop, 5 Q. B. 693; Coombes *v.* Dibble, L. R. 1 Ex. 248; State *v.* Hayden, 31 Mo. 35; Harless *v.*

XIII. EXPOSURE OF PERSON.[1]

§ 1468. We have already seen that a public exhibition of gross and wanton indecency is a nuisance at common law.[2] We have now to observe that an intentional or negligent indecent exposure of the private parts of the person to public view is a nuisance at common law.[3] A mere exposure of the naked person down to the waist is not enough;[4] the private parts must be exposed; or at least as much as is usually hidden, and the exposure of which tends to scandalize, or to excite lascivious desires.[5]

Indecent exposure a nuisance.

§ 1469. That the exposure is in a public place, where it can be seen by persons having opportunity of access to such place, is of the essence of the offence.[6] Whether, however, it is necessary to aver the exposure to be "in the sight of" divers persons, has been doubted. In North Carolina, in a case which has the high authority of Judge Gaston, it was held enough to allege the exposure to be "to public view in a public place;"[7] but this decision has been subsequently (1873) practically overruled in the same State, it being declared that it should appear that the exposure was in sight of others.[8] But it is clearly sufficient to aver an exposure "to the view of" divers persons. Thus in Massachusetts, an indictment for indecent exposure, which alleges that the defendant, devising and intending the morals of the people to debauch and corrupt, at a time and place named, in a certain public building there situate, in the presence of divers citizens, etc., unlawfully, scandalously, and wantonly did expose to the view of said persons present, etc., his body, etc., sufficiently sets forth the offence.[1] Nor in Massachusetts need the indictment conclude "to the common nuisance of all the citizens,"[2] etc. And in that State an indecent exposure of person to a child in private may be "gross lewdness," under a statute.[3]

Publicity must be averred.

An indictment charging the offence to have been committed on a highway is not sustained by evidence that the offence was committed in a place near the highway, though in full view of it.[4]

§ 1470. A urinal, fixed in a market-place, open to the public for the purpose of making urine, and on a public foot-path, is "an open and public place," so as to sustain an indictment for this offence;[5] and so of the inside of an omnibus;[6] and of the sea-beach, when visible from inhabited houses,[7] or from a public path frequented by females;[8] and of the roof of a house, visible from other houses;[9] and as we have seen, of a room or booth where all persons desiring are admitted for pay to witness an indecent exhibition.[10]

Place must be open to public.

Bathing near a public footway, frequented by females, is unlawful, and renders the party so bathing liable to be indicted for exposure. Nor is it any defence that the place has been always used as a resort for bathers; or that the exposure has not been beyond what is necessarily incident to such bathing.[11]

It is not necessary to constitute a public place, in the above sense,

U. S., 1 Morris, 169; Wilson *v.* Conlin, 3 Bradw. 517.

On the other hand, a horse race, when conducted recklessly, without police supervision, may be a public nuisance; and when the object of the race is not the improvement of stock, but the promotion of betting or gambling, the case may be one of gambling, under the statute. State *v.* Posey, 1 Humph. 384.

And blocking up a public road by a horse race is specifically indictable as a nuisance. State *v.* Fidler, 7 Humph. 508.

[1] For forms, see Whart. Prec. 765 *et seq.*

[2] *Supra*, § 1432.

[3] R. *v.* Sedley, 10 St. Trials, Ap. 93; 1 Sid. 168; 1 Keb. 620; and see R. *v.* Gallard, 1 Sess. Cas. 231; W. Kel. 163; R. *v.* Crunden, 2 Camp. 89; 1 B. & Ad. 933; R. *v.* Webb, 1 Den. C. C. 338; 2 C. & K. 933; R. *v.* Saunders, 13 Cox C. C. 116; L. R. 1 Q. B. D. 15; Brittain *v.* State, 3 Humph. 203; State *v.* Rose, 32 Mo. 560.

[4] See R. *v.* Gallard, *ut sup.*

[5] See Ardery *v.* State, 56 Ind. 328.

[6] See Lorimer *v.* State, 76 Ind. 495; Moffit *v.* State, 43 Tex. 346; State *v.* Griffin, Ibid. 538.

As to what is a public place, under the gambling statutes, see *supra*, § 1465.

[7] State *v.* Roper, 1 Dev. & Bat. 208.

[8] State *v.* Pepper, 68 N. C. 259. See, under Arkansas statute, State *v.* Hazle, 20 Ark. 156.

[1] Com. *v.* Haynes, 2 Gray, 72. See State *v.* Gardner, 28 Mo. 90; State *v.* Rose, 32 Ibid. 560.

[2] Com. *v.* Haynes, 2 Gray, 72.

[3] Com. *v.* Wardell, 128 Mass. 52.

[4] R. *v.* Farrell, 9 Cox C. C. 446.

[5] R. *v.* Harris, 11 Cox C. C. 659, overruling R. *v.* Orchard, 3 Ibid. 248; 20 Eng. L. & Eq. 598.

[6] R. *v.* Holmes, 20 Eng. L. & Eq. 597; Dears. C. C. 207; 6 Cox C. C. 216.

[7] R. *v.* Crunden, 2 Camp. 89.

[8] R. *v.* Reed, 12 Cox C. C. 1.

[9] R. *v.* Thallman, L. & C. 326; 9 Cox C. C. 388.

[10] R. *v.* Saunders, 13 Cox C. C. 116; L. R. 1 Q. B. D. 15. *Supra*, § 1432; People *v.* Bixby, 67 Barb. 221; 4 Hun, 636.

[11] R. *v.* Reed, 12 Cox C. C. 1.

that it should be a place to which the public have a right to resort; it is enough if it be at the time resorted to.[1]

Intent to be inferred.

§ 1471. The intent with which the act was done, when intent is averred, may be a material ingredient in the offence, and is a question of fact for the consideration of the jury, under all the circumstances of the case; and it has been held that a charge which withdraws that question from the consideration of the jury as a question of fact is erroneous.[2] But intent is to be inferred from recklessness; nor can it be questioned that a negligent exposure in a thoroughfare may be indictable.[3]

To be a nuisance offence must be in public place.

§ 1472. It has been properly held that if a man indecently expose his person to *one person* only, this is not an indictable misdemeanor.[4] It is otherwise if there are other persons in such a situation that they may be witnesses of the exposure.[5] It is by dwelling on this point that we may reach a solution of an apparent conflict. An intentional indecent exposure of the person to one individual in private may be indictable as an assault,[6] but not as a nuisance,[7] though under statute it may be indictable as a lascivious act.[8] When the exposure is in the nature of an indecent exhibition, it is indictable at common law as an offence against decency.[9] When it is in a

[1] R. *v.* Wellard, 51 L. T. N. S. 604. As to urinals, see *supra*, § 1432.

[2] Miller *v.* People, 5 Barb. 203. The ruling in this case, so far as it assumes intent to be necessary, cannot be sustained. Bathing naked in the sea, for instance, near the highway, may have been with the sole intent of taking a bath; yet it is none the less an indictable offence, since no one has a right to expose a naked person without first looking to see whether the exposure would be seen by neighbors or passers-by.

[3] *Supra*, § 1468.

[4] R. *v.* Webb, 1 Den. C. C. 338; 2 Cox C. C. 376; 20 Eng. L. & Eq. 599. See R. *v.* Elliott, L. & C. 103. Whether an indictment which charges A. with having "in a certain public place, within a certain victualling ale-house," indecently exposed his person *in the presence* of M. A., the wife of B., and other of the liege subjects there, is good—*quære*. But if it appear that the exposure was to M. A., the wife of B., *only*, the defendant ought not to be convicted. R. *v.* Webb, 2 C. & K. 933; S. C., 1 Den. C. C. 338.

[5] R. *v.* Farrell, 9 Cox C. C. 446; Van Hooten *v.* State, 46 N. J. L. 16. In R. *v.* Elliott, L. & C. 103, where fornication was committed beside an open road, but where only one witness who saw the parties was produced, and there was no evidence that they could have been seen by other parties, the court was equally divided.

[6] See *supra*, § 612.

[7] Fowler *v.* State, 5 Day, 81. See Com. *v.* Catlin, 1 Mass. 8. *Infra*, § 1757.

[8] State *v.* Millard, 18 Vt. 574.

[9] See *supra*, § 1432. *Infra*, § 1606;

public place, and in such a way that it is in the view of bystanders, passers, or neighbors, then it is a nuisance, though it is not averred in the indictment that it was actually seen by others beside the testifying witness, and though there is only indicatory proof that it was so seen.

XIV. OBSTRUCTING HIGHWAYS AND NAVIGABLE STREAMS.

Obstructing road over which public has right of way is indictable.

§ 1473. To sustain an indictment for nuisance in obstructing a road, the road must first be shown to be public and not private;[1] since, as has been seen, no indictment lies for a nuisance unless the offence be to the public generally, as distinguished from a special and limited class of persons.[2] A public road, however, to be thus protected, need not have been formally accepted by the municipal authorities. It is enough if over it the public have a right to pass and repass, whether freely or on payment of a fixed toll.[3] If there

Com. *v.* Sharpless, 2 S. & R. 91, and other cases cited, *infra*, § 1606, where it was held enough that one person saw an indecent exhibition.

[1] Com. *v.* Tucker, 2 Pick. 44; Root *v.* Com., 98 Penn. St. 170; State *v.* Randall, 1 Strobh. 110; Berry *v.* State, 12 Tex. Ap. 108, 249; and see Whart. on Neg. §§ 815, 956. For indictments against municipal authorities for neglect, see *infra*, § 1584 *a*. An entrance to the rear of certain houses not opening into the main street is not *per se* a highway. People *v.* Jackson, 7 Mich. 432. That the road must be shown to have been duly set apart for public use, see Martin *v.* People, 13 Ill. 341.

[2] See *supra*, §§ 1410 *et seq.*; and State *v.* Rye, 35 N. H. 368; People *v.* Jackson, 7 Mich. 432.

[3] Co. Litt. 56 *a*; 1 Hawk. P. C. c. 76; Cleaves *v.* Jordan, 34 Me. 9; Com. *v.* Gowen, 7 Mass. 378; Com. *v.* Wilkinson, 16 Pick. 175; Kelly *v.* Com., 11 S. & R. 345; Freeman *v.* State, 6 Port. 372; Mills *v.* State, 20 Ala. 86; Gregory *v.* Com., 2 Dana, 417; Parkinson *v.* State, 2 W. Va. 589. As to *turnpike roads*, see Whart. on Neg. §§ 956 *et seq.*; *infra*, § 1476; R. *v.* Preston, 2 Lew. 193; State *v.* Day, 3 Vt. 138; Com. *v.* Wilkinson, 16 Pick. 175; Com. *v.* Flemington, Lewis Cr. Law, 533; Craig *v.* People, 47 Ill. 487. As to *ferries*, see State *v.* Wilson, 42 Me. 9; People *v.* Babcock, 11 Wend. 586; State *v.* Hudson County, 3 Zab. 206; 4 Ibid. 718; Carter *v.* Com., 2 Va. Cas. 354. And so as to *foot-ways* and *horse-paths*. R. *v.* St. Weonard, 5 C. & P. 579. See Throwers' Case, 3 Salk. 392. For indictments against municipalities for neglect, see *infra*; § 1554 *a*. As to roads which are not thoroughfares, see State *v.* Rye, 35 N. H. 368; Com. *v.* Tucker, 2 Pick, 44; State *v.* Randall, 1 Strobh. 110. For indictments in Texas, see Day *v.* State, 14 Tex. Ap. 26; Brinkvetter *v.* State, Ibid. 67. That a new road has been opened is no excuse for obstructing the old, unless the old road be formally abandoned, see State *v.* Harden, 11 S. C. 360.

be such a right, in the public, obstruction of travel even by the owner of the soil, is a nuisance.[1] Any public square, any space of ground, dedicated and accessible to the public use, falls within the same general category.[2] Nor does it matter that the road is owned by a private corporation. Supposing that the public has a right, on payment of a fixed toll, to travel on it, an indictment for nuisance lies for its obstruction.[3] The same protection is thrown over bridges,[4] navigable rivers,[5] and harbors in the sea and great lakes.[6]

§ 1474. It is a common nuisance to prevent the public from having free use of a highway by unreasonably blocking it or otherwise temporarily excluding them from it, or by putting on it any permanent structures;[7] or by placing in its vicinity instruments which make its public use insecure or uncomfortable.[8] Fences, walls, and posts, protruded in a highway

Whatever interferes with travel is an obstruction.

[1] Mercer *v.* Woodgate, L. R. 5 Q. B. 31.

[2] *Infra*, § 1474 *a*; State *v.* Canterbury, 8 Fost. N. H. 195; State *v.* Atkinson, 24 Vt. 448; Com. *v.* Bowman, 3 Barr, 202; Rung *v.* Shoneberger, 2 Watts, 23; Com. *v.* Rush, 14 Penn. St. 186; State *v.* Commis., 3 Hill (S. C.), 149; see R. *v.* Middlesex, 3 B. & Ad. 201. As to toll, see North. Cent. R. R. *v.* Com., 90 Penn. St. 300. *Infra*, § 1476.

[3] R. *v.* Preston, 2 Lew. 193; Com. *v.* Wilkinson, 16 Pick. 175; State *v.* McIver, 88 N. C. 686; State *v.* Harden, 11 S. C. 360. *Infra*, § 1476.

[4] Whart. on Neg. § 977; R. *v.* Middlesex, 3 B. & Ad. 201; R. *v.* Derby, Ibid. 147; R. *v.* Kerchener, L. R. 2 C. C. 88, 12 Cox C. C. 522; State *v.* Canterbury, 8 Foster, 195; Com. *v.* Bridge, 9 Pick. 142; Com. *v.* Bridge, 2 Gray, 339. And see Clinton Bridge, *in re*, 10 Wal. 454; Binghamton Bridge, *in re*, 3 Wal. 51; State *v.* Raypholtz, 32 Kan. 450.

[5] See R. *v.* Betts, 16 Q. B. 1022; Thompson *v.* River Co., 54 N. H. 545.

[6] *Infra*, § 1477.

[7] As, for instance, putting anything on the road that diminishes its area for travel. R. *v.* Telegraph Co., 9 Cox C. C. 137; Hyde *v.* Middlesex, 2 Gray, 267; Com. *v.* Blaisdell, 107 Mass. 234. That liberty poles erected on a public street may not, if sanctioned by long usage, be a public nuisance, see Allegheny *v.* Zimmerman, 95 Penn. St. 287. But see Penns. *v.* Gillespie, Add. (Penn.) 267.

[8] Wood on Nuis. § 529. Sir J. F. Stephen gives the following illustrations of nuisances of this class:—

"Each of the following acts is a nuisance to a highway:—

"(1) Digging a ditch, or making a hedge across it, or ploughing it up. 1 Russ. Cr. 485." See Kelly *v.* Com., 11 S. & R. 345; Justice *v.* Com., 2 Va. Ca. 171; State *v.* Miskimmons, 2 Ind. 440; Henline *v.* People, 81 Ill. 269.

"(2) Allowing wagons to stand before a warehouse for an unreasonable time, so as to occupy a great part of the street for several hours by day and night. R. *v.* Russell, 6 East, 427.

"(3) Keeping up a hoarding in front of a house in the street, for the

beyond the statutory line are nuisances;[1] though the obstructions must be appreciable.[2] Constables, also, unnecessarily obstructing the streets by their sales are indictable for a nuisance;[3] and it is unlawful, in a large city, to place goods intended for sale or transportation in the public streets.[4] Blasting in such a way as to disturb and imperil passers-by is a nuisance.[5] Even pitfalls or excavations newly made close to or on a highway may be nuisances.[6] It is a nuisance, also, for a mill-owner to open a ditch or sluice across a public road for the flow of his waters.[7] So it is a nuisance to collect in a highway, by the use of violent, indecent, and excited language,[8] or by any public show or game,[9] or by any sensational exhibition in shop windows,[10] a crowd by which the street is choked;[11] and so to set spring-

purpose of repairs, for an unreasonable time. R. *v.* Jones, 3 Camp. 230.

"(4) Excavating an area close to a foot-path, and leaving it unfenced. Barnes *v.* Ward, 9 C. B. 332.

"(5) Blasting stone in a quarry so as to throw stones upon the houses and road. R. *v.* Mullins, L. & C. 489."

[1] R. *v.* Gregory, 2 N. & M. 478; 5 B. & Ad. 555. *Supra*, § 24.

[2] R. *v.* Lepille, or Lepine, 15 L. T. 158; 15 W. R. 45. See R. *v.* Burrell, 10 Cox C. C. 462.

[3] Com. *v.* Milliman, 13 S. & R. 403.

[4] R. *v.* Russell, 6 East, 427; R. *v.* Cross, 3 Camp. 227; Benjamin *v.* Storr, L. R. 9 C. P. 400; Passmore's Case, 1 S. & R. 217; State *v.* Berdetta, 73 Ind. 185. See, also, People *v.* Cunningham, 1 Denio, 524.

But a merely temporary moving of a building through a public street is not necessarily a nuisance. State *v.* Omaha, 14 Neb. 265. And so of temporary loading and unloading, Matthews *v.* Kelsey, 58 Me. 56. See Burling *v.* West, 29 Wis. 307.

[5] Arnold *v.* R. R., 22 W. R. 613; R. *v.* Mutters, L. & C. 491; 10 Cox C. C. 6.

[6] Fisher *v.* Prowse, 2 B. & S. 770; State *v.* Man. Soc., 42 N. J. L. 504. See Barnes *v.* Ward, *supra*.

[7] State *v.* Yarrell, 12 Ired. 130; see R. *v.* Kerrison, 1 M. & S. 526. Opening and laying pipes and trenches on a highway by private persons is an indictable nuisance. R. *v.* Longton Gas Co., 2 E. & E. 651; 8 Cox C. C. 317.

[8] *Supra*, § 1432 *b*; Com. *v.* R. R., 112 Mass. 469; Com. *v.* Oaks, 113 Ibid. 8; People *v.* Cunningham, 1 Denio, 524; Barker *v.* Com., 19 Penn. St. 412; Bell *v.* State, 1 Swan, 42; Sanders *v.* State, 18 Ark. 198. So as to provoking public disturbance by an exhibition of a "stuffed Paddy." Com. *v.* Haines, 4 Clark (Pa.), 17.

[9] *Supra*, §§ 1412, 1458. A regatta on a canal conducted in such a way as to bring a crowd trespassing on the land of riparian owners, may be a nuisance. Bostock *v.* R. R., 5 De G. & S. 584. See R. *v.* Moore, 3 B. & Ad. 154; Walker *v.* Brewster, L. R. 5 Eq. 25.

[10] Obstructing the stream of passage on a public street by putting into it agents with pictures and papers to draw attention to a particular business or show may be an indictable nuisance. R. *v.* Sarmon, 1 Burr. 516. In R. *v.*

[11] See State *v.* Hughes, 72 N. C. 25.

guns pointed to the highway, by which life is endangered ;[1] to place on or near the highway objects likely to frighten horses when placed near highways ;[2] and to wantonly and violently run a horse up and down a highway.[3]

The same rule applies to a stall placed on the sidewalk of a public street for the sale of fruit and confectionery, although the defendant pays rent to the owner of the adjoining premises for the use of so much of the pavement as he occupies ;[4] and to front steps of a dwelling placed in such a way that they protrude into the highway ;[5] to obstacles on the untravelled parts of a highway ;[6] to things overhanging or encroaching on a highway so as to endanger passage.[7] But the obstruction must be unlicensed.[8] Hence telegraph posts, erected by the municipal authorities, and in execution of a statutory power, are not indictable as nuisances,[9] though it is otherwise when they are not so licensed.[10] Therefore, in case of non-license, telegraph posts on a highway are a nuisance, though the posts are not placed on the repaired and travelled part of the highway, nor on an artifi-

Lewis, London Law Times, Dec. 17, 1881, the defendant was tried before Grove and Lopes, JJ., in the High Court of Justice, for a nuisance in exhibiting, in his shop windows, in the city of Manchester, sensational pictures of statesmen and ecclesiastics, sometimes in ludicrous positions, in such a way as to draw large crowds and block the streets. The defendant was convicted, and bound over not to repeat the nuisance. The fact that the defendant's counsel was Sir J. Holker shows that the defence was fairly presented to court and jury. S. P., R. *v.* Carlisle, 6 C. & P. 627. As to such exhibitions, see *supra*, § 1432 *b*.

[1] State *v.* Moore, 31 Conn. 479. See cases cited in Whart. on Neg. § 348. *Supra*, §§ 464, 507.

[2] See Judd *v.* Fargo, 107 Mass. 264; Dimock *v.* Suffield, 30 Conn. 129; Ayer *v.* Norwich, 39 Ibid. 376; Clinton *v.* Howard, 42 Ibid. 295.

[3] State *v.* Ellis, 6 Baxt. 549.

[4] Com. *v.* Wentworth, Brightly, 318; S. C., 4 Clark, 324; Smith *v.* State, 6 Gill, 425. See Com. *v.* Blaisdell, 107 Mass. 234; Kelly *v.* Com., 11 S. & R. 345.

[5] Com. *v.* Blaisdell, 107 Mass. 234.

[6] Com. *v.* King, 13 Metc. 115. See Wilkins *v.* Say, 49 L. T. (N. S.) 399.

[7] See Whart. on Neg. § 982; R. *v.* Watts, 1 Salk. 357; Com. *v.* Goodnow, 117 Mass. 114; Norristown *v.* Moyer, 67 Penn. St. 355. *Supra*, § 1412. As to limits of such liability, see State *v.* Useful Man. Soc., 44 N. J. L. 502; S. C., 42 Ibid. 504. Hence a hoist hole left unfenced within fourteen inches of a public way is a nuisance. Hadley *v.* Taylor, L. R. 1 C. P. 53. That water dripping from a roof may be a nuisance, see Fay *v.* Prentice, 1 C. B. 828.

[8] State *v.* Merritt, 35 Conn. 314; People *v.* New York and N. H. R. R., 89 N. Y. 266.

[9] Com. *v.* Boston, 97 Mass. 555.

[10] R. *v.* United Telegraph Co., 31 L. J. 167.

cially formed foot-path, but on a waste on the side of the road; and even though a jury might find that a sufficient space for the public use was left unobstructed.[1]

An overhanging lamp may be a nuisance.[2]

It is no defence that the travelled portion of the road was not affected by the obstruction. The public has a right to the free use of the whole of a highway as set apart by law.[3]

So as to grounds dedicated to the public.

§ 1474 *a*. As has just been seen,[4] it is a nuisance to encroach upon ground dedicated to the public use or enjoyment so as to impair its utility or beauty for such purpose.[5] The remedy, however, is said to be injunction, at the suit of the attorney-general, in cases where there is a mere trespass on public property, when such trespass is not a public nuisance.[6]

Prescription no defence.

§ 1475. A grant from lapse of time will not be presumed of a part of a public square or street so as to bar an indictment for a nuisance.[7] Thus, where the travelling public had for ten years ceased to use a portion of a road established by public authority, and had by use acquired a right to a portion of the land of the trustees of a church for highway purposes, instead of the said portion of old road; it was held that the acquisition of a right of way over the land of the trustees did not estop the State from asserting its claim to the old road, nor shield the individual obstructing it from punishment.[8]

When license is a defence has been already discussed.[9]

[1] R. *v.* United Kingdom Tel. Co., 3 F. & F. 732; 9 Cox C. C. 174.

[2] Farny *v.* Ashton, L. R. 1 Q. B. D. 314.

[3] R. *v.* Russell, 6 East, 427; R. *v.* Betts, 16 Q. B. 1022; R. *v.* Wright, 3 B. & Ad. 681; R. *v.* United Tel. Co., 31 L. J. 167; State *v.* Morse, 50 N. H. 9; Com. *v.* King, 13 Met. 115; Sprague *v.* Wright, 17 Pick. 312; Davis *v.* Mayor, 14 N. Y. 524.

That the location and terminal points of the highway must be specified, see State *v.* Crumpler, 88 N. C. 647.

That shade trees so planted as not to interfere with travel are not a public nuisance, see Clark *v.* Dasso, 34 Mich. 86; Everett *v.* Council Bluffs, 46 Iowa, 66.

[4] *Supra*, § 1474.

[5] State *v.* Woodard, 23 Vt. 92; State *v.* Atkinson, 24 Ibid. 448; Com. *v.* Wilkinson, 16 Pick. 175. As to encroachment on public waters, see *infra*, § 1477.

[6] Attorney-General *v.* Richards, 2 Anst. 603; People *v.* Vanderbilt, 28 N. Y. 369.

[7] Com. *v.* Tucker, 2 Pick. 44; Com. *v.* Alburger, 1 Whart. 469. *Supra*, § 1415.

[8] Elkins *v.* State, 2 Humph. 543.

[9] *Supra*, § 1424; *infra*, § 1484.

Unlicensed or excessive obstruction by railroad may be indictable.

§ 1476. A railway train, crossing an ordinary highway, being productive of anxiety, if not of danger, to those passing such highway, is indictable as a nuisance, unless chartered by the State. Such charter is to be strictly construed; and is not to be regarded as authorizing the railway to cross any highways except in the line specifically prescribed.[1] Hence railroad corporations have been held indictable for nuisance in keeping their rails several inches above the level of a crossing;[2] or in sending their trains across a turnpike at a very rapid rate without warning;[3] or in unnecessarily leaving cars or other structures on a crossing whose effect is to frighten horses or to obstruct travel;[4] or in constant and habitual failure to give due signals of passing trains;[5] or in appropriating a street in excess of the authority given by the legislature;[6] or in neglecting to open a new ground required by the legislature to take the place of one occupied by the railroad;[7] nor is it any defence that the principal officers of the corporation had no knowledge of the nuisance, or that great care was exercised in the proceedings complained of.[8] Even when authorized to cross a particular highway, the corporation may be indictable for a nuisance if its right is negligently or oppressively exercised.[9] But evidence that daily twenty trains on a

[1] Com. *v.* Erie & N. E. R. R., 27 Penn. St. 339; State *v.* Ches. & Oh. R. R., 24 W. Va. 809. See other cases *supra*, § 1424. The question of nuisance is one of fact. People *v.* New York & N. H. R. R., 89 N. Y. 266.

[2] Paducah R. R. *v.* Com., 80 Ky. 147. See R. *v.* Grand Trunk R. R., 17 Up. Can. (Q. B.) 165.

[3] Louisville R. R. *v.* Com., 80 Ky. 143.

[4] Com. *v.* N. Y. R. R., 112 Mass. 412; State *v.* Morris, etc., R. R., 3 Zab. 360; Cincinnati R. R. *v.* Com., 80 Ky. 137. See, as to necessity, State *v.* Louisville R. R., 86 Ind. 114; Wabash R. R. *v.* People, 12 Ill. App. 448. This applies, *a fortiori*, to encroaching on a highway with a station house. State *v.* Vermont R. R., 27 Vt. 103. See, also, Com. *v.* Old Colony R. R., 14 Gray, 93.

[5] Louisville R. R. *v.* Com., 13 Bush, 388.

[6] Com. *v.* Erie R. R., 27 Penn. St. 339.

[7] R. *v.* Scott, 2 Gale & D. 729; Danville R. R. *v.* Com., 73 Penn. St. 29.

[8] Com. *v.* Farren, 9 Allen, 489; Com. *v.* Emmons, 98 Mass. 6; Com. *v.* New York R. R., 112 Ibid. 412.

A railroad corporation when failing to set out a new road in the place of one whose course it has diverted, is indictable for a nuisance under the English statute. R. *v.* Scott, 2 G. & D. 729; 3 Q. B. 543.

[9] In North Cent. R. R. *v.* Com., 90 Penn. St. 300, it was held that a turnpike was a highway in the sense of the text. It was held no answer to the indictment that the obstruction could not be remedied without an expenditure of from $5000 to $8000. It is well recognized law, it was said, that an indictment will lie against a corporation, not municipal, for the creation and maintenance of a public nuisance. R. *v.* Great North of England Railway, 9 Q. B. 315; Dater *v.* Troy R. R. Co., 2 Hill, 629; Chestnut Hill Turnpike *v.* Rutter, 4 S. & R. 6; Delaware Div. Canal Co. *v.* Commonwealth, 60 Penn. St. 367. The mere construction of a railroad track across a public highway, in pursuance of law, is no nuisance. Danville R. R. Co. *v.* Commonwealth, 73 Penn. St. 29. But it must be constructed in such a manner as, "not to impede the passage or transportation of persons or property along the same. Act of February, 1849, Pur. Dig. 1220. A turnpike is a public highway; it is for the use of every person desiring to pass over it, on payment of the toll established by law. It differs from a common highway, in the fact that it is not constructed in the first instance at the public expense, and the cost of construction is reimbursed by the payment of toll imposed by authority of law. Its use is common to all who comply with the law. The same public annoyance and injury arise from its obstruction as if it were a common highway. Hence, in Lancaster Turnpike Co. *v.* Rogers, 2 Barr, 114, it was said, that when the turnpike company ceased to use a building, erected, in part on the turnpike, as a toll-house, it ceased to be there for a lawful purpose, and became a public nuisance. Common understanding and public policy unite in requiring us to hold that a turnpike is a public highway in so far that an indictment will lie against one obstructing it as for a public nuisance. It was so held in Com. *v.* Wilkinson, 16 Pick. 175." As to toll, see *supra*, § 1473. As to indictability of corporations generally, see *supra*, § 91.

railroad, and about as many vehicles on a highway, passed over a place where the railroad crossed the highway at grade, which was in full view from the highway at any point within a hundred and fifty feet; and where the public authorities never required the establishment of a gate, station agent, or flagman, although the crossing had existed for many years, is insufficient to warrant a finding that the railroad corporation was guilty of negligence in omitting to provide there any such safeguard.[1] And if the trains are kept closely within the range of the charter, no indictment can be maintained against the corporation for a nuisance because of alarm to horses and passengers produced by the locomotives.[2] And what is said of the license of railroads applies to the license of all other agencies whose effect is to incommode more or less the community.[3]

§ 1477. It is a nuisance, on the same principle, to pollute the waters of a stream used to supply drinking water to a community

[1] Com. *v.* Boston & Worcester R. R., 101 Mass. 201. See Com. *v.* Temple, 14 Gray, 69. *Supra*, § 1424.

[2] R. *v.* Pease, 4 B. & Ad. 30. *Supra*, § 1424.

[3] *Supra*, § 1424; R. *v.* Scott, 2 Gale & D. 729; 3 Q. B. 543; Com. *v.* Church, 1 Barr, 105.

entitled to use it in this way,[1] to obstruct the passage of a navigable river, or of a navigable lake, by bridges or otherwise, so as to diminish appreciably its capacities for navigation,[2] or to divert a part of such stream, whereby the current of it is weakened, and rendered incapable of carrying vessels of the same burden as it would before.[3] But if a ship or other vessel sink by accident in a river, although it obstruct the navigation, and may be removed by the public authorities,[4] yet the owner is not indictable for a nuisance in not removing it.[5] And it is also to be kept in mind, that the owner of the soil between high and low water-mark may use it for his own private purposes, provided he do not interfere with the navigation of the river.[6]

Nuisance to obstruct or pollute public waters.

The obstruction must be proved by the prosecution.[7]

Obstructions to navigable streams may be abated by individuals.[8]

§ 1478. It was once thought that a collateral benefit to the community could be set up as a defence. Thus, upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths there, for loading ships with coals, the jury were directed to acquit the defendant, if they thought the abridgment of the right of passage, occasioned by these staiths, was for a public purpose, and occasioned a public benefit, and if the erection were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and the judge pointed

Collateral benefit no defence.

[1] State *v.* Buckman, 8 N. H. 203; State *v.* Taylor, 29 Ind. 517; Com. *v.* Webb, 6 Rand. 726; Stein *v.* State, 37 Ala. 123; Messersmidt *v.* People, 46 Mich. 437. See Goldsmid *v.* Tunbridge Wells, L. R. 1 Eq. 161; L. R. 1 Ch. 349; Baxendal *v.* Murray, L. R. 2 Ch. 790.

[2] R. *v.* Watts, 2 Esp. 675; R. *v.* Ward, 4 Ad. & El. 384; R. *v.* Tindall, 6 Ibid. 143; R. *v.* Trafford, 1 B. & Ad. 874; R. *v.* Betts, 16 Q. B. 1022; State *v.* Freeport, 43 Me. 198; Penns. *v.* Wheeling, 13 How. 518; Com. *v.* Church, 1 Barr, 105; State *v.* Dibble, 4 Jones (N. C.), 107; State *v.* Graham, 15 Rich. (S. C.) 310; State *v.* Thompson, 2 Strob. 12; People *v.* St. Louis, 5 Gilman, 351; Moore *v.* Sanborn, 2 Mich. 519. Sir J. F. Stephen inserts the qualification "wilfully" (Dig. art. 191), but I think erroneously, as a negligent obstruction is indictable.

[3] 1 Hawk. c. 75, s. 11; R. *v.* Stanton, 2 Show. 30.

[4] McLean *v.* Matthews, 7 Ill. App. 599.

[5] R. *v.* Watts, 2 Esp. 675; White *v.* Crisp, 10 Exch. 318; Brown *v.* Mallett, 5 C. B. 599. See R. *v.* Russell, 9 D. & R. 566; 6 B. & C. 566; R. *v.* Ward, 4 Ad. & El. 384; R. *v.* Tindall, 6 Ibid. 143; R. *v.* Morris, 1 B. & Ad. 441.

[6] Zug *v.* Com., 70 Penn. St. 138. See State *v.* Wilson, 43 Me. 11.

[7] Ibid.

[8] *Supra*, § 1426.

out to the jury that, by reason of the staiths, the coals were supplied better and at a cheaper rate than they otherwise could be, which was a public benefit; and it was held that this direction was right.[1] This, however, was overruled afterwards in England,[2] and the later position, that no countervailing benefit can be a defence, has been followed in this country.[3] But the obstruction must be material,[4] and must obstruct business as a whole.[5] Hence it has been held that a wire or rope stretched across a stream for ferry purposes is not a nuisance if necessary for the transfer of travellers, and if not materially obstructing navigation.[6] And all level crossings must more or less obstruct free travel on the intersecting roads, yet such crossings are not, for this reason, indictable.[7]

§ 1479. Rivers in North America (in this respect being distinguished from those in England) do not cease to be navigable from the fact that they are at certain points broken by rapids or cataracts, which have to be avoided by portages. Hence the English rule as to ebb and flow of tides does not apply to the unimpeded parts of such rivers.[8] But a creek which cannot even with spring freshets float timber cannot claim to be navigable.[9] The test is, possibility of use for practical transport.[10]

Not necessary that tide should flow.

§ 1480. The provincial statute of 8 Anne, chap. 3, for preventing obstructions to fish in rivers, is still in force in Massachusetts; and as it declares all obstructions therein mentioned common nuisances, an indictment will lie; the special remedy provided by that statute being merely cumulative.[11] A seine or net, not placed permanently, is not within the act.[12] In other States statutes to the same effect have been enacted.[13]

Indictment may lie for obstructing fish.

[1] R. *v.* Russell, 9 D. & R. 566; 6 B. & C. 566, Tenterden, C. J., *dissentiente*.

[2] R. *v.* Ward, 4 Ad. & El. 384; R. *v.* Betts, 16 Q. B. 1022.

[3] Caldwell's Case, 1 Dallas, 150; Rowe *v.* Titus, 1 Allen (New Brunswick), 326. See *supra*, § 1416.

[4] *Supra*, § 1474.

[5] Atlee *v.* Packet Co., 21 Wal. 389.

[6] The Vancouver, 2 Sawyer, 381; see State *v.* Wilson, 42 Me. 9; Beach *v.* People, 11 Mich. 106.

[7] See Whart. on Neg. §§ 977 *et seq.*

[8] R. *v.* Meyers, 3 Up. Can. (C. P.) 347.

[9] Whelan *v.* McLachlan, 16 Up. Can. (C. P.) 102.

[10] Bell *v.* Quebec, 41 L. T. (N. S.) 451.

[11] Com. *v.* Ruggles, 10 Mass. 391.

[12] The following statute was passed in Massachusetts in 1857:—

"Every person who shall wilfully or wantonly, without color of right, ob-

[13] Werfel *v.* Com., 5 Binn. 65; for form, see Whart. Prec. 702.

An indictment at common law does not ordinarily lie for obstructing the passage of fish by a dam across an unnavigable river.[1] But such a dam becomes a nuisance when it obstructs the water to such an extent that it overflows its banks and the surrounding country, and stagnates, whereby the air along the highways and around the dwellings is infected with noxious and unwholesome vapors, and the health of the surrounding country is sensibly impaired.[2] And when the obstruction interferes with the supply of fish to the community as a whole, proceedings by indictment may be sustained.

§ 1481. Where a wharf is extended below low water-mark, and into the channel of the tide-waters of the Commonwealth, it does not necessarily follow that it is a common nuisance, but this is the presumption, and the defendant must show that it is no impediment to navigation, or detriment to the public.[3] If the effect of such a wharf be to fill up the channel or divert the current, it is a nuisance [4]

Wharf may be a nuisance

§ 1482. Public docks are protected in the same way, and it has been held a nuisance to monopolize such a dock by forcing into it a larger vessel than those for which it was constructed.[5]

And so may docks

§ 1483. Planting oysters in public waters is not such a special appropriation of such waters as will justify their removal as a nuisance, unless they interfere with the rights of the public; and even then a private person has no right to take them away and convert them to his own use.[6]

And so may oyster beds.

§ 1484. The supreme authority of the State may, as has been seen, authorize an obstruction of the highways of the State; but this license or charter must be strictly construed, and any negligence or excess in the exercise of

License no defence to negligent obstruction.

struct the water of any mill-pond, reservoir, canal, or trench, from flowing out of the same, shall be punished by imprisonment in the State prison, not more than five years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail, not more than two years." May 15, 1857. Supplement to Revised Statutes, 1857, chapter clx. p. 410.

[1] Com. v. Chapin, 5 Pick. 199.

[2] Com. v. Webb, 6 Rand. (Va.) 726; Douglass v. State, 4 Wis. 387; State v. Close, 35 Iowa, 670.

[3] R. v. Grosvenor, 2 Stark, 511. See Com. v. Wright, Thach. C. C. 211.

[4] Ibid.

[5] R. v. Leech, 6 Mod. 145.

[6] State v. Taylor, 3 Dutch. 117.

the conveyed powers will expose the parties, if a nuisance result, to an indictment.[1]

§ 1485. Neglect, as well as positive commission, may become the basis of an indictment for nuisance. Thus a person or corporation who undertakes the cleansing or repairing of a road or channel specially, is indictable for a nuisance created by neglect.[2]

Neglect in repairing roads may be indictable.

§ 1486. The indictment, when the basis of the charge is neglect, must set forth the nature of the duty specially imposed on the defendant; for this is matter of substance.[3] But it has been said not to be necessary to aver that the defendants had the means to repair.[4] In such indictments, two defendants, having duties distinct, both in source and limit, cannot be joined;[5] nor can offences having distinct characters and penalties be coupled in one count.[6] The termini of the road must be correctly laid,[7] and the road must be averred to be public.[8] Whether a *date* is to be averred, is elsewhere discussed.[9]

Indictment must aver duty.

§ 1487. When the indictment is for neglect in not repairing a road, the usual practice is to impose a fine, to be remitted (if there be no contempt or wilful violation of the law) on the road being repaired.[10]

Court may compel repair by fine.

§ 1488. The law in respect to abatement, as heretofore expressed, applies to nuisances on highways.[11]

Abatement.

[1] See *supra*, §§ 1424, 1476.

[2] See Whart. on Neg. § 956; *supra*, § 93; *infra*, § 1584 *a*. People v. Corporation of Albany, 11 Wend. 539; State v. King, 3 Ired. 411; State v. Commissioners, Walker, 368. For indictment, see *infra*, §§ 1486, 1573.

[3] State v. King, 3 Ired 411; State v. Commissioners, Walker, 368. See *supra*, §§ 1423, 1573; Whart. Prec. 781, note; Dickey v. Telegraph Co., 46 Me. 483.

[4] State v. Harsh, 6 Blackf. 346.

[5] 2 Hawk. c. 25, s. 89.

[6] Greenlow v. State, 4 Humph. 25.

[7] State v. Northumberland, 46 N. H. 156; State v. Graham, 15 Rich. (S. C.) 310; though see *contra*, State v. Harsh, 6 Blackf. 346.

[8] Parkinson v. State, 2 W. Va. 589.

[9] Whart. Cr. Pl. & Pr. §§ 120–9.

[10] See R. v. Inciedon, 13 East, 164. *Supra*, § 1426.

[11] *Supra*, §§ 97, 1426.